

## FEDERALISM AND THE ARBITRATION OF CONSUMER AND EMPLOYMENT DISPUTES IN THE UNITED STATES AND CANADA: THE ROAD NOT TAKEN?

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*In many respects, the tale of the arbitration of consumer and employment disputes in the United States and Canada is a similar one. Both jurisdictions were traditionally hostile to arbitration, both jurisdictions had a complete change of heart in recent years, and in both jurisdictions, arbitration is widely used in the consumer and employment sphere. Moreover, in both jurisdictions questions have been asked regarding the fairness of arbitration agreements in consumer and employment contracts due to the inherent power imbalance between consumers or employees on the one hand and businesses or employers on the other. Despite these similarities, the consumer and employment arbitration landscape in each is radically different, whereas consumer and employment arbitration in the US is almost impossible for consumers and employees to avoid; in Canada, the opposite is true. This radical difference results from key differences in each jurisdiction's understanding of federalism so that whilst Canadian provinces and courts have been able to protect consumers and employees, US states and courts have found themselves hamstrung by the Supreme Court's interpretation of the Federal Arbitration Act and the dominance of federal law over state law. This has led to US courts pushing the envelope of the doctrine of unconscionability whilst Canadian courts have found this unnecessary due to provincial regulation. This article analyzes the different paths taken by federalism in each jurisdiction and how that in turn led to almost opposite outcomes for arbitration law north and south of the world's longest border. Ultimately, the article concludes that in both federalism and arbitration law, Canada and the US each represent the road not taken by the other.*

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Two roads diverged in a yellow wood,  
 And sorry I could not travel both  
 And be one traveler, long I stood  
 And looked down one as far as I could  
 To where it bent in the undergrowth;

Then took the other, as just as fair,  
 And having perhaps the better claim,  
 Because it was grassy and wanted wear;  
 Though as for that the passing there  
 Had worn them really about the same,

And both that morning equally lay  
 In leaves no step had trodden black.  
 Oh, I kept the first for another day!  
 Yet knowing how way leads on to way,  
 I doubted if I should ever come back.

I shall be telling this with a sigh  
 Somewhere ages and ages hence:  
 Two roads diverged in a wood, and I –  
 I took the one less traveled by,  
 And that has made all the difference.<sup>1</sup>

## I. INTRODUCTION

Despite the common refrain that “everyone should have their day in court,” the possibility of having a day in court is nothing but a fairy tale for large numbers of North American consumers and employees due to the prevalence of arbitration agreements in consumer and employment contracts. Empirical studies in the United States have shown that over 60 million workers are barred from the courts due to their employer’s mandatory arbitration procedures,<sup>2</sup> with the situation for consumers being even worse: in 2018, there were over 800 million consumer arbitration agreements in force,<sup>3</sup> more than enough for every man, woman, and child in the US to be subject to two each. Unfortunately, it does not seem that similar empirical work has been carried out for Canada. There is anecdotal evidence that consumer arbitration is popular, and employment arbitration may be on the rise for those employees not subject to a collective employment agreement. For example, in the Supreme Court of Canada case of *Telus Communications Inc. v. Wellman*,<sup>4</sup> the proposed class of consumers consisted of 1.4 million Ontarians with TELUS contracts.<sup>5</sup> It is harder to find evidence

<sup>1</sup> Robert Frost, *The Road Not Taken: An Introduction to Robert Frost* (New York: Henry Holt & Company, 1951) at 270–71.

<sup>2</sup> Alexander JS Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More Than 60 Million American Workers* (Washington, DC: Economic Policy Institute, 2017).

<sup>3</sup> Imre Stephen Szalai, “The Prevalence of Consumer Arbitration Agreements by America’s Top Companies” (2019) 52 UC Davis L Rev Online 233 at 234.

<sup>4</sup> 2019 SCC 19 [*Telus Communications*].

<sup>5</sup> *Ibid* at para 13.

regarding the popularity of employment, as opposed to labour, arbitration, but the fact that cases concerning employment arbitration clauses regularly come before the courts suggests they are not unheard of.<sup>6</sup>

The main reason for employment and consumer arbitration's popularity is its alleged increased speed and decreased cost as compared to litigation, as well as confidentiality and predictability (particularly in the US, given the lack of jury involvement).<sup>7</sup> In abstract, it might be thought that these are inherently good things and thus there should be no controversy about using arbitration for consumer and employment matters. Unfortunately in practice, the situation is not so simple.

Firstly, it is not at all clear that arbitration is actually faster or cheaper,<sup>8</sup> and in any event, it will not necessarily be cheaper for consumers or employees<sup>9</sup> as whilst the court system is supported by taxation, arbitration is wholly private and thus its users have to pay all the costs involved directly. Secondly, there are concerns that arbitrators will be biased towards businesses due to the "repeat player effect" or for other reasons.<sup>10</sup> Thirdly, there is the issue of the power imbalance between consumers and employees on the one hand and businesses and employers on the other, which means that the former are forced by the latter to give up important rights, such as that to a jury,<sup>11</sup> having justice in public, or consumer protection rules, in order to obtain a product<sup>12</sup> or keep their job.<sup>13</sup> Fourthly, in the context of consumer arbitration agreements, there is a risk that consumers simply are not aware of the existence of the arbitration clause, for example, because it is buried in small print in an obscure part of the contract<sup>14</sup> or because they have allegedly agreed to a contract merely by browsing a webpage.<sup>15</sup> Moreover, even if consumers are aware of an arbitration clause, they are unlikely to understand it.<sup>16</sup>

All of the above has led to a clash between businesses and their lawyers who almost always favour inserting arbitration clauses into consumer and employment contracts, and employees, consumers, and their lawyers who almost always disfavour arbitration and fight

<sup>6</sup> *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber Technologies SCC*]; *Trainor v Fundstream Inc*, 2019 ABQB 800; *A-Teck Appraisals Ltd v Constantinou*, 2020 BCSC 135.

<sup>7</sup> Nam D Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* (US Chamber Institute for Legal Reform: NDP Analytics, 2020); Charles D Coleman, "Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective" (2010) 25:2 *American Bar Assoc J Labor & Employment L* 227; A Michael Weber, "Rise of ADR for Workplace Disputes: Deciding Whether to Adopt Mandatory Arbitration" (2008) *NYLJ*. Coleman, *ibid* at 233–36.

<sup>8</sup> Mark E Budnitz, "The High Cost of Mandatory Consumer Arbitration" (2004) 67:1/2 *Law & Contemp Probs* 133.

<sup>9</sup> Alexander JS Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes" (2011) 8:1 *J Empirical Leg Stud* 1 at 1; Lisa B Bingham, "Employment Arbitration: The Repeat Player Effect" (1997) 1 *Employment Rts & Employment Pol'y J* 189.

<sup>10</sup> Jean R Sternlight, "Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial" (2001) 16:3 *Ohio St J Disp Resol* 669.

<sup>11</sup> Shelly Smith, "Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System" (2001) 50:4 *DePaul L Rev* 1191.

<sup>12</sup> Janna Giesbrecht-McKee, "The Fairness Problem: Mandatory Arbitration in Employment Contracts" (2014) 50:2 *Willamette L Rev* 259.

<sup>13</sup> See generally Smith, *supra* note 12.

<sup>14</sup> Jeff Sauro, "Do Users Read License Agreements?" (11 January 2011), online (blog): <measuringu.com/eula/>; Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43:1 *J Leg Stud* 1.

<sup>15</sup> Jeff Sovern et al, "'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements" (2015) 75:1 *Md L Rev* 1.

such clauses tooth and nail. The two sides have inevitably enlisted legislatures and judiciaries to their respective causes, with varying degrees of success depending on the jurisdiction involved. In general terms, it is fair to say that in Canada, consumer and employee lawyers have had significantly more success than businesses and their lawyers whilst in the US the opposite is true. One key reason for this success lies in the constitutional idiosyncrasies of Canada and the US, and the very different courses charted by their respective supreme courts with regards to federal versus state/provincial powers. Part II of this article explores these differences which, in turn, explain the very different tactics consumer and employee lawyers have adopted in each jurisdiction. In Canada, they have relied on beneficial provincial legislation to invalidate arbitration clauses, whilst consumer and employee lawyers in the US have heavily applied the doctrine of unconscionability to invalidate arbitration agreements. Part III analyzes these differences whilst Part IV concludes by analyzing possible future convergences and divergencies between Canadian and American employment and consumer arbitration law.

## II. ARBITRATION AND THE UNITED STATES AND CANADIAN CONSTITUTIONS

The US and Canada are both federal systems, both therefore have two parallel bodies of law, state<sup>17</sup> or provincial law<sup>18</sup> and federal law,<sup>19</sup> and in both systems, there is a clear possibility for clashes between these two bodies of law. In both jurisdictions, these clashes raise not just legal questions, such as which law applies, but also deeper policy-based questions regarding state or provincial rights versus federal power.<sup>20</sup> Despite, or perhaps because of, these parallels, federalism in the US and Canada has developed in very different directions. These differences have, in turn, led to very different constitutional arrangements with regards to arbitration in each jurisdiction and that, combined with a series of socio-legal factors which are outside the scope of this article, has led to vastly different consumer and employee arbitration landscapes in the US and Canada.

This section aims to examine these differences and their bearing on arbitration with a focus on the competing systems of law (federal versus provincial/state), as opposed to the competing systems of judicial administration (federal versus provincial/state), as the latter has had significantly more effect on the development of arbitration than the former. To that end, this section will be split into four parts: (1) an examination of federalism in the US Constitution; (2) an examination of federalism in the Canadian Constitution; (3) an examination of the history of the *Federal Arbitration Act*<sup>21</sup> and the constitutional issues it

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<sup>17</sup> US Const Amend X.

<sup>18</sup> See e.g. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91–145, reprinted in RSC 1985, Appendix II, No 5.

<sup>19</sup> *Ibid*; US Const art I, § 8.

<sup>20</sup> Martha A Field, “The Differing Federalisms of Canada and the United States” (1992) 55:1 *Law & Contemp Probs* 107; Robin Elliot, “Safeguarding Provincial Autonomy from the Supreme Court’s New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?” (2007) 38 *SCLR* (2d) 629; Richard Briffault, “The Challenge of the New Preemption” (2018) 70 *Stan L Rev* 1995; Richard A Epstein & Michael S Greve, eds, *Federal Preemption: States’ Powers, National Interests* (Washington, DC: AEI Press, 2007); Mark C Miller, “A Comparison of the Judicial Role in the United States and in Canada” (1998) 22:1 *Suffolk Transnat’l L Rev* 1.

<sup>21</sup> 9 USC §§ 1–16; 9 USC §§ 201–208; 9 USC §§ 301–307 [FAA].

poses; and (4) an examination of arbitration in Canada and the constitutional questions it raises.

## A. FEDERALISM AND THE UNITED STATES AND CANADIAN CONSTITUTIONS

Federalism has always been one of the most controversial, if not the key, issue(s) in both US and Canadian constitutional history, and its implementation has proven highly complex with each jurisdiction charting different courses and facing their own challenges in that regard. This section will firstly examine the history of American federalism, before looking at its legal implementation, and then doing the same for Canadian federalism.

### I. A BRIEF HISTORY OF AMERICAN FEDERALISM AND ANTI-FEDERALISM

The Articles of Confederation, which are, in some ways, the first constitution of the US, have been described as a “Constitution [of] State Over Nation.”<sup>22</sup> They contained no supremacy clause, providing that the federal laws and treaties prevailed over state laws, and Article II guaranteed that “[e]ach state . . . retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”<sup>23</sup> However, the state before nation nature of the Articles of Confederation led to numerous practical problems and deadlocks between the federal and state governments,<sup>24</sup> with the result that it was bitterly criticized by “The Federalists” who proposed what became the US Constitution.<sup>25</sup>

The Federalists believed that “[t]he idea of an [uncontrollable] sovereignty in each state, over its internal police, will defeat the other powers given to Congress, and make our union feeble and precarious.”<sup>26</sup> In order to remedy this, the majority of the Federalists proposed a constitutional model that would be a “Nation Over State Within a Federal Framework,”<sup>27</sup> but just as they rejected the Articles of Confederation’s “[s]tate over nation” model, they ultimately rejected James Madison’s model of an all-powerful federal government “under which the states would be reduced to the status of counties.”<sup>28</sup> Instead, they proposed a system “in which the national government, while clearly superior, had to acknowledge and accept the sovereignty of the states.”<sup>29</sup>

The compromises between Federal and State power in The Federalists’ proposals did not satisfy “The Anti-Federalists,” who were fierce supporters of state rights. They argued that the federal government would inevitably absorb all the powers of the states and begin

<sup>22</sup> See generally Shlomo Slonim, *Forging the American Nation, 1787–1791: James Madison and the Federalist Revolution* (New York: Palgrave Macmillan, 2017) at 1.

<sup>23</sup> *Ibid* at 3.

<sup>24</sup> *Ibid*.

<sup>25</sup> See generally Alexander Hamilton, John Jay & James Madison, *The Federalist*, ed by George W Carey & James McClellan (Indianapolis: Liberty Fund, 2001).

<sup>26</sup> National Archives, “From Alexander Hamilton to James Duane, [3 September 1780],” online: *Founders Online* <founders.archives.gov/documents/Hamilton/01-02-02-0838>.

<sup>27</sup> Slonim, *supra* note 22 at 31.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*.

“interfering in the most minute objects of internal police, and the most trifling domestic concerns of every state.”<sup>30</sup> These arguments led to the inclusion of a bill of rights, via the First and following amendments, in the US Constitution, as well as a declaration of states’ rights in the Tenth Amendment.<sup>31</sup> In the end, as the existence of the US Constitution attests to, The Federalists won the day, but the Federalist versus Anti-Federalist debate did not end with the ratification of the US Constitution and continues until the present day,<sup>32</sup> including, as will be seen below, in the sphere of arbitration.

## 2. THE CHANGING LEGAL IMPLEMENTATION OF AMERICAN FEDERALISM

Originally, American federalism was implemented via a system of “dual federalism” where state and federal powers existed together but in separate spheres,<sup>33</sup> with “each supreme in its own defined sphere.”<sup>34</sup> A key pillar of this system was the “doctrine of enumerated powers,” which “stands for the idea that Congress has only those powers that are enumerated in the Constitution”<sup>35</sup> and rests on the statement by Madison that “[t]he powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>36</sup> Post-New-Deal,<sup>37</sup> this was abandoned for a system known as “cooperative federalism,” which is marked by “concurrent rather than exclusive federal and state powers, regulatory regimes administered jointly by federal and state agencies, and federal-to-state transfer payments and funding programs.”<sup>38</sup> There is an obvious issue with the idea of “concurrent jurisdiction” as, under the Supremacy Clause (Article VI, Paragraph 2 of the Constitution), federal laws will always trump state

<sup>30</sup> Antifederalist No 45, “Powers of National Government Dangerous to State Governments; New York as an Example,” online: <resources.utulsa.edu/law/classes/ricce/Constitutional/AntiFederalist/45.htm>.

<sup>31</sup> Slonim, *supra* note 22.

<sup>32</sup> Martin S Flaherty, “Are We to Be a Nation?: Federal Power vs. ‘States’ Rights’ in Foreign Affairs” (1999) 70:4 U Colo L Rev 1277; John O McGinnis & Ilya Somin, “Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System” (2004) 99:1 Nw UL Rev 89; Paul Finkelman, “States’ Rights, Southern Hypocrisy, and the Crisis of the Union” (2012) 45:2 Akron L Rev 449; Sotirios A Barber, *The Fallacies of States’ Rights* (Cambridge, Mass: Harvard University Press, 2013); Alpheus Thomas Mason, “Must We Continue the States Rights Debate?” (1963) 18:1 Rutgers L Rev 60.

<sup>33</sup> See Michael S Greve, “Federalism” in Mark Tushnet, Mark A Graber & Sanford Levinson, eds, *The Oxford Handbook of the U.S. Constitution* (New York: Oxford University Press, 2015) 431.

<sup>34</sup> James Bryce, *The American Commonwealth*, 2nd ed, vol 1 (New York: Macmillan, 1891) at 27.

<sup>35</sup> Roger Pilon, “The Powers Delegated to the Federal Government Are Few and Defined: The Doctrine of Enumerated Powers” in Scott D Cosenza & Claire M Griffin, eds, *Roots of Liberty: Unlocking the Federalist Papers* (One Generation Away, 2013) 19 at 19.

<sup>36</sup> James Madison, “The Federalist No. 45: The Alleged Danger from the Powers of the Union to the State Governments Considered” in Ian Shapiro, ed, *The Federalist Papers* (New Haven: Yale University Press, 2009) 234 at 237.

<sup>37</sup> The New Deal was Franklin D Roosevelt’s response to the great depression which included a general expansion of federal power for the good of private citizens via, for example, extensive public works, reforestation, regulating securities, and so on, as outlined in “Franklin D. Roosevelt Speeches: Presidential Nomination Address: The New Deal” (Address delivered at the Democratic National Convention, 2 July 1932), online: *Pepperdine School of Public Policy* <publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/roosevelt-speeches/fr070232.htm>; Eric Rauchway, *The Great Depression and the New Deal: A Very Short Introduction* (New York: Oxford University Press, 2008); Kiran Klaus Patel, *The New Deal: A Global History* (Princeton: Princeton University Press, 2016).

<sup>38</sup> See Greve, *supra* note 33 at 446.

laws. This process is now termed “pre-emption,” although that term was not used until the early 1900s,<sup>39</sup> and comes in three forms:

- (1) express preemption, where a “federal statute includes a preemption clause explicitly withdrawing specified powers from the states”;<sup>40</sup>
- (2) implied or “field” preemption, which occurs where “a federal statute wholly occupies a particular field and withdraws state lawmaking power over that field”;<sup>41</sup> and
- (3) conflict preemption, which occurs either where: (a) it is impossible to comply with both applicable federal and an applicable state law; or (b) state law is an obstacle “to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>42</sup>

In tandem with the theory of “cooperative federalism,” the US Supreme Court vastly expanded its understanding of the Commerce Clause, which permits Congress to regulate foreign commerce, intrastate commerce, and commerce with Indian tribes.<sup>43</sup> The expansion was worked by defining the Commerce Clause as assigning to Congress the power to legislate not just on matters of interstate commerce, but also on matters which have a close and substantial relation to interstate commerce,<sup>44</sup> and even activities which are completely intrastate may be so regulated if they have a substantial effect on interstate commerce.<sup>45</sup> The “substantial effect” requirement is broadly applied given that the case in which it was formulated held it applied to wheat grown on a farm “wholly for consumption on the farm.”<sup>46</sup> In consequence, it has been argued that the Supreme Court acted as if the extent of the Commerce Clause is “logically limitless”<sup>47</sup> and it could be argued that the entire system of “cooperative federalism” is dependent on congressional restraint.<sup>48</sup> However, this is a simplification as the direction of travel has not been all one way. In particular, the relationship between state and federal courts is significantly more nuanced. For example, state courts are free to, and often do, ignore federal case law concerning federal law and develop their own independent interpretation of federal law.<sup>49</sup> This provides a means for states to inject their concerns, and unique perspectives, into the interpretation of federal law. Originally, this rule was mirrored in the federal courts who could likewise disregard state

<sup>39</sup> For a history of the term see Epstein & Greve, *supra* note 20 at 27–47.

<sup>40</sup> Caleb Nelson, “Preemption” (2000) 86:2 Va L Rev 225 at 226.

<sup>41</sup> *Ibid* at 227.

<sup>42</sup> *Ibid* at 228.

<sup>43</sup> Richard A Epstein & Mario Loyola, “Saving Federalism” (Summer 2014) National Affairs 3; Richard A Epstein, “Constitutional Faith and the Commerce Clause” (1996) 71:2 Notre Dame L Rev 167; Forrest Revere Black, “The Commerce Clause and the New Deal” (1935) 20:2 Cornell LQ 169; Bradley A Harsch, “*Brzonkala, Lopez*, and the Commerce Clause Canard: A Synthesis of Commerce Clause Jurisprudence” (1999) 29:2 NML Rev 321.

<sup>44</sup> *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1 (1937).

<sup>45</sup> *Wickard, Secretary of Agriculture v Filburn*, 317 US 111 (1942).

<sup>46</sup> *Ibid* at 118.

<sup>47</sup> Harsch, *supra* note 43 at 321.

<sup>48</sup> Epstein, *supra* note 43.

<sup>49</sup> See generally Amanda Frost, “Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?” (2015) 68:1 Vand L Rev 53; M Jason Hale, “Federal Questions, State Courts, and the Lockstep Doctrine” (2007) 57:4 Case W Res L Rev 927.

court precedent when applying state law.<sup>50</sup> But, as part of the rebalancing necessary to make the new “cooperative federalism” work, the Supreme Court held in the case of *Erie Railroad Co. v. Tompkins*<sup>51</sup> that henceforth federal courts would have to apply state law, as laid down by the state legislature or judiciary, when deciding state law claims.<sup>52</sup>

### 3. A BRIEF HISTORY OF CANADIAN FEDERALISM

Although the Canadian constitutional experiment differed markedly from the American,<sup>53</sup> many of the same issues concerning federal versus local powers were raised during the process of confederation. The Canadians, however, learnt from the American experience, and in particular from what they believed were the mistakes made by the American Founding Fathers. Many of the Fathers of Confederation believed that the rights granted to states in the US Constitution were too generous and had, by enabling the theory of “states rights,” precipitated the US Civil War.<sup>54</sup> In consequence, their preferred option was a legislative union as noted by Prime Minister John A. MacDonal, “I have again and again stated in the House, that, if practicable, I thought a Legislative Union would be preferable.”<sup>55</sup> What this meant was that there would be “one government and one parliament, legislating for the whole of these peoples.”<sup>56</sup> However, this was never more than a pipe dream due to the linguistic, cultural, and legal differences between Quebec and the rest of Canada, as well as the Maritime Provinces’ desire to retain their individuality, and a federal system therefore became inevitable.<sup>57</sup> The question then became not whether Canada was to be a federation, but what sort of federal system was Canada to be?

The Fathers of Confederation were clear that it could not be a federation based on the American model which reserved all powers not granted to the Federal Government to the States, rather the Canadian federation would only grant specific powers to the Provinces with all remaining powers reserved to the Federal Government. In other words, the Canadian model was intended to be the complete inverse of American federalism: Canada would be a “strongly centralized federation with a preponderant central government.”<sup>58</sup> In consequence, one cannot really talk about ‘anti-federalists’ in the Canadian context as there was never any argument that if Canada was to exist it would be federalist, and neither a legislative union nor a looser confederation of sovereign states as has proved controversial in the US.

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<sup>50</sup> See generally Adam N Steinman, “What Is the *Erie* Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)” (2008) 84:1 Notre Dame L Rev 245.

<sup>51</sup> 304 US 64 (1938) [*Erie*].

<sup>52</sup> See generally Steinman, *supra* note 50.

<sup>53</sup> See generally David E Smith, *Federalism and the Constitution of Canada* (Toronto: University of Toronto Press, 2010) c 3.

<sup>54</sup> Donald Creighton, *The Road to Confederation: The Emergence of Canada: 1863–1867* (Toronto: MacMillan of Canada, 2012) at 145–46.

<sup>55</sup> Canada, Parliament, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Session, 8th Provincial Parliament of Canada* (Hunter, Rose & Co, Parliamentary Printers, 1865) at 29.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Creighton, *supra* note 54 at 101.

## 4. THE LEGAL IMPLEMENTATION OF CANADIAN FEDERALISM

As discussed above, Canadian federalism was originally intended to differ significantly from the American model and this intention was originally respected by the Canadian courts. For example, the Supreme Court of Canada stated in the 1879 case of *Valin v. Langlois*<sup>59</sup> that “[t]he States, in consenting to enter the American Union, preserved their position of sovereign and independent States, under the limitation only of the powers specially delegated to Congress. Here precisely the reverse has been done.”<sup>60</sup> Given this, how then are we to explain that, in the present-day, Canada has a significantly more decentralized system of government than the US, with Canadian provinces possessing both more rights and more autonomy than their American cousins?<sup>61</sup> Although the issue is one of the most controversial in Canadian constitutional law,<sup>62</sup> it is widely accepted that the Judicial Committee of the Privy Council (JCPC) played a key role in this unexpected state of affairs due to its provincial bias.<sup>63</sup> For example, the late JCPC judge Lord Haldane in a speech in the 1920s explained how his predecessor Lord Watson, and the JCPC generally, had rejected this centralized view of Canada and instead decided that “[t]he Provinces [possessed] ... equal authority co-ordinate with the Dominion.”<sup>64</sup>

In the interest of space, it is only possible to analyze two of the most relevant examples of the Canadian Constitution taking on a new form: (1) the JCPC’s interpretation of the relationship between the provincial and federal governments; and (2) the JCPC’s interpretation of the Constitution’s Commerce Clause.

## a. The Relationship Between Provincial and Federal Governments

In two seminal cases the JCPC had to consider whether provincial and federal governments were in a position of inferior and superior, or whether each was sovereign in its sphere. The JCPC categorically rejected the former approach, which was that of the Supreme Court of Canada in *Valin v. Langlois*, and arguably, also that of the Fathers of Confederation, in the cases of *Hodge v. The Queen*<sup>65</sup> and *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*.<sup>66</sup> In *Hodge*, the JCPC held that provincial parliaments were “in no sense delegates of or acting under any mandate from the Imperial Parliament ... [w]ithin [its] limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the

<sup>59</sup> [1879] 3 SCR 1.

<sup>60</sup> *Ibid* at 55 [emphasis in original].

<sup>61</sup> See generally Richard Simeon & Beryl A Radin, “Reflections on Comparing Federalisms: Canada and the United States” (2010) 40:3 *Publius: J Federalism* 357; Field, *supra* note 20.

<sup>62</sup> See e.g. Edward McWhinney, “The Role of the Privy Council in Judicial Review of the Canadian Constitution—A Post-Script” (1952) 5:4 *Vand L Rev* 746; Frederick Vaughan, “Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation” (1986) 19:3 *Can J Political Science* 495; Peter W Hogg, QC & Wade K Wright, “Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005) 38:2 *UBC L Rev* 329.

<sup>63</sup> Hogg & Wright, *ibid* at 341–42; Alan C Cairns, “The Judicial Committee and Its Critics” (1971) 4:3 *Can J Political Science* 301 at 319; McWhinney, *supra* note 62 at 756; for an admission of this from a late JCPC judge see Haldane, “The Work for the Empire of the Judicial Committee of the Privy Council” (1922) 1:2 *Cambridge LJ* 143 at 150.

<sup>64</sup> Haldane, *ibid*.

<sup>65</sup> [1883] UKPC 59 [*Hodge*].

<sup>66</sup> [1892] UKPC 34 [*Liquidators of the Maritime Bank*].

Dominion.”<sup>67</sup> The JCPC continued in this vein in *Liquidators of the Maritime Bank*, stating that

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.<sup>68</sup>

The JCPC’s decisions were a clear repudiation of the Supreme Court of Canada’s position in *Valin v. Langlois* and represented a modified adoption of the American model. Moreover, as the JCPC did not exercise the same centralizing influence in Canada as the US Supreme Court did in the US, the end result was that Canada followed the US model more faithfully than the US itself.<sup>69</sup> This remains the case despite the Supreme Court of Canada’s centralizing influence after the extinction of appeals to the JCPC, as “the main lines of authority established by the Privy Council ... have not been disturbed by the Supreme Court.”<sup>70</sup>

#### b. The Canadian Constitution’s Commerce Clause

As with the US Constitution, the Canadian Constitution also has a Commerce Clause, although the Canadian clause is broader as it simply provides that “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ... The Regulation of Trade and Commerce.”<sup>71</sup> The Federal Parliament is therefore prima facie given the power to regulate trade and commerce “without qualification” whereas in the US “Congress was given the more limited power to regulate ‘commerce with foreign nations and among the several states and with the Indian tribes.’”<sup>72</sup> However, as we saw above, the machinations of the US Supreme Court have meant that the Commerce Clause in the US has taken on the form of an almost unlimited power which, in turn, has allowed the *FAA* to dominate the field of arbitration law to the virtual exclusion of state arbitration legislation. Ironically, the situation is exactly reversed in Canada where the broad wording of section 91(2) was narrowly construed by the JCPC with the result that the Canadian provinces have significantly more control over commerce (and almost total control over arbitration) as compared to their American cousins.<sup>73</sup>

The key case is that of *Parsons v. Citizens’ Insurance Company of Canada*<sup>74</sup> where the JCPC noted that “[t]he words ‘regulation of trade and commerce,’ in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include

<sup>67</sup> *Hodge*, *supra* note 65 at 12–13.

<sup>68</sup> *Liquidators of the Maritime Bank*, *supra* note 66 at 3.

<sup>69</sup> See generally “Presidential Address of Sir James Aikins, K.C., to the Canadian Bar Association at its Twelfth Annual Meeting” (1927) 5:8 *Can Bar Rev* 551, online: <[cbr.cba.org/index.php/cbr/article/view/2838](http://cbr.cba.org/index.php/cbr/article/view/2838)>.

<sup>70</sup> *Hogg & Wright*, *supra* note 62 at 350.

<sup>71</sup> *Constitution Act, 1867*, *supra* note 18, s 91(2).

<sup>72</sup> *Hogg & Wright*, *supra* note 62 at 333–34, citing US Const art I, § 8(3).

<sup>73</sup> *Field*, *supra* note 20 at 110.

<sup>74</sup> [1881] UKPC 49.

every regulation of trade.”<sup>75</sup> The JCPC immediately went on to discuss why the context and other parts of the *Act* significantly narrowed the plain meaning of those words. First, it applied the *ejusdem generis* rule (much as the US Supreme Court did in several *FAA* cases) arguing that “the collocation of [commerce] with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature.”<sup>76</sup> It also argued that if the words had a broad meaning, there would be no need for the Federal Government to be given specific trade and commerce-based powers such as power over banking, weights and measures, bills of exchange, and so on.<sup>77</sup> The JCPC therefore held that “regulation of trade and commerce” actually meant “regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.”<sup>78</sup> One notices a complete lack of any argument that the commerce power encompassed making regulations on intrastate trade or commerce that had an affect on extra-state trade or commerce as in the US.

Moreover, unlike the US, this narrow approach neither changed nor was it even moderated during the great depression, and thus new deal type legislation in Canada continuously floundered on the rocks of unconstitutionality.<sup>79</sup> Whereas in the US, it began to be ruled constitutional due to a change of tack by the Supreme Court.<sup>80</sup> As a result, the Canadian Commerce Clause did not become a black hole of federal power as happened in the US. This in turn set Canadian arbitration law on a very different course from US arbitration law, as without a broad commerce clause the Canadian legislature was, unlike its American cousin, virtually powerless to regulate arbitration and the matter remained in provincial hands.

##### 5. A BRIEF OVERVIEW OF THE *FEDERAL ARBITRATION ACT* AND ITS TRANSFORMATION BY THE SUPREME COURT

Although arbitration in the US has existed since the earliest days of colonisation,<sup>81</sup> and states have their own arbitration acts, the story of American arbitration in the present day is very much the story of the *FAA*. The *FAA* was enacted in 1925 and was intended to address alleged long-standing judicial hostility to arbitration,<sup>82</sup> and from the very beginning raised constitutional issues which were discussed by scholars and judges. The most basic issue was on what basis Congress had the power to legislate regarding arbitration. One of the first articles published on the *FAA*, in 1926, just one year after the *FAA* was enacted, noted the view that Congress’ power sprang from its “interstate-commerce and admiralty powers” but argued that this was incorrect and in fact the *Act* was justified on the basis of Congress’

<sup>75</sup> *Ibid* at 10.

<sup>76</sup> *Ibid* at 11.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid* at 12.

<sup>79</sup> See the examples listed in Hogg & Wright, *supra* note 62 at 340, n 47.

<sup>80</sup> David P Currie, “The Constitution in the Supreme Court: The New Deal, 1931–1940” (1987) 54:2 *U Chicago L Rev* 504.

<sup>81</sup> James Oldham & Su Jin Kim, “Arbitration in America: The Early History” (2013) 31:1 *L & Hist Rev* 241.

<sup>82</sup> *Kulukundis Shipping Co v Amtorg Trading Corp*, 126 F (2d) 978 at 982 et seq (1942); *Scherk v Alberto-Culver Co*, 417 US 506 at 511 (1974); *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20 at 25 (1991) [*Gilmer*]; Wesley A Sturges & Irving Olds Murphy, “Some Confusing Matters Relating to Arbitration under the United States Arbitration Act” (1952) 17:3 *Law & Contemp Probs* 580 at 582–83; Jodi Wilson, “How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act” (2012) 63:1 *Case W Res L Rev* 91 at 97–102.

ability to regulate procedure in the lower Federal courts.<sup>83</sup> This in turn would mean that the *FAA* was only a procedural, rather than a substantive, act and would only apply in federal and not state courts.

Interpreting the *FAA* as a purely procedural act seriously limited its applicability. For example, if a party wanted to ground the application of the *FAA* on the basis of interstate commerce “[a] citizen of New Jersey may enforce arbitration against a citizen of New York upon a contract of sale which requires him to ship the goods from Newark to Manhattan, but not upon one where they are to go from Manhattan to the Bronx.”<sup>84</sup> The applicability of the *FAA*, therefore, depended on whether there was diversity of citizenship,<sup>85</sup> “as well as the source of the controversy.”<sup>86</sup>

Criticisms of these limitations were made by scholars from as early as 1926, with academics arguing that the *FAA* could be expanded to require the enforcement of arbitration agreements both in state and federal courts based on the Constitution’s Commerce Clause, if “the failure to enforce an agreement for arbitration imposes such a direct burden upon interstate commerce as seriously to hamper it or whether the enforcement of such a clause is of material benefit.”<sup>87</sup> These arguments took on greater force following the holding of the US Supreme Court in *Erie*<sup>88</sup> which, as discussed above, held that henceforth federal courts would have to apply state law when deciding state law claims.<sup>89</sup> Although this did not apply to federal procedural law, the Supreme Court in *Guaranty Trust Co. v. York* dismissed formalistic interpretations of this restriction stating that “[a] policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties”<sup>90</sup> with the result that federal courts were required to apply state law rules where failing to do so would “lead to a substantially different result.”<sup>91</sup> As restrictions on arbitration would meet this test, including the common law right to revoke consent to arbitrate which prevailed in most states’ application of the *FAA*, the *FAA* was overridden by state law in many cases.<sup>92</sup> The Supreme Court confirmed this in the case of *Bernhardt v. Polygraphic Company of America*,<sup>93</sup> and although the majority refused to reach the issue, Justice Frankfurter held in his concurrence that as a result, the *FAA* did not apply to diversity cases.<sup>94</sup> This state of affairs completely undermined the objectives of the *FAA*, and in 1967, the Supreme Court changed its approach in the case of *Prima Paint Corp v. Flood & Conklin Mfg. Co.*,<sup>95</sup> holding that the *FAA* was a part of federal substantive law and justified on the basis of the Commerce

<sup>83</sup> Julius Henry Cohen & Kenneth Dayton, “The New Federal Arbitration Law” (1926) 12:4 Va L Rev 265 at 275; cf Sturges & Murphy, *supra* note 82 at 587–96.

<sup>84</sup> *Krauss Bros Lumber Co v Louis Bossert & Sons Inc*, 62 F (2d) 1004 at 1006 (2d Cir 1933).

<sup>85</sup> This is defined in 28 USC § 1332(a) as meaning controversies between “(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state [excluding permanent residents and domiciled in the US]; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state ... as plaintiff and citizens of a State or of different States.” Sturges & Murphy, *supra* note 82 at 586, n 13.

<sup>86</sup> Cohen & Dayton, *supra* note 83 at 277.

<sup>87</sup> *Erie*, *supra* note 51.

<sup>88</sup> See generally Steinman, *supra* note 50.

<sup>89</sup> *Guaranty Trust Co v York*, 326 US 99 at 110 (1945).

<sup>90</sup> *Ibid* at 109.

<sup>91</sup> Janet Lee Herold, “Federal Preemption – Arbitration – Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes” (1984) 54:3/4 Miss LJ 571 at 575–76.

<sup>92</sup> *Bernhardt v Polygraphic Co of America*, 350 US 198 at 203–206, 208–10 (1956).

<sup>93</sup> *Ibid* at 208–209.

<sup>94</sup> 388 US 395 (1967) [*Prima Paint*].

<sup>95</sup>

Clause, not Congress' ability to regulate procedure in the federal courts. In consequence, the federal courts were required to enforce arbitration agreements under the *FAA* regardless of the position of any applicable state law.<sup>96</sup>

The clear implication of holding that the *FAA* amounted to federal substantive law was that it would be applied in both federal and state courts, this was noted by the dissent in *Prima Paint*,<sup>97</sup> and thus it is not surprising that in 1983, the US Supreme Court held in the case of *Southland Corp. v. Keating*<sup>98</sup> that the *FAA* applied in both state and federal courts, with the monumentous effect that it would pre-empt any conflicting state laws.<sup>99</sup> Since then, pre-emption has become the key issue in *FAA* literature and jurisprudence, with the Supreme Court hearing pre-emption cases on at least ten different occasions<sup>100</sup> (holding state rules pre-empted in almost all cases),<sup>101</sup> innumerable state and lower federal court cases deciding *FAA* pre-emption issues,<sup>102</sup> and countless journal articles addressing the subject.<sup>103</sup> The reason for this morass of academic writing and jurisprudence is that there is neither express nor field pre-emption under the *FAA*, rather there is only the possibility of 'conflict preemption' which means that courts and scholars are forced to address each potential conflict on a case-by-case basis.

One can therefore say that the *FAA* has had a significant reversal of fortune, going from an act which had a limited effect, even in the federal courts, to an act that not only applies in both the federal and state courts, but also pre-empts any state law rule which could be deemed unfavourable to arbitration. This sea change is, in part, because the Supreme Court has, as with its interpretation of the Commerce Clause, taken a policy-based, rather than a textual or historical, approach to the *FAA* holding that it "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."<sup>104</sup> The Supreme Court therefore applies the pre-emption doctrine liberally, holding as pre-empted not just any rule that "discriminates on its face against arbitration"<sup>105</sup> but also any rule "that covertly accomplishes the same objective."<sup>106</sup> Although, as acknowledged by the Supreme Court,<sup>107</sup> the *FAA* merely aims to ensure that arbitration contracts are treated equally to other contracts. In reality, the Supreme Court's jurisprudence has turned arbitration agreements into "super contracts"<sup>108</sup> by treating

<sup>96</sup> *Ibid* at 404–407.

<sup>97</sup> *Ibid* at 420.

<sup>98</sup> 465 US 1 (1984).

<sup>99</sup> *Ibid* at 11–17.

<sup>100</sup> *Perry v Thomas*, 482 US 483 (1987) [*Perry*]; *Volt Information Sciences, Inc v Board of Trustees of Leland Stanford Junior University*, 489 US 468 (1989) [*Volt*]; *Mastrobuono v Shearson Lehman Hutton, Inc*, 514 US 52 (1995); *Doctor's Associates, Inc v Casarotto*, 517 US 681 (1996); *Preston v Ferrer*, 552 US 346 (2008); *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011); *Marmet Health Care Center, Inc v Brown*, 565 US 530 (2012); *DIRECTV, Inc v Imburgia*, 577 US 47 (2015) [*DIRECTV*]; *Kindred Nursing Centers Ltd v Clark*, 581 US 246 (2017) [*Kindred Nursing Centers*]; *Viking River Cruises, Inc v Moriana*, 596 US \_\_\_ (2022) [*Viking River Cruises*].

<sup>101</sup> A rare example of a state rule not being preempted can be found in *Volt, ibid*; the Supreme Court also found the state rule only partially preempted in *Viking River Cruises, ibid*.

<sup>102</sup> A search for cases including the terms "federal arbitration act" and "preempted" generates more than 3,000 results since 1984.

<sup>103</sup> A search for journal articles including the terms "federal arbitration act" and "preempted" generates more than 3,000 results since 1984.

<sup>104</sup> *Moses H Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1 at 24 (1983) [*Moses*].

<sup>105</sup> *Kindred Nursing Centers, supra* note 100 at 1423.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* at 1426–29.

<sup>108</sup> Richard Frankel, "The Arbitration Clause as Super Contract" (2014) 91:3 Washington UL Rev 531.

them more favourably than any other type of contract. This is so even though the Supreme Court expressly disavows that that is what it has done, for example in *Morgan v. Sundance Inc.*<sup>109</sup> it stated that “a court may not devise novel rules to favor arbitration over litigation [because] [t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration.”<sup>110</sup>

Another example of the problems posed by the US Supreme Court’s policy-based approach can be seen in its interpretation of the term “commerce” in the *FAA*. Section 2 provides for the enforceability of arbitration agreements in a “contract evidencing a transaction involving commerce.”<sup>111</sup> It is unclear from the text of the *FAA* itself whether the term means the same as “commerce” as the US Constitution’s Commerce Clause is currently understood, in which case the *FAA* would have an extremely broad scope, whether it means “commerce” as the US Constitution’s Commerce Clause was understood in 1925, in which case it is more restrictive, or whether it has an independent meaning, in which case, all bets are off. In *Allied-Bruce Terminix Inc. v. Dobson*,<sup>112</sup> the Supreme Court again adopted a pro-arbitration approach and held that it meant “commerce” as that term was currently understood in the US Constitution. The Supreme Court rejected the argument that either the terms “involving” or “evidencing” limited the scope of the term “commerce,” and held that it was coterminous with the Commerce Clause as currently understood.<sup>113</sup> This was despite the fact that, as the Supreme Court conceded,<sup>114</sup> Congress probably did not understand it that way at the time that it passed the *FAA*. In consequence, it is arguable that the *FAA* faced by states today is very different from that passed by Congress in 1925 and results from an excessively pro-arbitration interpretation by the Supreme Court, which has grossly distorted the text of the *Act*.<sup>115</sup> These distortions are particularly apparent, and problematic, with regards to employment and consumer arbitration, as will be seen later.

## 6. A BRIEF HISTORY OF CANADIAN ARBITRATION LAW AND THE *CONSTITUTION ACT, 1867*

The history of Canadian arbitration law is significantly simpler than that of the *FAA* in the US because Canada has, mercifully, been spared the endless complications caused by the conflict between federal and provincial jurisdiction over arbitration. Indeed, as compared to the American position, there is an almost complete dearth of literature and jurisprudence discussing the constitutional issues posed by arbitration in Canada. For example, the earliest article the author could find regarding whether the federal or provincial governments had jurisdiction to regulate arbitration, briefly discussed the matter and concluded that “[a]ll nine

<sup>109</sup> 142 S Ct 1708 (2022).

<sup>110</sup> *Ibid* at 1710. *Cf Prima Paint*, *supra* note 95 at 404, n 12.

<sup>111</sup> *FAA*, *supra* note 21, s 2.

<sup>112</sup> 513 US 265 (1995).

<sup>113</sup> *Ibid* at 277–82.

<sup>114</sup> *Ibid* at 275.

<sup>115</sup> Margaret L Moses, “Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress” (2006) 34:1 Fla St UL Rev 99; Imre Stephen Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (Durham, NC: Carolina Academic Press, 2013); Imre Stephen Szalai, “Exploring the Federal Arbitration Act Through the Lens of History” (2016) 2016:1 J Disp Resol 115; David Horton, “Federal Arbitration Act Preemption, Purposivism, and State Public Policy” (2013) 101:5 Geo LJ 1217; but see contra Christopher R Drahozal, “In Defense of *Southland*: Reexamining the Legislative History of the Federal Arbitration Act” (2002) 78:1 Notre Dame L Rev 101.

provinces have passed laws relating to arbitration and their authority has never been challenged.”<sup>116</sup> It argued that the only restriction on the competence of provincial legislatures over this matter was that they could “not [trespass] on the field covered by the subjects enumerated in section 91, such as, for example, criminal law or shipping.”<sup>117</sup> As for the competence of the Canadian Parliament to regulate commercial arbitration although, *prima facie*, this might be justified based on Canada’s Commerce Clause that provision has, as discussed above, been interpreted much more strictly than in the US so it would be unlikely to be held as justifying the enactment of commercial arbitration provisions.<sup>118</sup> The exception to this would be provisions regarding maritime matters<sup>119</sup> and that in fact remains largely the position today under the *Commercial Arbitration Act*.<sup>120</sup>

The reason for the lack of controversy regarding who has jurisdiction to regulate arbitration is because of the relatively clear-cut provisions in the *Constitution Act, 1867*. Section 92 lists the exclusive powers of provincial legislatures and this includes “Property and Civil Rights in the Province”<sup>121</sup> and “[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.”<sup>122</sup> This has, in turn, been consistently interpreted as including the power to regulate arbitration<sup>123</sup> and thereby excluding any jurisdiction on the part of the Government of Canada to regulate the matter. It was not until 1986 that the Government of Canada claimed any authority to regulate arbitration, something that was described by a contemporaneous article as “highly significant because it constitutes an excursion of the federal authority into a domain it has not hitherto occupied.”<sup>124</sup> In reality, this may have been overstating matters given that, as noted above, the scope of application of the *Act* is extremely limited and covers much the same areas which the earlier article noted were under the exclusive jurisdiction of the Federal Government.

Given the above, it is perhaps unsurprising that it does not appear that the question of whether the Provinces or the Federal Government had jurisdiction to regulate arbitration was not addressed by the Supreme Court of Canada until 2010 in the case of *Yugraneft Corp. v. Rexx Management Corp.*<sup>125</sup> The case concerned Canada’s implementation of the 1958 New York Convention on Foreign Arbitral Awards (NYC), which in Canada was effected by provincial arbitration acts, and one of the key issues was whether provinces could have different limitation acts applying to the recognition and enforcement of arbitration awards or whether this violated the NYC. The Supreme Court of Canada rejected the argument that the NYC meant that the provinces could not have different limitation periods stating that “[t]he position advanced by ADR Chambers is fundamentally at odds with Canada’s federal constitution, under which the recognition and enforcement of arbitral awards is a matter

<sup>116</sup> Brooke Claxton, “Commercial Arbitration under Canadian Law” (1943) 21:3 Can Bar Rev 171 at 174.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp), s 5(2).

<sup>121</sup> *Constitution Act, 1867*, *supra* note 18, s 92(13).

<sup>122</sup> *Ibid.*, s 92(14).

<sup>123</sup> Claxton, *supra* note 116 at 174; John EC Brierly, “Canadian Acceptance of International Commercial Arbitration” (1988) 40:2 Me L Rev 287 at 290.

<sup>124</sup> Brierly, *ibid* at 291.

<sup>125</sup> 2010 SCC 19.

within provincial jurisdiction (s. 92(13) ‘Property and Civil Rights’ and s. 92(14) ‘Administration of Justice’ of the *Constitution Act, 1867*).<sup>126</sup>

In terms of federal competence to regulate arbitration, it would appear that the only case addressing the matter is the Federal Court of Appeal case of *Canadian National Railway Co. v. Canada (National Transportation Agency)*.<sup>127</sup> That case concerned a rather niche area of law, disputes regarding the rates railway companies could charge, and is relevant only because the mechanism for setting such rates involved arbitration as a result of the provisions in sections 120(6) and 48 of the *National Transportation Act* of 1987. The Canadian National Railway Company argued that various provisions of the *Act* concerned “private contractual rights and remedies [and] [t]hey are, therefore, legislation in relation to property and civil rights, matters within the exclusive legislative jurisdiction of the provinces.”<sup>128</sup> The Federal Court of Appeal rejected this argument on the basis that the Federal Government had exclusive jurisdiction to regulate railways and this legislation fell into this category, even if it also affected property and civil rights.<sup>129</sup>

The practical effect of the above is that although there is a Canadian “federal arbitration act,” the *Commercial Arbitration Act (CAA)* of 1986, the Federal Government has very limited power to regulate arbitration and, in reality, arbitration in Canada is governed by a multiplicity of provincial statutes<sup>130</sup> as the *CAA* is extremely limited in scope. Their existence demonstrates that the provinces are perfectly capable of adopting arbitration law, or other areas of law having an impact on arbitration, such as consumer or employee protection, to suit their different and changing circumstances and public mores, something which their American cousins cannot. As will be seen, this difference is the ultimate cause of the contrasting ways in which consumer and employment arbitration has evolved in the US and Canada.

### III. CONSUMER AND EMPLOYMENT ARBITRATION IN THE UNITED STATES AND CANADA: PARALLEL WORLDS ON DIVERGENT TIMELINES

Consumer and employment arbitration in the US and Canada raises many of the same issues, whether factual, policy, or legal, and often involves many of the same companies so one could say that they are parallel worlds; however, the two jurisdictions diverged in the way in which these issues were addressed and this, in turn, has led to a radically different consumer and employment arbitration landscape in each. This section addresses two of the

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<sup>126</sup> *Ibid* at para 32.

<sup>127</sup> [1996] 1 FC 355.

<sup>128</sup> *Ibid* at 364.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Arbitration Act*, RSA 2000, c A-43; *Arbitration Act*, SBC 2020, c 2; *The Arbitration Act*, CCSM c A120; *Arbitration Act*, RSNB 2014, c 100; *Arbitration Act*, RSNL 1990, c A-14; *Arbitration Act*, RSNS 1989, c 19; *Arbitration Act*, RSNWT (Nu) 1988, c A-5; *Arbitration Act*, RSPEI 1988, c A-16; *The Arbitration Act*, 1992, SS 1992, c A-24.1; *Arbitration Act*, 1991, SO 1991, c 17; *International Commercial Arbitration Act*, RSA 2000, c 1-5; *International Commercial Arbitration Act*, RSBC 1996, c 233; *International Commercial Arbitration Act*, RSNB 2011, c 176; *International Commercial Arbitration Act*, RSNL 1990, c 1-15; *International Commercial Arbitration Act*, RSNS 1989, c 234; *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c 1-6; *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5; *International Commercial Arbitration Act*, RSPEI 1988, c 1-5; *The International Commercial Arbitration Act*, CCSM c C151.

most important divergences: (1) consumer and employee protection statutes and arbitration; and (2) unconscionability and arbitration. Each will be analyzed in turn below.

## A. CONSUMER PROTECTION RULES AND ARBITRATION

The story of the conflict between consumer protection rules and arbitration is, in reality, the story of class action lawsuits and arbitration. Although an evolution from English law, class action lawsuits were invented in, and remain pioneered by, the US.<sup>131</sup> They are “a legal action undertaken by one or more plaintiffs on behalf of themselves and all other persons having an identical interest in the alleged wrong.”<sup>132</sup> Such lawsuits, and the (often inevitable) settlements, can be enormously expensive for companies<sup>133</sup> with some amounting to billions, tens of billions, or even hundreds of billions of dollars. These sums are enough to bankrupt even the largest of companies, whilst netting lawyers considerable legal fees,<sup>134</sup> and thus have proven highly controversial throughout their history.<sup>135</sup> In particular, it is often argued that although purportedly brought on behalf of consumers, the only people who benefit from them are lawyers.<sup>136</sup> The fact that some class action claims have resulted in egregious fraudulent behaviour by lawyers, or those engaged by them, has also damaged the image of class action lawsuits.<sup>137</sup> It is worth noting that, again, Canada has been spared many of these issues and, in general, the Canadian class action landscape is more restrained than its US counterpart.<sup>138</sup>

In this context, it is hardly surprising that the US Supreme Court and Congress (but not Canadian legislatures or courts) have engaged in numerous class action law reform efforts over the years,<sup>139</sup> but by far the most potent weapon deployed by businesses has been the use of arbitration clauses, often together with class action waivers.<sup>140</sup> Indeed, so potent has this weapon been that some scholars in the US now openly discuss the “end of class of actions.”<sup>141</sup> As a result, legislatures and courts have enacted legislation, or judge-made rules, restricting or prohibiting such clauses to protect consumers. The fate of such rules in the US and Canada has significantly differed, with US rules inevitably running ashore on the rocks

<sup>131</sup> Raymond B Marcin, “Searching for the Origin of the Class Action” (1974) 23:3 Cath U L Rev 515.  
<sup>132</sup> Merriam-Webster, “Class Action,” online: <[www.merriam-webster.com/dictionary/class%20action](http://www.merriam-webster.com/dictionary/class%20action)>.  
<sup>133</sup> Andy Gillin, “The Largest Class Action Lawsuits & Settlements” (1 August 2022), online (blog): <[www.gjel.com/blog/largest-class-action-settlements.html](http://www.gjel.com/blog/largest-class-action-settlements.html)>.  
<sup>134</sup> See generally, Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (U.S. Chamber Institute for Legal Reform, 2013), online: <[instituteforlegalreform.com/wp-content/uploads/media/Class-Action-Study.pdf](http://instituteforlegalreform.com/wp-content/uploads/media/Class-Action-Study.pdf)>; cf Brian T Fitzpatrick, “An Empirical Study of Class Action Settlements and Their Fee Awards” (2010) 7:4 J Empirical Leg Stud 811.  
<sup>135</sup> See generally David Marcus, “The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953–1980” (2013) 90:3 Washington UL Rev 587; David Marcus, “The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994” (2018) 86:4 Fordham L Rev 1785.  
<sup>136</sup> See generally *supra* note 133.  
<sup>137</sup> Francesca Mari, “The Lawyer Whose Clients Didn’t Exist,” *The Atlantic* (May 2020), online: <[www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082/](http://www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082/)>; “The \$22 Billion Gold Rush,” *Forbes* (24 March 2006), online: <[www.forbes.com/forbes/2006/0410/086.html](http://www.forbes.com/forbes/2006/0410/086.html)>.  
<sup>138</sup> See generally, Garry D Watson, “Class Actions: The Canadian Experience” (2001) 11:2 Duke J Comp & Intl L 269.  
<sup>139</sup> George F Sanderson III, “Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present” (1999) 2:2 NYUJ Legis & Pub Pol’y 315; Howard M Erichson, “CAFA’s Impact on Class Action Lawyers” (2008) 156:6 U Pa L Rev 1593.  
<sup>140</sup> Jean R Sternlight & Elizabeth J Jensen, “Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?” (2004) 67:1/2 Law & Contemp Probs 75.  
<sup>141</sup> Maureen A Weston, “The Death of Class Arbitration after *Concepcion*?” (2012) 60:4 Kan L Rev 767; cf Brian T Fitzpatrick, “The End of Class Actions?” (2015) 57:1 Ariz L Rev 161.

of the Supreme Court's *FAA* pre-emption jurisprudence, whilst Canadian rules have met with smooth sailing.

The first apex court case in either jurisdiction to consider the issue was the Supreme Court of Canada case of *Dell Computer Corp. v. Union des consommateurs*.<sup>142</sup> That case came about as a result of consumers placing orders at extremely low prices for computers, a pricing error on Dell's part, which resulted in Dell issuing a price correction notice and refusing to honour orders at the allegedly mistaken prices. A consumer who had placed an order at such a price, along with a consumer protection group, consequently started the procedure for bringing a class action lawsuit against Dell, with Dell arguing that this was barred as a result of an arbitration clause on their website.<sup>143</sup> The Supreme Court of Canada rejected the argument that class actions were a matter of public policy and held that the provisions which governed class actions did not mean to create a new right, but rather a new procedure for enforcing existing rights. In consequence, where, as in the current case, a party did not have the right to bring an individual claim (because of the arbitration clause), they would not have the right to bring a class action claim either.<sup>144</sup> However, the Supreme Court of Canada's ruling was stillborn as the Quebec Legislature had, after the Quebec Court of Appeal had previously upheld the arbitration clause, decided to reform the Quebec *Consumer Protection Act*<sup>145</sup> so that clauses which required consumers to go to arbitration and prohibited class actions were henceforth invalidated.<sup>146</sup> Although the legislation was found not to be retroactive, and therefore did not affect the current case,<sup>147</sup> it did mean that in the future all such clauses would be invalid. The Quebec Legislature could do this as arbitration in Quebec is governed by Quebec law. In other words, there was no issue of "pre-emption" as under the *FAA* in the US. Similar legislation exists in Alberta<sup>148</sup> and Ontario,<sup>149</sup> although the wording of each differs, the effect is broadly the same as the Quebec legislation as pre-dispute arbitration agreements are generally prohibited regarding consumers but post-dispute arbitration agreements, namely those entered into after the dispute has already arisen, are not. It would also appear from the text that none of the three provincial laws invalidate optional arbitration clauses, such as clauses which merely allow the consumer to choose whether to arbitrate or litigate, but rather only invalidate mandatory arbitration clauses, such as those which require a consumer to arbitrate a dispute.

The contrast between the Canadian and US consumer arbitration landscapes is clearly illustrated by the next case, the US Supreme Court decision of *AT&T Mobility LLC v. Concepcion*.<sup>150</sup> That case arose out of AT&T offering 'free phones' on certain phone plans but then charging sales tax on said phones, with the result that they were not actually free. A consumer brought a lawsuit against AT&T, which was subsequently merged with a class action lawsuit alleging false advertising and fraud. AT&T argued that the claim was barred as a result of an arbitration clause in the AT&T service contract, whereas the consumers

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<sup>142</sup> 2007 SCC 34 [*Dell*].

<sup>143</sup> *Ibid* at 816–17.

<sup>144</sup> *Ibid* at 855–57.

<sup>145</sup> CQLR c P-40.1.

<sup>146</sup> *Dell, supra* note 142 at 857–58.

<sup>147</sup> *Ibid* at 858–60.

<sup>148</sup> *Consumer Protection Act*, RSA 2000, c C-26.3, s 16.

<sup>149</sup> *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, s 7(2).

<sup>150</sup> 563 US 333 (2011) [*AT&T Mobility*].

argued that the arbitration clause was unconscionable and therefore invalid.<sup>151</sup> The fundamental issue was the validity of a California rule formulated by the California Supreme Court in *Discover Bank v. Superior Court of Los Angeles*<sup>152</sup> which held that class action waivers in consumer contracts of adhesion were, in some circumstances, unconscionable and therefore unenforceable.<sup>153</sup> To determine whether the rule was pre-empted, the US Supreme Court had to decide whether it was a ground which existed “at law or in equity for the revocation of any contract.”<sup>154</sup>

As an initial point, it is worth noting that the rule did not prohibit arbitration per se, but merely prohibited class action waivers in consumer arbitration clauses with the result that it effectively required class arbitration ex-post, if the consumer requested it.<sup>155</sup> The Supreme Court accepted that the California rule was based on unconscionability, which was a ground available at law or equity under the *FAA*, but argued that as it required “the availability of classwide arbitration [it interfered] with fundamental attributes of arbitration and thus [created] a scheme inconsistent with the *FAA*.”<sup>156</sup> This was even though the *Discover Bank* rule was framed in general terms,<sup>157</sup> and therefore, arguably, should have survived pre-emption as a ground which existed at law or in equity.<sup>158</sup>

Effectively, the US Supreme Court held that the *Discover Bank* rule was pre-empted, even though generally applicable, merely because it had an incidental negative effect on arbitration. It goes without saying that this severely limits the ability of states to implement consumer protection, at least insofar as they may affect the procedural aspects of enforcing consumer protection claims. Moreover, unlike Quebec, California cannot simply override Supreme Court decisions applying federal law which undermine its consumer protection rules via legislation, but must instead employ some creativity to work around them.

A good example of such creativity can be found in the next case, *DIRECTV*, where the US Supreme Court again had to consider the operation of the *Discover Bank* rule. As we have seen, the Supreme Court invalidated the *Discover Bank* rule, but the California courts believed they had found a way around this relying on the earlier precedent of *Volt*.<sup>159</sup> In that case, the Court upheld a Californian judgment holding that by choosing Californian law the parties had selected California arbitration law, rather than the *FAA*, to apply to their arbitration clause even if the *FAA* would otherwise apply or might lead to a different result. In *DIRECTV* the California courts held that a choice of California law made by the parties in 2009 meant that California arbitration law at the time (including the *Discover Bank* rule), instead of the *FAA*, should be applied to the arbitration clause at issue.<sup>160</sup> In consequence, the arbitration clause and class action waiver (including a waiver of class arbitration) in that case was invalid and the consumer’s claim could proceed in the California courts. In theory, under the *Erie* rule, the US Supreme Court had to accept the California court’s judgments regarding

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<sup>151</sup> *Ibid* at 1740–43.

<sup>152</sup> 113 P (3d) 1100 (2005) [*Discover Bank*].

<sup>153</sup> See generally *ibid*.

<sup>154</sup> *FAA*, *supra* note 21, s 2.

<sup>155</sup> *AT&T Mobility*, *supra* note 150 at 1743.

<sup>156</sup> *Ibid* at 1748.

<sup>157</sup> *Discover Bank*, *supra* note 152 at 1110.

<sup>158</sup> *FAA*, *supra* note 21, s 2.

<sup>159</sup> *Volt*, *supra* note 100.

<sup>160</sup> *DIRECTV*, *supra* note 100 at 466–68.

their own law, something the justices accepted,<sup>161</sup> but the Supreme Court argued that the choice of law clause should mean valid as opposed to invalid California law (that is valid or invalid at the time of arbitration, not at the time of entering into the clause) and therefore did not include the *Discover Bank* rule.<sup>162</sup> Although the Supreme Court attempted to justify this conclusion by suggesting that the California courts were interpreting the phrase “Law of your State” (which in this case meant California) in an anti-arbitration way, the reality is that the Supreme Court’s conclusion contradicted its rule in *Erie* that federal courts should apply state law as applied by state courts or legislatures. The case demonstrates that even applying considerable creativity, the ability of states to regulate consumer arbitration, or indeed even consumer law generally, is significantly hamstrung by the Supreme Court’s pro-arbitration jurisprudence.

Going back in time, to 2011 specifically, we can again see the contrast with Canada by looking at the Supreme Court of Canada case of *Seidel v. TELUS Communications Inc.*<sup>163</sup> That case also concerned a class action claim which, it was claimed, was barred by an arbitration clause entered into by a consumer and TELUS Communications Inc, a telecommunications company.<sup>164</sup> In that case, the primary issue was the application of the British Columbia *BPCPA*, which provided in section 172(1) that “person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court.”<sup>165</sup> This had to be read against section 3 of the *BPCPA* which provided that “[a]ny waiver or release by a person of the person’s rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.”<sup>166</sup> It is relatively obvious that these provisions would invalidate exclusive arbitration clauses and, unsurprisingly, the Supreme Court of Canada held as much stating that “s. 172 offers remedies different in scope and quality from those available from an arbitrator and constitutes a legislative override of the parties’ freedom to choose arbitration.”<sup>167</sup>

The arbitration clause did not stand alone, however, and the next issue for the Supreme Court to consider was whether the class action waiver was also invalid. The Supreme Court of Canada held that as the class action waiver was not severable by the arbitration clause, it was also invalidated by section 3 of the *BPCPA*. It noted that “[t]he undertakings are linked by the term ‘[b]y so agreeing’. What precedes (the arbitration clause) is the foundation for what follows (the class action waiver). If the arbitration provision is rendered invalid by s. 3 of the *BPCPA* ... the dependent class action waiver falls with it.”<sup>168</sup> The Supreme Court did not completely abandon its arbitration-friendly approach, however, and held that as regard to claims which fell outside the scope of the *BPCPA*, the arbitration clause, and thus the class action waiver, remained valid. In other words, the *BPCPA* only invalidated

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<sup>161</sup> *Ibid* at 468.

<sup>162</sup> *Ibid* at 468–71.

<sup>163</sup> 2011 SCC 15 [*Seidel*].

<sup>164</sup> *Ibid* at para 1. See also *Business Practices and Consumer Protection Act*, SBC 2004, c 2 [*BPCPA*].

<sup>165</sup> *BPCPA*, *ibid*, s 172(1).

<sup>166</sup> *Ibid*, s 3.

<sup>167</sup> *Seidel*, *supra* note 163 at para 40.

<sup>168</sup> *Ibid* at para 46.

arbitration clauses insofar as they applied to rights under that *Act*, it did not affect rights at common law or under other statutes.<sup>169</sup>

In the 2019 Supreme Court of Canada case of *Telus Communications*, which again concerned a proposed class action, the Supreme Court had to consider the workings of Ontario's *Consumer Protection Act, 2002*.<sup>170</sup> The case involved unique circumstances in that one Avraham Wellman filed a proposed class action on behalf of roughly two million Ontario residents which, uniquely, included both consumers and business customers of TELUS.<sup>171</sup> Once again the relevant contracts were standard form, and contained a requirement for any disputes to be first mediated, and if that failed, settled by individual arbitration.<sup>172</sup> It was clear that the arbitration clause was not enforceable as regard to the consumers as a result of the Ontario *Consumer Protection Act, 2002*, which invalidated all arbitration clauses "in a consumer agreement ... that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration [if] it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice."<sup>173</sup>

The only real controversy was whether business customers could ride on the consumer's coattails to evade the arbitration clause and benefit from the ability to bring a class action against TELUS. Section 7(5) of the Ontario *Arbitration Act, 1991*, granted the court discretion not to stay proceedings when an arbitration agreement only dealt with some of the matters dealt with by a court case and it was reasonable to separate some matters from others. In consequence, it was argued by the respondent, who had filed the proposed class action, that the Supreme Court should exercise its discretion not to stay the class action but rather should let it proceed in the Ontario courts as the arbitration agreement only dealt with some matters, those of consumers, and it was not reasonable to separate them.<sup>174</sup> This would have resulted in businesses being able to benefit from the Ontario provisions prohibiting class action waivers as regard to consumers and would thereby have allowed them to proceed to court with other members of the class rather than having to go to arbitration individually. Although this was an ingenious argument, the Supreme Court of Canada rejected it, stating that it "would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes. Clearly, this was not what the legislature had in mind when it passed the *Arbitration Act*."<sup>175</sup> Despite the strained nature of the argument, no less than four judges agreed with the businesses' submissions and dissented from the Supreme Court's judgment,<sup>176</sup> perhaps indicating that there is room for yet further restrictions on the enforceability of arbitration clauses in Canadian consumer contracts in the future.

It can be seen from the above that choices as regard to constitutional structure, or perhaps better said, choices regarding constitutional interpretation, have had a significant impact on

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<sup>169</sup> *Ibid* at paras 11, 31, 50.

<sup>170</sup> *Telus Communications*, *supra* note 4; *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A.

<sup>171</sup> *Telus Communications*, *ibid* at para 2.

<sup>172</sup> *Ibid* at para 3.

<sup>173</sup> *Consumer Protection Act, 2002*, *supra* note 170, s 7(2).

<sup>174</sup> *Telus Communications*, *supra* note 4 at paras 5–7. See also *Arbitration Act, 1991*, *supra* note 130.

<sup>175</sup> *Telus Communications*, *ibid* at para 76.

<sup>176</sup> *Ibid* at para 106 et seq.

the consumer regulatory landscapes in Canada and the US with regard to arbitration. In Canada, provincial legislatures have been able to regulate consumer arbitration without encountering any constitutional difficulties, whereas in the US, states have found it impossible to regulate consumer arbitration due to the constitutional problems posed by the US Supreme Court's interpretation of the *FAA* and their application of the pre-emption doctrine. In theory, this would not (absent separate issues of state versus federal rights) be a problem, but Congress has found itself overworked and over-politicized in recent decades<sup>177</sup> with the result that it is difficult to pass even popular legislation of general importance and the likelihood of it being able to find time to legislate on a "niche" topic such as arbitration is therefore low. The exception to this is where the legislation is a "hot" topic which has caught the public imagination, and therefore, the attention of politicians; for example, Congress recently passed legislation prohibiting arbitration of sexual harassment and sexual assault in the employment context.<sup>178</sup> It is also arguable, though proving such a claim is outside the scope of this article, that this would always be the case as federal legislatures will always push "niche" topics such as arbitration down their list of priorities whereas provincial legislatures might be more open to them.

## B. EMPLOYMENT RIGHTS STATUTES AND ARBITRATION

One of the most controversial issues concerning employment arbitration is whether statutory claims, such as a claim for age discrimination or statutory wage claims, can be subject to mandatory arbitration or whether parties should be free to bring such claims before the courts. It is often argued that employment arbitration leads to worse outcomes for employees due to biased panels, whether because of actual bias or merely due to the "repeat player effect,"<sup>179</sup> and several empirical studies have been conducted to demonstrate this is so.<sup>180</sup> A more far-reaching, and abstract, argument that is also often made is that it is inappropriate for employers to be able to force employees to arbitrate public rights in a private forum such as arbitration.<sup>181</sup> The US Supreme Court has, however, not been swayed by such arguments and has consistently ruled in favour of the enforceability of arbitration agreements even as regard to statutory employment rights. The earliest case in this regard is *Perry*.<sup>182</sup>

In *Perry*, the US Supreme Court had to consider whether the *FAA* pre-empted a California rule that allowed employees to bring actions to collect wages in court notwithstanding the existence of an arbitration clause.<sup>183</sup> The Supreme Court held that the clear federal policy of

<sup>177</sup> Paul Kane & Derek Willis, "Laws and Disorder," *The Washington Post* (5 November 2018), online: <[www.washingtonpost.com/graphics/2018/politics/laws-and-disorder/](http://www.washingtonpost.com/graphics/2018/politics/laws-and-disorder/)>; Timothy M LaPira, Lee Drutman & Kevin R Kosar, eds, *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform* (Chicago: University of Chicago Press, 2020); Jonathan Lewallen, Sean M Theriault & Bryan D Jones, "Congressional Dysfunction: An Information Processing Perspective" (2016) 10:2 Regulation & Governance 179.

<sup>178</sup> *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, Pub L No 117-90, 136 Stat 26 (codified as amended at 9 USC §§ 401–402) [EFASAH].

<sup>179</sup> Giesbrecht-McKee, *supra* note 13.

<sup>180</sup> See e.g. Colvin, *supra* note 10; cf Bingham, *supra* note 10.

<sup>181</sup> Katherine Van Wezel Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s" (1996) 73:4 Denv UL Rev 1017; Lewis L Maltby, "Private Justice: Employment Arbitration and Civil Rights" (1998) 30:1 Colum HRLR 29.

<sup>182</sup> *Perry*, *supra* note 100.

<sup>183</sup> *Ibid* at 486–88.

rigorously enforcing private agreements which the parties had made as regards arbitration placed “the Act in unmistakable conflict with California’s § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.”<sup>184</sup> The Supreme Court’s decision was not surprising as it was a straightforward application of its earlier holding that the *FAA* “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,”<sup>185</sup> and the California rule was clearly a substantive or procedural policy to the contrary.

The next case, *Gilmer*, was more complex as it concerned whether an employer could require claims under the *Age Discrimination in Employment Act* of 1967 (*ADEA*) to be arbitrated.<sup>186</sup> As this was a federal piece of legislation no issue of pre-emption could arise and the US Supreme Court could not take the easy way out. Instead, the Supreme Court held that the key issue was whether “Congress intended to preclude a waiver of a judicial forum for *ADEA* claims,”<sup>187</sup> something that was always going to be an uphill battle for *Gilmer* as “nothing in the text of the *ADEA* or its legislative history explicitly precludes arbitration.”<sup>188</sup> *Gilmer* raised the policy arguments mentioned earlier, regarding the bias of arbitral panels,<sup>189</sup> limitations on the relief given by arbitrators,<sup>190</sup> and the power imbalance between employees and employers.<sup>191</sup> All of these arguments were rejected by the Supreme Court, which noted that: (1) speculation about the bias of arbitral panels was based on anti-arbitration sentiment;<sup>192</sup> (2) it was not clear that the arbitrators could not grant certain types of relief and even if true, this did not matter as the Equal Employment Opportunity Commission could bring claims requesting such relief;<sup>193</sup> and (3) “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>194</sup> Although all of these holdings are open to criticism the most problematic aspect of the US Supreme Court’s decision is what it did not decide; whether contracts of employment came within the scope of the *FAA*.

The Supreme Court, in a footnote, stated that it did not need to address this exemption because the matter had not been addressed in the courts below and, in any event, the contract was not contained in a contract of employment.<sup>195</sup> As argued in the dissent, this is not convincing as the Supreme Court could have addressed the matter *sua sponte*<sup>196</sup> and the arbitration clause at issue, whilst not in an employment contract, clearly arose out of an employment relationship and thus arguably *prima facie* fell within the *FAA*’s section 1 exemption.<sup>197</sup> The Supreme Court’s reluctance to address the section 1 exemption, and its overly technical *obiter* justification for failing to do so, was an ill omen for opponents to

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184 *Ibid* at 491.

185 *Moses*, *supra* note 104 at 24.

186 *Gilmer*, *supra* note 82.

187 *Ibid* at 26.

188 *Ibid*.

189 *Ibid* at 30–32.

190 *Ibid* at 32.

191 *Ibid* at 33.

192 *Ibid* at 30–31.

193 *Ibid* at 31–32.

194 *Ibid* at 33.

195 *Ibid* at 25, n 2.

196 *Ibid* at 36–38.

197 *Ibid* at 40.

employment arbitration and some 20 years later, in *Circuit City Stores, Inc. v. Adams*,<sup>198</sup> the Supreme Court confirmed their worst fears. In *Circuit City*, the Supreme Court finally addressed the scope of the section 1 FAA exemption for employment contracts and, unsurprisingly, gave that exemption an extremely narrow and strained interpretation. It rejected the argument that all employment contracts were excluded from the scope of the FAA stating that:

[T]he location of the phrase “any other class of workers engaged in ... commerce” in a residual provision, after specific categories of workers have been enumerated, undermines any attempt to give the provision a sweeping, open-ended construction. And the fact that the provision is contained in a statute that “seeks broadly to overcome judicial hostility to arbitration agreements,” ... which the Court concluded in *Allied-Bruce* counseled in favor of an expansive reading of § 2, gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA’s coverage.<sup>199</sup>

Instead, the Supreme Court held that the exemption applied “only [to] contracts of employment of transportation workers,”<sup>200</sup> thus setting up further years of argument concerning exactly what is meant by “transportation worker.”<sup>201</sup> In any event, the joint effect of *Gilmer* and *Circuit City* was to open the floodgates of employment arbitration in a way which simply has not happened in Canada and although proving that either case actually caused said flood is an impossible task, it is a fact that both cases played a significant role in encouraging its expansion.<sup>202</sup>

As with its changed interpretation of the Commerce Clause, the US Supreme Court had to engage in a rebalancing exercise post *Circuit City* to prevent the US system of employment law from being circumvented. It carried out this rebalancing a year after deciding *Circuit City* in the case of *Equal Employment Opportunity Commission v. Waffle House, Inc.*<sup>203</sup> As in *Circuit City*, the employee in this case, one Eric Baker, had an arbitration clause in his documents of employment (specifically his application for employment and later as a condition of employment).<sup>204</sup> Unlike that case, however, the question in *Waffle House* was whether the Equal Employment Opportunity Commission (EEOC) could bring claims for backpay, reinstatement, and damages against Waffle House in court on Mr. Baker’s behalf. The Supreme Court had specifically mentioned the EEOC’s ability to bring such relief, notwithstanding an arbitration agreement, being a reason to enforce employment arbitration contracts in *Gilmer*.<sup>205</sup> The issue was that allowing the EEOC to bring claims on Mr. Baker’s behalf would mean that the EEOC could “do on behalf of an employee that which an employee has agreed not to do for himself,”<sup>206</sup> thereby breaking the Latin dictum *nemo dat quod non habet*.

<sup>198</sup> 532 US 105 (2001) [*Circuit City*].

<sup>199</sup> *Ibid* at 118–19 [citations omitted].

<sup>200</sup> *Ibid* at 119.

<sup>201</sup> The Supreme Court avoided deciding the matter by issuing a narrow ruling in *Southwest Airlines Co v Saxon*, 596 US \_\_\_\_ (2022) [*Saxon*].

<sup>202</sup> See generally Sarah Staszak, “Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace” (2020) 34:2 *Studies in American Political Development* 239.

<sup>203</sup> 534 US 279 (2002) [*Waffle House*].

<sup>204</sup> *Ibid* at 282–83.

<sup>205</sup> *Gilmer*, *supra* note 82 at 32.

<sup>206</sup> *Waffle House*, *supra* note 203 at 298.

Notwithstanding this, the Supreme Court ruled that the EEOC was not bound by the arbitration clause and could bring proceedings in court given that “whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.”<sup>207</sup> The Supreme Court circumvented the *nemo dat* rule by holding that the EEOC did not act as a proxy for the employee, but rather had separate statutory authority for bringing claims on their behalf. Thus, claims brought by the EEOC were not derivative and they were not bound by an arbitration clause entered into by an employee on whose behalf they were acting.<sup>208</sup> *Waffle House* was one of the few pieces of good news that employees would receive from the Supreme Court post *Circuit City* with the Supreme Court strengthening the hand of employers in its next employment arbitration decision, *Epic Systems Corp. v. Lewis*.<sup>209</sup>

The fundamental issue in *Epic Systems* was whether employees should be able to bring class or collective actions notwithstanding any arbitration agreement they had entered into with their employer.<sup>210</sup> The employees in this raised a novel argument, namely that: (1) the *National Labor Relations Act* granted employees the right to engage in “concerted activities”;<sup>211</sup> (2) class or collective actions amounted to such activities; (3) the *FAA* allows courts to invalidate arbitration agreements on such grounds as exist at law or equity, generally; and (4) contradicting a federal law was such a generally applicable ground of invalidation. In consequence, they argued that they had the right to bring class or collective actions notwithstanding any arbitration clause they had entered into.<sup>212</sup> Again, the Supreme Court applied the *ejusdem generis* rule to hold that because the term “concerted activities” appeared after the terms “‘form[ing], join[ing], or assist[ing] labor organizations’, and ‘bargain[ing] collectively’”<sup>213</sup> it only covered things that “serve[d] to protect things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace, rather than ‘the highly regulated, courtroom-bound “activities’” of class and joint litigation.”<sup>214</sup>

It is fair to say that the Supreme Court’s application of the *ejusdem generis* rule is coloured by its extreme pro-arbitration attitude, an attitude which is demonstrated by the fact that “[i]n many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected every such effort to date.”<sup>215</sup> The dissent also notes that in reality “for over 75 years, the [National Labor Relations] Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment.”<sup>216</sup> Moreover, this view had long been upheld by the

<sup>207</sup> *Ibid* at 296.

<sup>208</sup> *Ibid* at 296–98.

<sup>209</sup> 584 US \_\_\_ (2018) [*Epic Systems*].

<sup>210</sup> *Ibid* at 1.

<sup>211</sup> *National Labor Relations Act*, 29 USC §§ 151-169, § 157, s 7 (1935).

<sup>212</sup> *Epic Systems*, *supra* note 209 at 5–7.

<sup>213</sup> *Ibid* at 12.

<sup>214</sup> *Ibid*.

<sup>215</sup> *Ibid* at 16 [emphasis in original].

<sup>216</sup> *Ibid* at 10, Ginsburg J, dissenting.

federal courts<sup>217</sup> and it would therefore appear that *Epic Systems* is, therefore, another example of the Supreme Court engaging in a pro-arbitration, policy-based interpretation of the *FAA* and any statutes which might affect it, or arbitration generally.

The situation in Canada is very different, as will be seen with the next case chronologically speaking, the Ontario Court of Appeal case of *Heller v. Uber Technologies Inc.*<sup>218</sup> The issue in that case was similar to that in *Waffle House* and *Epic Systems*, did mandatory employment arbitration clauses conflict with Ontario employment legislation (specifically the *Employment Standards Act (ESA)*)? As with equal opportunity legislation in the US and the EEOC, under the *ESA*, employees could submit complaints which would then be investigated by a government official, an Employment Standards Officer (ESO).<sup>219</sup> The Court held that this process constituted an employment standard and as the *Act* voided any agreements that purported to contract out of employment standards,<sup>220</sup> the arbitration clause was invalid and the class action could proceed.<sup>221</sup> The Court focused not so much on the specific individual before it proposing the class action as on all the other individuals who might benefit if it was allowed to proceed, stating that “we are dealing not just with the appellant but with all persons who might be in the same position as the appellant. The interpretative process must take that into account.”<sup>222</sup>

The Ontario Court of Appeal therefore charted a very different course from the US Supreme Court as regards the balance between respect for arbitration agreements and employment rights. Rather than merely holding that an employee could still submit an employment complaint which would be subject to an ESO investigation, as the US Supreme Court did *mutatis mutandis* in *Waffle House*, or holding that there was no “right” to bring employment class action lawsuits given that they were merely a matter of procedure, as the US Supreme Court did in *Circuit City*, the Ontario Court of Appeal chose the simpler, and blunter, option of invalidating the arbitration clause altogether. The Court’s decision was no more, and no less, policy-based than the US Supreme Court’s decision in *Epic Systems*, the only difference is that the Ontario Court of Appeal chose to uphold a pro-class action policy whereas the US Supreme Court chose to uphold a pro-arbitration policy.

In the US, the recent decision of *New Prime Inc. v. Oliveira*<sup>223</sup> has led to hopes that there is some light at the end of the tunnel for workers who wish to avoid arbitration, but the decision has led to significant uncertainty regarding the one narrow exemption the Supreme Court allows from the enforcement of employment arbitration clauses, the transportation workers exemption. In *New Prime*, the Supreme Court had to consider whether the transportation worker exemption covered truck drivers, who were prima facie independent contractors as opposed to employees, and thus did not have an employment contract as such. The trucker in that case, one Dominic Oliveira, brought (yet another) class action lawsuit against New Prime alleging that although labelled as independent contractors, New Prime treated its truckers as employees and therefore should have, but did not, pay them the

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<sup>217</sup> *Ibid.*

<sup>218</sup> 2019 ONCA 1 [*Uber Technologies*].

<sup>219</sup> *Ibid* at para 35.

<sup>220</sup> *Ibid* at para 29.

<sup>221</sup> *Ibid* at para 47.

<sup>222</sup> *Ibid* at para 43.

<sup>223</sup> 586 US \_\_\_ (2019) [*New Prime*].

statutory minimum wage. New Prime counter-argued that the issue should be resolved by arbitration and after several court decisions, the issue ended up before the Supreme Court.<sup>224</sup> It held that the term “contracts of employment” in section 1 of the *FAA* included not just contracts between employers and employees but also “*agreements that require independent contractors to perform work.*”<sup>225</sup> Interestingly, contrary to its disdain for history in *Circuit City*, a key plank in this argument was how the term was understood at the time that the *FAA* was enacted in 1925.<sup>226</sup>

The Supreme Court also noted that the term “contracts of employment” was interpreted in this broader sense in both jurisprudence and statutory law in the early 20th century.<sup>227</sup> As a result, it held that truck drivers who worked as independent contractors for an interstate trucking company<sup>228</sup> came within the scope of the section 1 *FAA* exemption and therefore were not covered by the *FAA*.<sup>229</sup> Unfortunately for the Supreme Court, the rise of the gig economy meant that the decision opened a can of worms; were gig workers, for example Uber drivers, covered by the *FAA* or did they fall within the scope of the section 1 exemption? The issue led to several conflicting circuit court decisions,<sup>230</sup> some preceding *New Prime* but most coming after and explicitly referring to it, and the Supreme Court issued a narrow ruling on the transportation worker exemption in *Saxon*.<sup>231</sup> In that case, the Supreme Court held that “[w]orkers, like Saxon, who load cargo on and off airplanes belong to a ‘class of workers in foreign or interstate commerce.’”<sup>232</sup> As a whole, the Supreme Court’s recent arbitration decisions have been described as “demonstrat[ing] a more textualist approach to the Federal Arbitration Act”<sup>233</sup> with the result that “for any new *FAA* matters not previously addressed by the Court, future decisions are more likely to be grounded in the *FAA*’s text rather than a federal policy favoring arbitration.”<sup>234</sup>

It is not just the Supreme Court providing some light at the end of the tunnel, however, Congress has also moved to restrict the scope of the *FAA* in employment cases for the first time in decades by passing the *EFASAH* of 2021. *EFASAH* amends the *FAA* to provide that:

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.<sup>235</sup>

<sup>224</sup> *Ibid* at 1–3.

<sup>225</sup> *Ibid* at 7 [emphasis added].

<sup>226</sup> *Ibid* at 7–8.

<sup>227</sup> *Ibid* at 8.

<sup>228</sup> *Ibid* at 1–2.

<sup>229</sup> *Ibid* at 15.

<sup>230</sup> *Singh v Uber Technologies Inc*, 939 F (3d) 210 (3rd Cir 2019); *Waithaka v Amazon.com, Inc*, 966 F (3d) 10 (1st Cir 2020); *Rittmann v Amazon.com, Inc*, 971 F (3d) 904 (9th Cir 2020); *Capriole v Uber Technologies, Inc*, 7 F (4th) 854 (9th Cir 2021).

<sup>231</sup> *Saxon*, *supra* note 201.

<sup>232</sup> *Ibid* at 7.

<sup>233</sup> Imre Szalai, “The Supreme Court’s 2021–2022 Arbitration Cases: A More Textualist Approach” (2022) 40:8 *Alternatives to High Cost Litigation* 126 at 126.

<sup>234</sup> *Ibid* at 127.

<sup>235</sup> *EFASAH*, *supra* note 178, s 402(a).

The provision came about as, following the #MeToo movement, there was widespread controversy about the arbitration of sexual harassment and discrimination claims in employment disputes.<sup>236</sup> It was one of those rare creatures, a bill which received widespread bipartisan support passing the House on a lopsided 335-97 vote and the Senate on a voice vote.<sup>237</sup> *EFASAH* was necessary as previous attempts to forbid employment arbitration in the light of the #MeToo movement had been struck down as pre-empted by the *FAA*.<sup>238</sup> Although the legislation no doubt comes as a relief to victims of sexual assault or harassment who did not wish to be forced into arbitration, its limited scope, and the fact that it was necessary for an act of Congress to give relief to such victims, demonstrates the powerlessness of states to limit arbitration even in situations where there is widespread support for doing so.

Further evidence of the difficulty faced by those who wish to return American arbitration jurisprudence to a more even keel can be found in the Supreme Court's recent case of *Viking River Cruises*<sup>239</sup> where the Supreme Court again struck down Californian employment law legislation on the grounds that it was pre-empted by the *FAA*. The *Act* in question is the *Private Attorney Generals Act (PAGA)*, which "authorizes any 'aggrieved employee' to initiate an action against a former employer 'on behalf of himself or herself and other current or former employees' to obtain civil penalties that previously could have been recovered only by the State."<sup>240</sup> The unique aspect of *PAGA* is that under it the employee "sues as an 'agent or proxy' of the State,"<sup>241</sup> and given the fact that by bringing *PAGA* actions employees are enforcing "public duties that are owed to the State, not private rights belonging to employees,"<sup>242</sup> California courts hold pre-dispute waivers of the right to bring *PAGA* claims to be invalid as contrary to public policy.<sup>243</sup> The dispute in the case arose as a former employee, Angie Moriana, was hired by Viking and thereby purportedly agreed to arbitrate any dispute with Viking and waive the right to bring a class action. After leaving her job, Moriana filed a *PAGA* action against Viking who defended it on the grounds that she was subject to a valid arbitration clause and moved to compel arbitration. The California courts unsurprisingly ruled in Moriana's favour and the issue eventually came before the Supreme Court, which had to decide whether the California rule was pre-empted by the *FAA*.

<sup>236</sup> Elizabeth Dias & Eliana Dockterman, "The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard," *TIME* (21 October 2016), online: <[time.com/4540111/arbitration-clauses-sexual-harassment/](http://time.com/4540111/arbitration-clauses-sexual-harassment/)>; Nick Wingfield & Jessica Silver-Greenberg, "Microsoft Moves to End Secrecy in Sexual Harassment Claims," *The New York Times* (19 December 2017), online: <[www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html](http://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html)>; Jonathan Stempel, "Fox News' Ailes Moves for Arbitration in Carlson Employment Case," *Reuters* (8 July 2016), online: <[www.reuters.com/article/us-foxnews-lawsuit-idUSKCN0ZO217](http://www.reuters.com/article/us-foxnews-lawsuit-idUSKCN0ZO217)>; Davey Alba & Caroline O'Donovan, "Square, Airbnb, and eBay Just Said They Would End Forced Arbitration for Sexual Harassment Claims," *BuzzFeed News* (12 November 2018), online: <[www.buzzfeednews.com/article/daveyalba/tech-companies-end-forced-arbitration-airbnb-ebay](http://www.buzzfeednews.com/article/daveyalba/tech-companies-end-forced-arbitration-airbnb-ebay)>; Salvador Rodriguez, "Facebook Follows Google to End Mandatory Arbitration for Sexual-Harassment Claims," *CNBC* (9 November 2018), online: <[www.cnbc.com/2018/11/09/facebook-ends-mandatory-arbitration-for-sexual-harassment-claims.html](http://www.cnbc.com/2018/11/09/facebook-ends-mandatory-arbitration-for-sexual-harassment-claims.html)>; Jessica Guynn, "'Enough Is Enough': Gretchen Carlson Says Bill Ending Arbitration Would Break Silence in Sexual Harassment Cases," *USA Today* (6 December 2017), online: <[www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/](http://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/)>.

<sup>237</sup> "H.R.4445 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," online: <[www.congress.gov/bill/117th-congress/house-bill/4445/actions](http://www.congress.gov/bill/117th-congress/house-bill/4445/actions)>.

<sup>238</sup> For an example, see the New Jersey legislation found pre-empted in *New Jersey Civil Justice Institute v Grewal*, 2021 WL 1138144 (D NJ 2021).

<sup>239</sup> *Viking River Cruises*, *supra* note 100.

<sup>240</sup> *Ibid* at 2; *Labour Code Private Attorneys General Act of 2004*, Cal Lab Code §§ 2698-99.8.

<sup>241</sup> *Viking River Cruises*, *ibid* at 3.

<sup>242</sup> *Ibid* at 4.

<sup>243</sup> *Ibid* at 6.

The Supreme Court first addressed Viking's claim that the rule was similar to pre-empted prohibitions on class action waivers which required class arbitration as *PAGA* "creates an intrinsically representational form of action and *Iskanian* requires parties either to arbitrate in that format or forgo arbitration altogether."<sup>244</sup> The Supreme Court rejected this argument stating that "we have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract. Nor have we suggested that [such suits] are inconsistent [with] the norm of bilateral arbitration as our precedents conceive of it."<sup>245</sup> However, the Supreme Court found another basis for holding *PAGA* partially pre-empted on the basis that its mandatory joinder rule whereby employees can use any loss they personally suffered as the basis to join any claims that the State could have brought against the employee in the *PAGA* action, and prohibits parties from agreeing to arbitrate only individual *PAGA* claims.<sup>246</sup> In other words, parties were not allowed to divide *PAGA* actions into individual and non-individual claims. The issue with this is that arbitration is a matter of consent so that "state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate."<sup>247</sup> However, the decision may result in a *DIRECTV* situation (where the California courts circumvented the earlier US Supreme Court ruling of *AT&T Mobility* for several years) given that, as noted by Justice Sotomayor in her concurring opinion, the Supreme Court held that once individual claims had been dismissed, *PAGA* provided no means for courts to consider non-individual claims and this is a matter of state and not federal law.<sup>248</sup> As a result "if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."<sup>249</sup> Moreover, even if the Supreme Court was right, the California legislature could simply modify *PAGA* rules on standing and thereby get around the Supreme Court's holding.<sup>250</sup> It remains to be seen whether California will actually do this, however, and even if it does it is unclear whether the Supreme Court would ultimately permit it. Much depends on the balance the Supreme Court strikes between its desire to respect past precedent and its commitment to textualism.<sup>251</sup> One black swan in that regard is the Supreme Court's decision in *Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization*<sup>252</sup> to overturn its previous finding that there was a constitutional right to abortion in *Roe v. Wade*.<sup>253</sup> It is arguable that if the Supreme Court is willing to overturn an almost 50-year-old precedent, despite widespread opprobrium from certain sectors of society, it might be willing to overturn less controversial, and less ancient, *FAA* precedents. On the other hand, the decision in *Dobbs* has a moral component<sup>254</sup> which cases regarding arbitration, no matter their importance, simply do not. Thus, it may be that *Dobbs* simply does not have any relevance for *FAA* cases.

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<sup>244</sup> *Ibid* at 15.

<sup>245</sup> *Ibid*.

<sup>246</sup> *Ibid* at 17–18.

<sup>247</sup> *Ibid* at 18.

<sup>248</sup> *Ibid* at 1.

<sup>249</sup> *Ibid* at 1–2, Sotomayor J, concurring.

<sup>250</sup> *Ibid* at 2.

<sup>251</sup> See generally Szalai, *supra* note 233.

<sup>252</sup> 597 US \_\_\_\_ (2022) [*Dobbs*].

<sup>253</sup> *Roe v Wade*, 410 US 113 (1973).

<sup>254</sup> *Dobbs*, *supra* note 252 at 78–79.

### C. UNCONSCIONABILITY AND ARBITRATION

Although unconscionability is a doctrine common to the US and Canada, the test for determining whether a contract is unconscionable has a different flavour in each. In the US, unconscionability has been split into two subcategories: (1) procedural unconscionability, which “hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print”;<sup>255</sup> and (2) substantive unconscionability, which “arises when a term is ‘overly-harsh’ or ‘one-sided.’”<sup>256</sup> The Uniform Commercial Code (UCC) is even more open-ended, with section 2-302 simply providing that “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract.” But nowhere does it define or provide any guidance on what amounts to unconscionability.<sup>257</sup> This failure to define unconscionability has long been criticized with an early article complaining that “reading this section alone makes nothing clear about the meaning of ‘unconscionable’ except perhaps that it is perjorative.”<sup>258</sup> In consequence, one can say that in the US unconscionability is an elastic doctrine which is applied by the courts in circumstances where the dictionary definition of ‘unconscionable’ is met, namely, when an agreement is “shockingly unfair or unjust.”<sup>259</sup>

The Canadian experience of attempting to define unconscionability, or provide a workable test for when it exists, has not been very different from that of the US. As noted by one recent article the “Canadian doctrine of unconscionability is notoriously uncertain,”<sup>260</sup> something that results from the fact that “Canadian courts are more concerned with results than reasoning. If the facts justify relief, a basis for granting it will be found.”<sup>261</sup> Another article states that “Canadian judges are seldom explicit or analytically rigorous on this vital matter. The standard judicial approach could be labeled ‘reflex repetition’ ... Canadian courts seem content to ‘apply’ the varying tests and slogans in this area, while ignoring whatever might lie behind those tests and slogans at the deeper philosophical and justificatory level.”<sup>262</sup>

As noted above, the US has developed a two-pronged division of unconscionability into “procedural” and “substantive,” this was a gloss on the UCC’s provisions by Arthur Allen Leff in his influential article “Unconscionability and the Code — The Emperor’s New Clause” where he stated that “I shall ... refer to bargaining naughtiness as ‘procedural unconscionability,’ and to evils in the resulting contract as ‘substantive unconscionability.’”<sup>263</sup> Although this division was not present in the UCC, nor is it to be

<sup>255</sup> David Horton, “Unconscionability Wars” (2012) 106:1 Nw UL Rev 387 at 393.

<sup>256</sup> *Ibid.*

<sup>257</sup> Arthur Allen Leff, “Unconscionability and the Code — The Emperor’s New Clause” (1967) 115:4 U Pa L Rev 485 at 487, citing UCC § 2-302 (1951).

<sup>258</sup> *Ibid.*

<sup>259</sup> Merriam-Webster, “Unconscionable,” online: <www.merriam-webster.com/dictionary/unconscionable>. Chris Hunt, “Unconscionability in the Supreme Court of Canada: *Uber Technologies Inc. v Heller*,” Case Comment, (2021) 80:1 Cambridge LJ 25 at 25.

<sup>261</sup> Steven R Enman, “Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law” (1987) 16:3 Anglo-Am L Rev 191 at 209.

<sup>262</sup> Rick Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005) 84:2 Can Bar Rev 171 at 173 [footnotes omitted].

<sup>263</sup> Leff, *supra* note 257 at 487.

found in the antecedent common law doctrine of unconscionability, it has proven highly influential and is now generally accepted by courts and scholars.<sup>264</sup>

Despite this vast amount of literature, it would appear that the first unconscionability cases in arbitration began to appear in the 1970s,<sup>265</sup> although the treatment of the doctrine in these early cases is basic with only one of them, *Miner*,<sup>266</sup> discussing the issue in any depth. That case concerned an arbitration clause contained in an adhesive contract entered into by a patient with regards to medical work carried out by a plastic surgeon, the Court stated that:

Doctors are held in high esteem and admiration by the public . . . the average person [does not] leave a doctor they rely upon and shop for another who does not require an arbitration agreement to be signed.

The classic elements of unconscionability are present in this case: unequal bargaining power, resulting in a contract more favorable to the defendant and for the sole benefit of the defendant.<sup>267</sup>

At this stage, the focus was on state arbitration laws and not the *FAA*, something that is not surprising given that pre-*Southland* it did not apply in state courts and did not have any general pre-emptive effect. This led to significant legal diversity and some interesting treatments of unconscionability, as well as the issues it was designed to address, for example the 1965 *Texas General Arbitration Act* included a requirement for arbitration clauses to include the signature of each parties' lawyers "to protect the individual from being the victim of unequal bargaining power."<sup>268</sup> This requirement was removed in 1979 and instead specific mention of unconscionability was included with section 171.022 of the *Texas Civil Practice and Remedies Code* (still) providing that "[a] court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made."<sup>269</sup> In 1981, the Supreme Court of California decided the case of *Bill Graham v. Scissor-Tail Inc.*<sup>270</sup> where it held that:

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. . . . The second – a principle of equity applicable to all contracts generally – is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."<sup>271</sup>

<sup>264</sup> See e.g. *Vasquez-Lopez v Beneficial Oregon, Inc.*, 152 P (3d) 940 (2007); *Hayes v Oakridge Home*, 908 NE (2d) 408 (2009); *Sitogum Holdings, Inc v Ropes*, 800 A (2d) 915 (2002); *Zuver v Airtouch Communications, Inc.*, 103 P (3d) 753 (2009); *In re Halliburton Co.*, 80 SW (3d) 566 (2002); *Harris v Green Tree Financial Corp.*, 183 F (3d) 173 (1999); *A & M Produce Co v FMC Corp.*, 135 Cal App (3d) 473 (1982); Brian M McCall, "Demystifying Unconscionability: A Historical and Empirical Analysis" (2020) 65:4 Vill L Rev 773; Susan Randall, "Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability" (2004) 52:1 Buff L Rev 185; Horton, *supra* note 255; Yongdan Li, "Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers" (2010) 31:4 Whittier L Rev 665.

<sup>265</sup> *AAACON Auto Transport, Inc v Newman*, 77 Misc (2d) 1069 (1974); *EF Hutton & Co, Inc v Schank*, 456 F Supp 507 (1976); *Miner v Walden*, 101 Misc (2d) 814 (1979) [*Miner*].

<sup>266</sup> *Miner, ibid.*

<sup>267</sup> *Ibid* at 818.

<sup>268</sup> Susan Marie Jones, "The 1979 Amendment to the General Arbitration Act: Will it Allow Arbitration to Become a Viable Tool for Settling Disputes?" (1980) 32:2 Baylor L Rev 314 at 315, citing *Texas General Arbitration Act* tit 10 art 224 (1965).

<sup>269</sup> Tex Civ Prac & Rem tit 7 § 171.022 (1997).

<sup>270</sup> *Graham v Scissor-Tail, Inc.*, 171 Cal Rptr 604 (1981).

<sup>271</sup> *Ibid* at 612.

Over the next few years, the issue of unconscionability was raised in numerous cases concerning stock brokerage contracts, with varying degrees of success,<sup>272</sup> and the issue finally came before the Supreme Court, albeit *obiter*, in *Perry*.<sup>273</sup> That case held that the *FAA* pre-empted<sup>274</sup> a California rule which allowed parties to bring claims for the collection of wages in court regardless of the existence of an arbitration agreement<sup>275</sup> and thereby indirectly prevented mandatory labour arbitration. Although the case was decided on pre-emption grounds, an alternative argument was made on the basis that the arbitration agreement was unconscionable, although neither the California Courts nor the Supreme Court addressed the arguments; the Supreme Court stated *obiter*, in a footnote, that:

a court [may not] rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.<sup>276</sup>

In consequence, any unconscionability rule which only applied to arbitration or which applied to it in a special way, would appear to be pre-empted by the *FAA*. Despite these cases, it is fair to say that unconscionability as a defence to arbitration did not come into its own until the 2000s with an uptick in such cases beginning in the 1990s.<sup>277</sup> One of the decisions that marked unconscionability's coming of age, and perhaps even opened the floodgates for claims of unconscionability, is the 2000 decision of *Armendariz v. Foundation Health Psychcare Services, Inc.*,<sup>278</sup> which laid down the test for unconscionability in California, and provided specific guidance regarding unconscionability in employment arbitration. It held that an unconscionability analysis begins with a determination that a contract was one of adhesion, which is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it,"<sup>279</sup> and, if adhesive, "the court must then determine whether 'other factors are present which, under established legal rules ... operate to render it [unenforceable].'"<sup>280</sup>

*Armendariz* defined unconscionability as "a principle of equity applicable to all contracts generally [whereby] a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'"<sup>281</sup> Unconscionability comprised both procedural and substantive elements and whilst they were both necessary for a contract to be unconscionable, there was a sliding scale so that "the more substantively oppressive the

<sup>272</sup> *Lewis v Prudential-Bache Securities, Inc.*, 28 Cal (3d) 807 (1986); *Tate v Saratoga Savings & Loan Assn.*, 216 Cal App (3d) 843 (1989); *Tonetti v Shirley*, 173 Cal App (3d) 1144 (1985); *Lewis v Merrill Lynch, Pierce, Fenner & Smith*, 183 Cal App (3d) 1097 (1986).

<sup>273</sup> *Perry*, *supra* note 100.

<sup>274</sup> *Ibid* at 492.

<sup>275</sup> *Ibid* at 484–87.

<sup>276</sup> *Ibid* at 491, n 8B.

<sup>277</sup> Charles L Knapp, "Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device" (2009) 46:3 San Diego L Rev 609 at 621 et seq.

<sup>278</sup> 99 Cal Rptr (2d) 745 (2000) [*Armendariz*].

<sup>279</sup> *Ibid* at 767, quoting *Neal v State Farm Insurance Companies*, 188 Cal App (2d) 690 at 694 (1961).

<sup>280</sup> *Armendariz*, *ibid*.

<sup>281</sup> *Ibid* [citations omitted].

contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”<sup>282</sup>

In the employment arbitration context, the Court noted that the economic pressure exerted by employers who agreed to arbitration as a pre-condition of employment was extreme as few employees were so “sought-after” to be able to resist such pressure.<sup>283</sup> In consequence, arbitration clauses in employment contracts would often be adhesive therefore satisfying the first stage of the test. The next issue was whether the arbitration clause was unconscionable because it required the employees to arbitrate any claims they might have against their employer whilst not requiring the employer to arbitrate any claims they might have against their employees. In other words, it was a unilateral arbitration clause in favour of the employer.<sup>284</sup> The Court noted that arbitration had significant disadvantages for employees including no jury trial, limited discovery, limited judicial review, and the possibility of lower damage awards due to the repeat player effect.<sup>285</sup> In consequence, the Court held that unilateral employment arbitration clauses would be unconscionable unless there was a business justification for them, something that was not present in the current case.<sup>286</sup> Additional issues of unconscionability included a limitation on the types of damages recoverable by the employee, but not the employer.<sup>287</sup>

Crucially, and contrary to the implication in *Perry*,<sup>288</sup> the Court held that “the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context.”<sup>289</sup> Curiously, it appears that *Armendariz*’s holdings regarding unconscionability and arbitration survived *AT&T Mobility*,<sup>290</sup> and the Supreme Court refused to hear a petition for certiorari which directly challenged the continued application of *Armendariz* in the case of *Winston & Strawn LLP v. Ramos*.<sup>291</sup> It is not just California that applies unconscionability to arbitration agreements, several empirical studies have shown that numerous states, including Missouri, Nevada, New Mexico, Illinois, Vermont, Texas, Florida, Pennsylvania, and others, have also applied the unconscionability doctrine.<sup>292</sup> In consequence, one can say that unconscionability has long been, and still is, a successful defence to arbitration throughout the US, notwithstanding the Supreme Court’s spate of decisions quashing state rules applying it to consumer and employment arbitration, and unless the Supreme Court adopts a significantly more muscular position than it did when refusing to hear *Winston & Strawn*, it is unlikely this will change in the near future.

In Canada, by contrast, there are relatively few cases on unconscionability in the arbitration context, with the earliest appearing to date to the 2000s. The first case, *Huras v*

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<sup>282</sup> *Ibid* at 767–68 [citations omitted].

<sup>283</sup> *Ibid* at 768.

<sup>284</sup> *Ibid* at 768 et seq.

<sup>285</sup> *Ibid* at 768.

<sup>286</sup> *Ibid* at 770.

<sup>287</sup> *Ibid* at 772.

<sup>288</sup> *Perry*, *supra* note 100.

<sup>289</sup> *Armendariz*, *supra* note 278 at 771.

<sup>290</sup> See for example its treatment as good law in *Betancourt v Transportation Brokerage Specialists, Inc.*, 62 Cal App (5th) 522 (2021).

<sup>291</sup> 140 S Ct 108 (2019) [*Winston & Strawn*].

<sup>292</sup> Susan Landrum, “Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements” (2014) 97:3 Marq L Rev 751; Randall, *supra* note 264.

*Primerica Financial Services Ltd.*,<sup>293</sup> involved an employment class action suit brought by one Cindy Huras against her former employer, Primerica, on the basis that it had failed to pay the minimum wage as required by the Ontario *ESA*.<sup>294</sup> The latter asked for a stay of the action on the basis that there was a valid arbitration clause,<sup>295</sup> but the judge (Justice Cumming) ultimately held that the clause did not apply as Ms. Huras's claim related to an unpaid training period and the arbitration clause entered into by the parties did not cover the training period but rather only "[any] subsequent period as a trained, accepted, licensed sales representative."<sup>296</sup> However, Justice Cumming went on to hold in *obiter* that the clause was invalid in any event as it purported to contract out of the *ESA*,<sup>297</sup> and was also unconscionable.<sup>298</sup> The Justice noted the following circumstances which rendered the arbitration clause unconscionable:

- (1) it was contained in a standard form contract;<sup>299</sup>
- (2) there was an inequality of bargaining power between the parties;<sup>300</sup>
- (3) the arbitration agreement was one-sided as it allowed Primerica to choose whether to arbitrate or litigate whilst requiring other parties to arbitrate;<sup>301</sup>
- (4) the value of any disputes to be brought would be insubstantial and thus it would not be financially viable to bring such claims via arbitration, the arbitration clause thereby frustrated rather than enabled the resolution of such claims;<sup>302</sup> and
- (5) the clause was contrary to the policies embodied in the *Class Proceedings Act, 1992 (CPA)*.<sup>303</sup>

As an initial point, it is worth noting that the reasoning of the Justice is somewhat muddled; rather than including the clause's conflict with policies embodied in the *CPA* as a circumstance of unconscionability, they should have held that the clause was non-enforceable due to being contrary to public policy. The latter is a separate, and well-developed, ground for the non-enforcement of contracts,<sup>304</sup> and if the arbitration clause truly was contrary to a public policy embodied in the *CPA* then it is invalid on this ground alone: there is no need to engage in a multilayered analysis of unconscionability. This is something that was noted by the Ontario Court of Appeal when, upholding Justice Cumming's decision on different grounds, it stated that "[t]hese findings are clearly *obiter dicta* and, therefore, not

<sup>293</sup> (2000), 13 CPC (5th) 114 (Ont Sup Ct J) [*Huras*].

<sup>294</sup> *Ibid* at 116.

<sup>295</sup> *Ibid* at 116–18.

<sup>296</sup> *Ibid* at 119–20.

<sup>297</sup> *Ibid* at 120–21.

<sup>298</sup> *Ibid* at 121–24.

<sup>299</sup> *Ibid* at 122.

<sup>300</sup> *Ibid*.

<sup>301</sup> *Ibid*.

<sup>302</sup> *Ibid* at 122–23.

<sup>303</sup> *Ibid* at 123–24, citing *Class Proceedings Act, 1992*, SO 1992, c 6.

<sup>304</sup> Brandon Kain & Douglas T Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2007) 1.

binding as a precedent.”<sup>305</sup> Notwithstanding this, the decision clearly articulated many of the circumstances that are argued by plaintiffs, both in Canada and the US, to render arbitration clauses in many employment and consumer contracts unconscionable.

The lead of *Huras* was not followed by the next case, *Kanitz v. Rogers Cable Inc.*,<sup>306</sup> which concerned a consumer class action brought against Rogers Cable on behalf of “former subscribers to the defendant’s high-speed Internet access service.”<sup>307</sup> Justice Nordheimer held that for a contract to be unconscionable, three requirements had to be satisfied: (1) an inequality of bargaining power; (2) a taking advantage of or preying upon one party by the other; and (3) a resulting improvident agreement.<sup>308</sup> As in *Huras*, Justice Nordheimer held that there was an inequality of bargaining power given the realities of a contract between a single consumer and a corporation such as Rogers.<sup>309</sup> As regards the second ground, Justice Nordheimer held that an arbitration clause did not, in and of itself, amount to taking advantage of, or preying on, consumers and thus the unconscionability argument failed at the second hurdle.<sup>310</sup> Justice Nordheimer nevertheless considered the third ground and, contrary to the decision in *Huras*, rejected the argument that the clause frustrated the resolution of disputes on the basis that there was no evidence that Rogers consumers would not arbitrate such claims or be put off doing so due to cost.<sup>311</sup> This argument is unconvincing given that it is legalistic in the extreme and contrary to common sense, the fact that “no one is going to arbitrate over \$240 because of the costs associated with any arbitration”<sup>312</sup> is so intuitively correct that it would require a convincing counter-argument to rebut, something which Justice Nordheimer fails to provide.

It was over a decade before another relevant Canadian case concerning unconscionability and arbitration emerged, the Manitoba case of *Briones v. National Money Mart Company* which considered an arbitration clause in various payday loan agreements.<sup>313</sup> The Court briefly considered a claim of unconscionability, but rejected it.<sup>314</sup> The next relevant case is that of *Uber Technologies*, an Ontario Court of Appeal decision which marked a significant change of fortunes for the unconscionability defence in Canadian arbitration law.<sup>315</sup> As discussed above, the case concerned an arbitration clause in a contract between Uber and an Uber Eat’s deliveryman where the latter had brought a proposed class action against Uber. The Court applied the four-step test it laid down in *Titus v. William F. Cooke Enterprises Inc.*<sup>316</sup> for determining unconscionability holding that:

- (1) the arbitration clause was a substantially improvident or unfair bargain as it required individuals with likely small claims to incur over CDN13,000 in upfront costs to bring a claim in a foreign jurisdiction and under Dutch law;

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<sup>305</sup> *Huras v. Primerica Financial Services Ltd* (2001), 55 OR (3d) 449 (CA) at 455.

<sup>306</sup> *Kanitz v. Rogers Cable Inc* (2002), 58 OR (3d) 299.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid* at 311.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid* at 311–12.

<sup>311</sup> *Ibid* at 313.

<sup>312</sup> *Ibid.*

<sup>313</sup> 2013 MBQB 168.

<sup>314</sup> *Ibid* at para 51.

<sup>315</sup> *Uber Technologies*, *supra* note 218.

<sup>316</sup> 2007 ONCA 573 [*Titus*].

- (2) there was no evidence of the appellant having received legal or other advice and he could not negotiate any of the terms of the agreement;
- (3) there was significant inequality of bargaining power between Uber and the appellant; and
- (4) as a result of the above three factors, it could be implied that “Uber chose this Arbitration Clause in order to favour itself and thus take advantage of its drivers.”<sup>317</sup>

In consequence, the Court held that as well as being invalid as an illegal opting out of the *ESA*, the arbitration clause was also unconscionable and therefore separately invalid on this ground as well. The Supreme Court of Canada upheld the Ontario Court of Appeal’s decision but did not address the Court of Appeal’s *ESA* arguments, instead finding the arbitration agreement unconscionable on the same factual grounds discussed above, albeit disapproving of the *Titus* test<sup>318</sup> and instead merely requiring “both an inequality of bargaining power and a resulting improvident bargain.”<sup>319</sup> The Supreme Court of Canada also appeared to splice underlying concerns regarding access to justice into the unconscionability doctrine, justifying the departure from its usually pro-arbitration approach by stating that “[r]espect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all.”<sup>320</sup> Justice Brown wrote a concurrence in which he argued that the arbitration clause was invalid not because it was unconscionable, but rather because such clauses undermined “the rule of law by denying access to justice, and are therefore contrary to public policy.”<sup>321</sup>

*Uber Technologies* does not appear to have opened the floodgates as regards the invalidation of vast swathes of consumer and employment arbitration agreements on unconscionability grounds, as the doctrine of unconscionability does not yet appear to have been applied by any other court to invalidate an arbitration clause even though the issue was raised in several cases.<sup>322</sup> However, it has been applied on several occasions by courts to invalidate forum selection clauses<sup>323</sup> and class action waivers.<sup>324</sup> After analyzing these cases, it becomes clear that *Uber Technologies* has been interpreted as a case which infuses the doctrine of unconscionability with concerns about access to justice. For example, in *Irwin* the Ontario Court of Appeal rejected an attempt to invalidate an arbitration clause on the basis of unconscionability where the appellant was earning “a base salary of \$350,000, claiming over \$1.5 million, and facing arbitration in Ontario under Ontario law.”<sup>325</sup> Moreover, the appellant had benefited from legal advice whilst negotiating her employment agreement, it was individually negotiated, and “there is no suggestion that the costs of

<sup>317</sup> *Uber Technologies*, *supra* note 218 at para 68.

<sup>318</sup> *Uber Technologies* SCC, *supra* note 6 at paras 80–82.

<sup>319</sup> *Ibid* at para 65.

<sup>320</sup> *Ibid* at para 97.

<sup>321</sup> *Ibid* at para 101.

<sup>322</sup> *Banni v Johnson*, 2020 BCPC 264; *Irwin v Protiviti*, 2022 ONCA 533 [*Irwin*]; *Petty v Niantic Inc*, 2022 BCSC 1077; *Toronto Standard Condominium Corporation No 1628 v Toronto Standard Condominium Corporation No 1636*, 2021 ONCA 360; *Singer Enterprises Inc v Parrish & Heimbecker*, 2022 SKKB 268 [*Singer*].

<sup>323</sup> See e.g. *Matijczak v Homewood Health Inc*, 2021 BCSC 1658.

<sup>324</sup> See e.g. *Pearce v 4 Pillars Consulting Group Inc*, 2021 BCCA 198 [*Pearce*].

<sup>325</sup> *Irwin*, *supra* note 322 at para 14.

arbitration are disproportionate to the potential reward, or that barrier to arbitration would effectively leave the appellant without remedy.”<sup>326</sup> The Court held that as a result “none of the access to justice concerns that animated [*Uber Technologies*] are present in this case”<sup>327</sup> and refused the appeal against a decision which had held that the arbitration clause was valid.<sup>328</sup>

In *Pearce*,<sup>329</sup> the British Columbia Court of Appeal analyzed the validity of a class action waiver in contracts between a debt advisor business and consumers, who were “individuals on the brink of insolvency who are seeking debt restructuring.”<sup>330</sup> The Court held that there was an inequality of bargaining power as consumers who signed it were “on the verge of insolvency and struggling to service and repay debt — turning to the appellants for help”<sup>331</sup> and a consumer would not understand what rights they were giving up under the clause.<sup>332</sup> As in *Uber Technologies*, the clause constituted an improvident bargain given that the low value of claims would make it uneconomical for individuals to pursue claims except through a class action. Consequently, and as in *Uber Technologies*, “[w]hile on paper it might appear that a pathway to dispute resolution exists, the practical effect of the clause so narrowly defines that pathway as to effectively and practically block access to justice and as such it is unconscionable.”<sup>333</sup>

*Singer*<sup>334</sup> concerned the use of allegedly unconscionable arbitration clauses in a commercial context but is nevertheless of interest as it considers several novel issues which were not fully addressed in earlier post-*Uber Technologies* SCC<sup>335</sup> cases. Firstly, Justice Currie addressed the question of who would decide whether the claims were unconscionable, the court or the arbitral tribunal. In general, arbitral tribunals are empowered to rule on their jurisdiction, at least in the first instance, something known as “*competence-competence*” or “*kompetenz-kompetenz*.”<sup>336</sup> In earlier cases, this issue had fallen to one side but it would appear that courts implicitly held that they would not apply the principle where there was a possibility that the issue would never be decided by the arbitral tribunal due to access to justice considerations, that is, because the plaintiff could never afford to engage in arbitration in the first place.<sup>337</sup> Justice Currie, however, addressed the issue in some detail by considering whether the allegation of unconscionability could be resolved “purely through examining the contract provisions, with no more than a cursory reference to facts, or whether ... [it] require[d] consideration of a meaningful factual matrix.”<sup>338</sup>

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid* at paras 15–16.

<sup>329</sup> *Pearce*, *supra* note 324.

<sup>330</sup> *Ibid* at para 1.

<sup>331</sup> *Ibid* at para 226.

<sup>332</sup> *Ibid* at para 230.

<sup>333</sup> *Ibid* at para 245.

<sup>334</sup> *Singer*, *supra* note 322.

<sup>335</sup> *Uber Technologies* SCC, *supra* note 6.

<sup>336</sup> Joel Richler, “*Competence-Competence* in Canada: A Barometer of Court Support for Commercial Arbitration” (2019) 1:1 *Can J Commercial Arbitration* 13; Frédéric Bachand, “*Kompetenz-Kompetenz*, Canadian Style” (2009) 25:3 *Arb Intl* 431.

<sup>337</sup> *Uber Technologies* SCC, *supra* note 6 at paras 43–47.

<sup>338</sup> *Singer*, *supra* note 322 at para 44.

In the current case, Singer included as relevant factors:

- I. “[T]he comparative levels of sophistication between Singer and P&H”;
- II. “Singer’s lack of opportunity to negotiate the standard terms”;
- III. The fact that Singer had to contract with someone to sell its grain, only a few companies did so in Saskatchewan, and all had standard form contracts.<sup>339</sup>

This in turn led to several affidavits being pled as evidence of the above<sup>340</sup> and in general one could say that “the question of improvident bargain is not one that will be determined with reference to the clause and the contracts without reference to any facts that would be specific to this case. Rather, the question will be determined with reference to — and, if Singer succeeds in its position, in reliance on — facts that are specific to this case.”<sup>341</sup> In consequence, the issue was one of mixed fact and law and had to be ruled on, at least in the first instance, by the arbitral tribunal and not the court.<sup>342</sup> Justice Currie’s decision is not surprising being in keeping with existing Canadian law and following the lines sketched out by the Supreme Court in *Uber Technologies*.<sup>343</sup> However, given that the majority in *Uber Technologies* only touched on the issue, with only Justice Brown addressing the issue in detail in his concurring judgment<sup>344</sup> and Justice Côté relying on it extensively in her dissent,<sup>345</sup> there remains uncertainty regarding the extent to which the existing *competence-competence* principle applies to claims of unconscionability made by employees or consumers. *Singer* does not resolve this uncertainty both because it lacks precedential authority and because it concerns commercial parties as opposed to employees or consumers.

Secondly, Justice Currie addressed the novel argument, sometimes raised in the context of trust arbitration,<sup>346</sup> that an arbitral tribunal would not be empowered to grant equitable remedies, unconscionability was an equitable doctrine, as it involved the equitable remedy of contract rescission, and thus an arbitral tribunal could not properly hear the unconscionability claim.<sup>347</sup> Justice Currie dismissed this argument, after examining the relevant legislation in detail, on the basis that “given the breadth and force with which the power to rule on jurisdiction is stated in the legislation, I conclude that an arbitral tribunal is empowered to rule on its own jurisdiction even when that issue touches on a matter of equity.”<sup>348</sup> This is in line with case law in other jurisdictions which has generally rejected the argument that because a case raises issues of equity it cannot be decided by arbitration,<sup>349</sup> and it can therefore safely be said that this line of argument is unlikely to be successful in future.

<sup>339</sup> *Ibid* at para 46.

<sup>340</sup> *Ibid* at paras 47–50.

<sup>341</sup> *Ibid* at para 58 [emphasis omitted].

<sup>342</sup> *Ibid* at para 61.

<sup>343</sup> *Uber Technologies SCC*, *supra* note 6 at paras 122–24, Brown J, concurring.

<sup>344</sup> *Ibid* at paras 122–28.

<sup>345</sup> *Ibid* at paras 229–47.

<sup>346</sup> See generally, Lucas Clover Alcolea, *Arbitration of Trust Disputes* (Cheltenham, UK: Edward Elgar, 2022); cf *Fitzpatrick v Emerald Grain Pty Ltd*, [2017] WASC 206 [*Fitzpatrick*].

<sup>347</sup> *Singer*, *supra* note 322 at para 24.

<sup>348</sup> *Ibid* at para 34.

<sup>349</sup> See e.g. *Fitzpatrick*, *supra* note 346; cf *Rinehart v Welker*, [2012] NSWCA 95.

The conclusion one can draw from these cases is that similar to the way in which US courts appear to have developed unconscionability primarily in the context of arbitration clauses, and specifically those which involve consumers and employees, Canadian courts post-*Uber Technologies* appear to be developing a form of unconscionability which applies only in the context of dispute resolution clauses. This follows from the consistent reference to access to justice considerations in the unconscionability analysis of courts considering such clauses and the fact that such reference would clearly have no place with regards to unconscionability generally. One key difference between the two jurisdictions, however, is the positive way in which the Supreme Court of Canada and other appellate courts seem to be treating class actions whereas the US Supreme Court, as discussed above, appears to be anti-class action whether that means it finds in favour of individual arbitration or in favour of regulatory agencies.

Although no empirical or doctrinal study has been carried out regarding Canadian arbitration law, in the US, empirical and doctrinal work suggests that the wide use of unconscionability as a defence to arbitration results from the fact that it is one of the only means by which states, or rather state courts, can regulate arbitration agreements which they do not wish to enforce.<sup>350</sup> In consequence, it is arguable that unconscionability as regards arbitration has developed the way it has, at least partially, because of constitutional reasons. In the US, “necessity is the mother of invention” for states and state courts who have no other way, due to the preemptive effect of the *FAA*, to regulate arbitration agreements which they feel are unfair or otherwise abusive, whilst in Canada the provinces can simply regulate such agreements by statute and thus have no incentive to apply the doctrine of unconscionability to arbitration agreements in new and innovative ways. However, it must be said that post-*Uber Technologies*, Canadian courts are demonstrating greater creativity with regards to how unconscionability might be applied to dispute resolution clauses, even if to date it does not appear that there are any cases where courts have applied *Uber Technologies* to invalidate an arbitration clause.

#### IV. CONCLUSION — THE ROAD NOT TAKEN

Canada and the US represent, each to the other, the road not taken in their respective constitutional history with regards to centralization and the very different interpretations of textually similar parts of their constitution, often against the expressed intentions of their Founding Fathers. In the American case, despite the desire for greater decentralization of many of the Founding Fathers, a relatively centralized federalism has taken hold due to the actions of its Supreme Court, whilst in the Canadian case, exactly the opposite has taken place. Although the reasons for this are complex, and the non-legal reasons are outside the scope of this article, it is clear that the fact that Canada had the JCPC as its final Court of Appeal, which had a provincial decentralizing bias, whilst the US had its own Supreme Court, which sometimes inadvertently and sometimes deliberately opted for centralizing policies, represents a key part of the puzzle. These different constitutional choices in turn created a vastly different arbitration landscape in each nation, with federal law dominating

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<sup>350</sup> Aaron-Andrew P Bruhl, “The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law” (2008) 83:5 NYUL Rev 1420; Randall, *supra* note 264; Stephen A Broome, “An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act” (2006) 3:1 Hastings Bus LJ 39.

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the field in the US whereas it plays almost no role in Canada where provincial legislation dominates instead. As a result, the US and Canada provide a classic case study for comparative lawyers by demonstrating how countries which are similar in terms of historical and geographical circumstances, form of state, people, legal system and, to an extent, language, can nevertheless differ radically in how they approach perceived legal problems, in this case employment and consumer arbitration, due to differing constitutional choices (whether that be differing constitutional texts or differing judicial interpretations).