

Federal Court



Cour fédérale

Date: 20111123

Docket: T-1754-09

Citation: 2011 FC 1341

Ottawa, Ontario, November 23, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

KERRY MURPHY

Plaintiff

and

**COMPAGNIE AMWAY CANADA
and
AMWAY GLOBAL**

Defendant

REASONS FOR ORDER AND ORDER

Overview

[1] This case concerns a dispute between Kerry Murphy (plaintiff), an Independent Business Owner (IBO), and the Compagnie Amway Canada (Amway) (defendant), a wholesaler of home, personal care, beauty and health products.

[2] The Court recalls that the spouse of Kerry Murphy, Cheryl Rhodes, was also listed as a plaintiff at the outset of this action but she withdrew and filed a notice of discontinuance on May 9, 2011. Thus, for ease of reference, the Court will refer solely to the plaintiff in these Reasons for Order and Order.

[3] On October 23, 2009, pursuant to Rule 334.16 of the *Federal Courts Rules*, SOR/98-106, the plaintiff instituted a proposed class proceeding against the defendant, alleging that its business model and distribution system is in violation of sections 52, 55, and 55.1 of the *Competition Act*, RSC 1985, c C-34 (*Competition Act*). Pursuant to section 36 of the *Competition Act*, the plaintiff seeks damages from the defendant in the amount of \$15,000. The plaintiff filed a Motion for Certification of a Proposed Class Action to that effect.

[4] The defendant has responded to the plaintiff's Motion to Certify a Class Action with several motions. Amongst them is the defendant's Motion to Stay and Compel Arbitration. The defendant's central argument is that the Federal Court lacks the jurisdiction to hear the plaintiff's motion and that, instead, the arbitrator, contemplated in the "Agreement to Arbitrate" of the Registration Agreement concluded by the parties, has jurisdiction. As well, the defendant filed a Motion to Strike Affidavits and Exhibits Thereto from the Motion for Certification as well as a Motion for an Order that Responses to Certain Requests for Undertakings be treated as Confidential.

[5] The aforementioned four (4) motions were heard jointly on October 3, 4, and 5, 2011.

Factual Background

The Defendant and its Business Model

[6] The defendant operates in Canada since 1962. From July 16, 1999 to December 28, 2000, the defendant was known as Quixtar Canada Inc. On January 1, 2001, Quixtar Canada Inc. transformed into Quixtar Canada Corporation. On September 1, 2008, Quixtar Canada Corporation reverted to its name Amway Canada Corporation (Compagnie Amway Canada).

[7] The defendant markets its products to consumers through a system known as a multi-level marketing plan. This structure consists of a vast network of Independent Business Owners (IBOs). This system is established as follows: the defendant supplies products to its IBOs throughout Canada and then encourages them to recruit other distributors in turn, and so on, which results in the creation of multiple layers of distributors. The sales made by the recruited IBO also compensate the original recruiter IBO in part through a bonus system known as a “sponsorship chain”. The recruitees are known as the “downlines” of the marketing scheme and the recruiters are known as the “uplines”.

[8] When new IBOs are recruited, they must review the Business Opportunity Brochure and they must sign a Registration Agreement, in which they agree to be bound by the defendant’s IBO Compensation Plan and the Rules of Conduct that are set out in the Business Reference Guide. As well, the Registration Agreement also contains a clause entitled “Agreement to Arbitrate” by which the parties agree to submit any possible claim to arbitration, which shall be governed by the Ontario *Arbitration Act*, 1991, SO 1991, c-17.

Relationship between the Parties

[9] The defendant's company records indicate that the plaintiff registered four (4) times with the defendant over the course of a number of years. The defendant alleges that in 1980-82 the plaintiff proceeded with registration but did not follow-up or purchase any products. Subsequently, the plaintiff signed a Registration Agreement with the defendant on October 21, 1999 that lasted until December 31, 2001. The plaintiff signed a third Registration Agreement on May 22, 2002 until he stopped operating as an IBO on December 31, 2002. Finally, the plaintiff entered into a fourth Registration Agreement from June 5, 2008 to December 31, 2009. The Registration Agreements concluded by the parties all contained an arbitration clause and made reference to certain dispute resolution procedures contained in the IBOs Rules of Conduct.

[10] On November 26, 2008, the plaintiff renewed his registration with the defendant online for the 2009 year. The plaintiff claims that it ended its relationship with the defendant on August 11, 2009, as this date represents its last sale.

Registration Agreement and Supporting Materials

[11] The Registration Agreement drawn up by the defendant referred to at the hearing and signed by the applicant contains the following provisions:

Agreement to Arbitrate

I agree that I will give notice in writing of any claim or dispute arising out of or relating to my Independent Business, the Quixtar IBO Compensation Plan, or the IBO Rules of Conduct, to the other party or parties involved in the dispute, specifying the basis for my claim and the amount claimed or relief sought. I will then try in good faith to resolve the dispute using the Dispute Resolution Procedures contained in the IBO Rules of Conduct, including the conciliation process.

If the claim or dispute is not resolved to my satisfaction within 90 days, or after the conciliation process is complete, whichever is later, I agree to submit any remaining claim or dispute arising out of or relating to my Independent Business, the Quixtar IBO Compensation Plan, or the IBO Rules of Conduct (including any claim against another IBO, or any such IBO's officers, directors, agents or employees; or against Quixtar Inc., Quixtar Canada Corporation, and any parent, subsidiary, affiliate, predecessor or successor thereof, or any of their officers, directors, agents, or employees) to binding arbitration in accordance with the Arbitration Rules, which are set forth in the IBO Rules of Conduct. ... The Ontario Arbitrations Act (1991) or any Canadian arbitration statute that may supersede it, shall govern the interpretation, enforcement and proceedings in any federal or provincial court in Canada. The parties intend for the Arbitration Rules to apply to the maximum degree possible in any arbitration.

...

Business Support Materials

I understand that some IBOs independently produce and distribute Business Support Materials (BSMs) such as books, magazines, audio and video tapes, software, Web sites, Internet services and other electronic media, support tools, or tickets to motivational or business-building seminars and rallies. Some IBOs earn income from the sale of BSMs apart from their earnings as IBOs. I understand that my decision to purchase any BSMs is entirely up to me. In making this decision, I will use my own good judgment as to what is best for my Independent Business. I acknowledge that I have received and read a copy of the Business Support Materials Arbitration Agreement (BSMAA). If I decide to purchase BSMs, I should also execute the Agreement to Arbitrate contained therein, but I acknowledge that in any event BSMs disputes involving another IBO remain subject to my Agreement to Arbitrate, above.

Registrant(s)

I certify that all of the information above is complete and correct, including my sponsoring IBO. *I have read and agree to adhere to the terms of this Agreement, including the Quixtar Terms and Conditions printed on the reverse side (Page 2 of 2).* I further agree to abide by any additional terms and conditions of use posted on the Quixtar.com Web site. I need only select the Business Services & Support portion of the Quixtar Registration Package to become an IBO. I certify that in deciding to become an IBO I have relied solely on the earnings representations and information contained in the IBO Compensation Plan. *I certify that I have received, read, and understood the Quixtar Business Opportunity Brochure. I understand that the average monthly gross income earned by "active" IBOs was \$181.*

[12] Moreover, the following are the applicable dispute resolution and arbitration sections set forth in the Rules of Conduct:

11. Dispute Resolution Procedures

The Corporation and the IBOAI provide a confidential dispute resolution process under which Amway Global and its IBOs agree to resolve all claims and disputes arising out of or relating to an IB, the Amway Global Independent Business Owner Compensation Plan (“IBO Compensation Plan”), or the Rules, as well as disputes involving Support Materials (SMs.) IBOs agree to submit any dispute with another IBO, a former IBO, Amway Global, or an approved seller or supplier of SM to the dispute resolution procedures in this Rule 11, including Conciliation (Rule 11.2) and, if necessary, Arbitration (Rule 11.3). This Rule 11 applies, without limitation, to any claim or dispute against an IBO, former IBO or any such IBO’s officers, directors, agents, or employees; or against Amway Corp. d/b/a Amway Global, Amway Canada Corporation d/b/a Amway Global, and any parent, subsidiary, affiliate, predecessor or successor thereof, or any of their officers, directors, agents, or employees. Rule 11 is reciprocal and binds both Amway Global and IBOs.

...

11.3. Arbitration.

All disputes not resolved through the process described in Rules 11.1 and 11.2 above shall be settled in arbitration as stated below. The arbitration award shall be final and binding and judgment thereon may be entered by any court of competent jurisdiction...

...

11.3.5. If IBOs become involved in a claim or dispute under the arbitration rules, they will not disclose to any other person not directly involved in the conciliation or arbitration process (a) the substance of, or basis for, the claim; (b) the content of any testimony or other evidence presented at an arbitration hearing or obtained through discovery; or (c) the terms or amount of any arbitration award. However, nothing in these Rules shall preclude a party from, in good faith, investigating a claim or defense, including interviewing witnesses and otherwise engaging in discovery.

...

11.3.7. To reduce the time and expense of the arbitration, the arbitrator will not provide a statement of reasons for his or her award unless requested to do so by all parties. The arbitrator's award shall be limited to deciding the rights and responsibilities of the parties in the specific dispute being arbitrated.

...

11.3.9. No party to this agreement shall assert any claim as a class, collective, or representative action if (a) the amount of the party's individual claim exceeds \$1,000, or (b) the claiming party, if an IBO, has attained the status of Platinum either in the current fiscal year or any prior period. This subparagraph shall be enforceable when the applicable law permits reasonable class action waivers and shall have no effect when the applicable law prohibits class action waivers as a matter of law. In any case, the class action waiver provision, as well as any other provision of Rule 11, is severable in the event any court finds it unenforceable or inapplicable in a particular case.

11.3.10. Class action claims are not arbitrable under these Rules under any circumstances; but in the event a court declines to certify a class, all individual plaintiffs shall resolve any and all remaining claims in arbitration.

Justice Mainville's Order of July 2, 2010

[13] On April 7, 2010, the plaintiff filed a Motion for Directions, asserting that the defendant's Motion to Stay and to Compel Arbitration was premature. By Order dated May 5, 2010, Justice Mainville (as he then was), the acting case management judge at the time, held that the Motion to Stay and to Compel Arbitration was to be heard *in limine litis* on June 18, 2010, as he maintained that "the Defendants' motion may bring an end to the proceedings in their entirety or may result in a narrowing of the scope of the case for certification".

[14] On July 2, 2010, Justice Mainville rendered Reasons for Order and Order concerning the hearing of June 18, 2010 on the Motion to Stay and Compel Arbitration which it is recalled merely concerned the jurisdiction of the Court. The defendant and plaintiff limited their arguments as to

whether the Federal Court or an arbitrator could decide the scope, validity and enforceability of the arbitration agreement at issue. Thus, the substantive issues were left to be decided at a later date. In this context, Justice Mainville stated the following:

[20] I agree with the Plaintiffs that the provisions of the Amway Rules of Conduct are clear: a) class action claims are excluded from arbitration, and b) any controversy concerning the unenforceability or inapplicability of the limited class action waiver set out in subparagraph 11.3.9 of the Amway Rules of Conduct is to be decided by the courts. Consequently, both class action claims and any controversies concerning the enforceability or applicability of the limited class action waiver are not “matter[s] to be submitted to arbitration under the [arbitration] agreement” as contemplated by subsection 7(1) of the Ontario *Arbitration Act, 1991*.

...

[25] In this case, the parties have entered into an agreement which clearly confers jurisdiction and authority on the courts over class action claims and over the enforceability or applicability of the limited class action waiver. The Amway Rules of Conduct are largely dictated by the Defendants themselves, and these Rules exclude these types of disputes from the arbitration process.

[15] Justice Mainville accordingly determined that it fell upon the Court to determine the applicability of the partial class action waiver contained in the arbitration agreement concluded by the parties. He therefore deferred the hearing of the substance of the Motion to Stay and Compel Arbitration such as it be heard at the same time as the plaintiff’s Motion for Certification.

[16] On July 12, 2010, the defendant filed a Notice of Appeal to the Federal Court of Appeal regarding the decision rendered by Justice Mainville on July 2, 2010. However, the defendant ultimately filed a Notice of Discontinuance in Appeal on November 12, 2010.

[17] For the sequence of the joint hearings on October 3, 4, and 5, 2011, the Court determined that the Motion to Stay and Compel Arbitration would be heard first as it deals with the Court's jurisdiction over the matter as a whole. Indeed, the Court's decision with respect to the Motion to Stay and Compel Arbitration impacts on the outcome of the other three (3) motions.

Issue

[18] The Motion to Stay and Compel Arbitration raises the issue of the scope, validity and enforceability of the parties' arbitration agreement and, more particularly, the limited class action waiver contained in section 11.3.9 of the Rules of Conduct. In addressing this issue, the Court must consider the following aspects:

- 1) The interpretation of sections 11.3.9 and 11.3.10 of the Rules of Conduct;
- 2) The jurisprudential principles regarding no-class action arbitration clauses and the doctrine of the "preferable procedure";
- 3) The *Competition Act*;
- 4) Section 7(5) of the *Ontario Arbitration Act*.

Applicable Legislation

[19] Several provisions of the *Competition Act*, the *Federal Courts Rules*, SOR/98-106, the *Federal Courts Act*, RSC 1985, c F-7 (*Federal Courts Act*) and the *Ontario Arbitration Act*, 1991, (*Ontario Arbitration Act*), are relevant to the present case. For ease of reference, these provisions are reproduced in the Annex to this Order.

Analysis

1) The Interpretation of Sections 11.3.9 and 11.3.10 of the Rules of Conduct

Defendant's Position

[20] By virtue of its Motion to Stay and Compel Arbitration, the defendant contends that the plaintiff's claim in the circumstances is subject to arbitration pursuant to the parties' arbitration agreement. Hence, the defendant submits that the present proceedings must be dismissed or stayed permanently in accordance with section 50(1) of the *Federal Courts Act* and the plaintiff's claim must be referred to arbitration.

[21] More particularly, the defendant emphasizes that section 11.3.9 of the Rules of Conduct encompasses a class action waiver for individual claims exceeding \$1,000. This, argues the defendant, evidences that a claim such as the one at issue in the amount of \$15,000, is subject to this class action waiver. Consequently, the defendant asserts that the plaintiff is not entitled to initiate a class action. Rather, the plaintiff's claim must be heard by an arbitrator on an individual basis.

Plaintiff's Position

[22] It is the plaintiff's position that the Federal Court has jurisdiction to hear the present class action as sections 11.3.9 and 11.3.10 confer this jurisdiction over class actions or claims exceeding \$1,000 to the Court as opposed to an arbitrator. The plaintiff is further of the view that the parties' arbitration agreement confers upon the Court jurisdiction to determine whether the class action waiver at issue in this case is "enforceable" and "applicable".

[23] More particularly, the plaintiff relies on section 11.3.10 of the Rules of Conduct and asserts that the language of this provision suggests that a claim will be brought to arbitration only in the event a court declines to certify a class action. The plaintiff accordingly contends that its claim cannot be heard in arbitration prior to a debate on the issue of certification.

[24] Finally, the plaintiff also emphasizes that though section 11.3.9 of the Rules of Conduct contains a class action waiver for claims exceeding \$1,000, this waiver is said to be “severable in the event any court finds it unenforceable or inapplicable in a particular case” according to the terms of section 11.3.9.

Analysis

[25] The Court recalls that section 11.3 of the Rules of Conduct entitled “Arbitration” provides, in relevant parts as follows:

11.3. Arbitration.

All disputes not resolved through the process described in Rules 11.1 and 11.2 above shall be settled in arbitration as stated below. The arbitration award shall be final and binding and judgment thereon may be entered by any court of competent jurisdiction...

...

11.3.5. If IBOs become involved in a claim or dispute under the arbitration rules, they will not disclose to any other person not directly involved in the conciliation or arbitration process (a) the substance of, or basis for, the claim; (b) the content of any testimony or other evidence presented at an arbitration hearing or obtained through discovery; or (c) the terms or amount of any arbitration award. However, nothing in these Rules shall preclude a party from, in good faith, investigating a claim or defense, including interviewing witnesses and otherwise engaging in discovery.

...

11.3.7. To reduce the time and expense of the arbitration, the arbitrator will not provide a statement of reasons for his or her award unless requested to do so by all parties. The arbitrator’s award shall be limited to deciding the rights and responsibilities of the parties in the specific dispute being arbitrated.

...

11.3.9. No party to this agreement shall assert any claim as a class, collective, or representative action if (a) the amount of the party’s individual claim exceeds \$1,000, or (b) the claiming party, if an IBO, has attained the status of Platinum either in the current fiscal year or any

prior period. This subparagraph shall be enforceable when the applicable law permits reasonable class action waivers and shall have no effect when the applicable law prohibits class action waivers as a matter of law. In any case, the class action waiver provision, as well as any other provision of Rule 11, is severable in the event any court finds it unenforceable or inapplicable in a particular case.

11.3.10. Class action claims are not arbitrable under these Rules under any circumstances; but in the event a court declines to certify a class, all individual plaintiffs shall resolve any and all remaining claims in arbitration.

[26] The Court further recalls that the parties freely entered into an extensive and detailed “Agreement to Arbitrate” as part of the Registration Agreement dated June 5, 2008, to which they remain bound.

[27] The Court will thus refer to the above-quoted provisions, collectively, as the parties’ arbitration agreement.

[28] The Court finds the parties’ arbitration agreement to be clear. First, section 11.3.9 of the Rules of Conduct allows class actions for an amount not exceeding \$1,000. Second, claims over \$1,000 are subject to a class action waiver. Third, as stated in section 11.3.10, class actions are not arbitrable under the Rules of Conduct under any circumstances. Finally, for claims under \$1,000, in the event a court declines to certify a class, all individual plaintiffs shall resolve any and all remaining claims in arbitration.

[29] Equally clear in the mind of the Court are the terms of section 11.3.9 which further state that the class action waiver is enforceable when permitted by law but will have no effect when class action waivers are prohibited as a matter of law, which in turn raises the importance of legislative

intent as discussed in more detail later in these Reasons for Order and Order. As noted earlier, section 11.3.9 also states that the class action waiver is severable if a Court were to find it “unenforceable” or “inapplicable”.

[30] The Court further recalls that there is no dispute between the parties that the relevant statutes applicable to this case, namely the *Competition Act*, the *Ontario Arbitration Act* and the *Federal Courts Rules* do not explicitly and expressly prohibit class action waivers.

[31] Against this background, and considering the clear wording of both sections 11.3.9 and 11.3.10, the Court rejects the plaintiff’s contention that the Court has jurisdiction over its class action claim and accordingly concludes that the plaintiff’s claim for \$15,000 must be heard (i) by an arbitrator and (ii) on an individual basis in accordance with the parties’ arbitration agreement.

2) *The Jurisprudential Principles Regarding No-Class Action Arbitration Clauses and the the Doctrine of the “Preferable Procedure”*

[32] Although the Court rejects the plaintiff’s interpretation of sections 11.3.9 and 11.3.10 of the Rules of Conduct, a further question raised by the parties’ dispute concerns emerging jurisprudential principles with regards to no-class action arbitration clauses and the applicability of the “preferable procedure” doctrine in the present circumstances.

Defendant’s Position

[33] As a general proposition, the defendant contends that an arbitration agreement creates a “private jurisdiction” that is conferred to the arbitral tribunal, and thus diverts state-appointed courts of jurisdiction over all disputes falling within the scope of the said arbitration agreement.

[34] In keeping with this proposition, the defendant also submits that a plaintiff cannot request a court to assert jurisdiction over a matter that is subject to an arbitration agreement, on the mere basis that the plaintiff has chosen to proceed by way of a class action as the procedural vehicle to advance his claim.

[35] In this regard, the defendant refers to the jurisprudence of the Supreme Court of Canada which, argues the defendant, establishes that agreements to arbitrate, including ones that incorporate a class action waiver, must be enforced in the absence of clear legislative language to the contrary. Section 36 of the *Competition Act*, says the defendant, is void of any such legislative intent.

[36] Finally, whilst the defendant acknowledges that the provisions of the parties' arbitration agreement are subject to the Ontario *Arbitration Act*, it argues that this Act, and more specifically s 7(5) does not apply in the case at bar.

Plaintiff's Position

[37] In response, the plaintiff advances the proposition that the Court should consider the enforceability of the class action waiver in the context of the "preferable procedure" doctrine.

[38] More particularly, although the plaintiff agrees that the *Competition Act*, the *Federal Courts Rules*, and the Ontario *Arbitration Act* are all silent with regard to the validity of class action waivers, the plaintiff submits that the validity of a class action waiver must be decided in light of the "preferable procedure" doctrine. It is the plaintiff's position that, in the present circumstances, a

class action proceeding is the only way to ensure that the objectives of the *Competition Act* are truly respected and that justice is provided.

Analysis

[39] From the outset, the Court observes that both the plaintiff and the defendant refer to the recent Supreme Court of Canada decision in *Seidel v TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 531 [*“Seidel”*] in support of their respective position.

[40] The *Seidel* case involved a consumer’s claim against TELUS, a telecommunications service provider, pursuant to a cellular phone services contract concluded by the parties. The plaintiff in that case had sought certification of a class proceeding under the *Business Practices and Consumer Protection Act*, SBC 2004, c-2 (BPCPA) and invoked certain rights and protections pursuant to the BPCPA. TELUS sought to stay the proceedings and have them refer to arbitration pursuant to both the parties’ arbitration agreement and the British Columbia *Commercial Arbitration Act*, SBC 1986, c-3, s-15. The arbitration agreement in *Siedel* also contained a class action waiver.

[41] In a split decision (5-4), the majority of the Supreme Court of Canada allowed the claim pursuant to s 172 of the BPCPA. The majority found that section 172 - coupled with s 3 - of the BPCPA reflected the intention of the legislature to prohibit class action waivers. On this basis, the majority of the Supreme Court of Canada concluded that the class proceeding should proceed notwithstanding the arbitration clause contained in the arbitration agreement between the parties. The majority was of the view that s 172 of the BPCPA was in fact a public interest remedy and its policy objectives were incompatible with low-profile, private and confidential arbitrations.

[42] Although more recent, the *Siedel* case comes after a long string of Supreme Court of Canada decisions which have contributed to confirming Canada's status as an "arbitration-friendly" jurisdiction. In particular, the Court recalls the Supreme Court of Canada's landmark decision in *Desputeaux v Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 SCR 178 [*Desputeaux*], which stands for the principle that a statute cannot be assumed to exclude arbitration unless it so states (para 42). This principle was also acknowledged in *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R.801 [*Dell*], *Rogers Wireless v Muroff*, 2007 SCC 35, [2007] 2 SCR 921 [*Rogers*] and *Bisaillon v Concordia University*, 2006 SCC 19, [2006] 1 SCR 666 [*Bisaillon*]. These cases - and the *Siedel* case does not take exception to this - all illustrate that arbitration agreements must be enforced by courts absent specific legislative language to the contrary.

[43] More particularly, the majority reaffirmed this principle in *Seidel* at paras 2 and 42:

[2] The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause. ...

[42] For present purposes, the relevant teaching of *Dell* and *Rogers Wireless* is simply that whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. *Dell* and *Rogers Wireless* stand, as did *Desputeaux*, for the enforcement of arbitration clauses *absent legislative language to the contrary*.

[Emphasis in Original]

[44] The Court accordingly may not, absent legislative language to this effect, assert jurisdiction over a matter that is subject to an arbitration agreement. The enforcement of arbitration agreements has long been recognized by Canadian jurisprudence as an acknowledgment of the “jurisdictional choice” made by the parties. This has been the case in the face of class action waivers applicable to matters subject to public order consumer protection legislation void of language to the contrary (*Dell*).¹

[45] It is likewise true that class actions, as a procedural vehicle, have long been recognized as serving the purpose of facilitating access to justice for citizens. It has further been confirmed by the Supreme Court of Canada that class action proceedings play an important role in our judicial system (*Bisaillon*, para 16). To quote the case law in this regard, class actions represent a “means of facilitating access to justice, promoting efficiency in and reducing costs associated with civil litigation, and deterring or modifying dangerous or risky behaviour ...” (*Seidel*, para 135; *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 SCR 534). For this reason, class action waivers are sometimes regarded with suspicion.

[46] However, courts have consistently defined class actions, as a procedural vehicle “whose use neither modifies nor creates substantive rights” (*Bisaillon*, para 17). Specifically, class actions cannot serve as a means of circumventing an agreement to arbitrate.

[47] In this regard, the Court recalls the Supreme Court of Canada’s reasoning in *Bisaillon*:

¹ The Court notes that a number of legislatures - including Québec and Ontario - have since enacted legislation that renders class action waiver clauses inoperative. See Consumer Protection Act, R.S.Q., chapter P-40.1, s. 11.1 and Consumer Protection Act, S.O. 2002, chapter 30, ss. 7 and 8.

[17] The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so

[19] Similarly, recourse to this procedural vehicle does not change the legal rules relating to subject-matter jurisdiction ...

[22] In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights. ...

[48] It is also noteworthy that the Supreme Court of Canada reiterated the above in *Dell* at para 107.

[49] In the present case, the plaintiff relied heavily on the case *Griffin v Dell Canada Inc*, [2009] OJ No 418 (Ontario Superior Court), [2010] OJ No 177 (Ontario Court of Appeal) [*Griffin*] and its adoption of the “preferable procedure” doctrine in order to meet the underlying objectives of class actions, namely: access to justice, judicial economy and behaviour modification.

[50] The Court has not been persuaded that the “preferable procedure” doctrine is applicable in the circumstances and the *Federal Courts Rules* sections on class proceedings do not support the plaintiff’s argument on this issue.

[51] Nor has the Court been persuaded that upholding the class action waiver in the present circumstances would be unconscionable as implied by the plaintiff. On this point, the Court observes that in *Siedel*, while the majority chose not to address the doctrine of unconscionability (para 45), the minority would not have applied the doctrine, noting that “the courts have instead left

the question whether arbitration is appropriate for particular categories of disputes to the discretion of the legislatures” (para 172).

[52] In sum, the Court finds that, absent clear legislative language prohibiting class action waivers, it must give effect to the parties’ agreement to arbitrate. Given that the plaintiff has argued that such intent can be found, in particular in the *Competition Act*, the Court now turns to this question.

3) *The Competition Act*

Plaintiff’s Position

[53] The plaintiff submits that the class action waiver contained in section 11.3.9 of the Rules of Conduct should not be upheld in the present circumstances because this would be contrary to the purposes of the *Competition Act* which creates a regime of public order that governs the conduct of companies in Canada and that aims to prevent anti-competitive practices. In this connection, the plaintiff relies on section 36 of the *Competition Act* which identifies the Federal Court of Canada as a court of competent jurisdiction under the Act.

[54] The plaintiff compares section 36 of the *Competition Act* to sections 3 and 172 of the BPCPA at issue in *Siedel* and submits that, as in *Siedel*, the plaintiff should not be held to the class action waiver.

Defendant's Position

[55] The defendant contends that section 36 of the *Competition Act* and sections 3 and 172 of the BPCPA differ in many respects and that the analogy urged by the plaintiff is untenable.

Analysis

[56] The *Competition Act* is a federal statute that governs the conduct of business in Canada. Section 1.1 of the Act outlines that its purpose is to maintain and encourage competition in Canada in order to: i) promote the efficiency and adaptability of the Canadian economy; ii) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada; iii) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and, iv) provide consumers with competitive prices and product choices.

[57] As noted above, the plaintiff relies on section 36 of the *Competition Act* which states:

Recovery of damages

36. (1) Any person who has suffered loss or damage as a result of
 (a) conduct that is contrary to any provision of Part VI, or
 (b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or

Recouvrement de dommages-intérêts

36. (1) Toute personne qui a subi une perte ou des dommages par suite :
 a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
 b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi, peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance

damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.
...	[...]
Jurisdiction of Federal Court	Compétence de la Cour fédérale
(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.	(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).
...	[...]

[58] The plaintiff further contends that an analogy can be drawn between the objectives of the *Competition Act* and its section 36, and the BPCPA, more particularly its section 172. Sections 3 and 172 of the BPCPA state the following:

Waiver or release void except as permitted	Nullité de la renonciation non autorisée aux droits
3. Any 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.	3. Sauf dans la mesure où elle est expressément permise par la présente loi, la renonciation aux droits, avantages ou protections qui y sont prévus est nulle.
Court actions respecting consumer transactions	Recours judiciaires relatifs à des opérations commerciales
172. (1) The director or a person other than a supplier, whether or not the person bringing the	172 (1) Le directeur ou une personne autre qu'un fournisseur -- que cette

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 for one or both of the following:

(a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;

(b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

...

(3) If the court grants relief under subsection (1), the court may order one or more of the following:

(a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

(b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;

(c) that the supplier advertise to

personne ait ou non un intérêt, particulier ou autre, à faire valoir sous le régime de la présente loi ou qu'elle soit ou non touchée par l'opération commerciale à l'origine du litige -- peut intenter une action devant la Cour suprême en vue d'obtenir :

a) un jugement déclarant qu'un acte commis par un fournisseur, ou sur le point de l'être, ou une pratique qu'il utilise, ou est sur le point d'utiliser, en ce qui concerne une opération commerciale contrevient à la présente loi ou à ses règlements;

b) une injonction provisoire ou permanente interdisant au fournisseur de contrevenir à la présente loi ou à ses règlements.

[...]

(3) Si la Cour accueille l'action sous le régime du paragraphe (1), elle peut ordonner

a) que le fournisseur restitue à une personne les sommes ou autres biens ou choses, à l'égard desquels cette personne a un intérêt, et qui peuvent avoir été obtenus par suite d'une contravention à la présente loi ou à ses règlements;

b) si l'action est intentée par le directeur, que le fournisseur lui rembourse la totalité ou une partie raisonnable des frais engagés pour soumettre le fournisseur à une inspection sous le régime de la présente loi;

c) que le fournisseur informe

the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

le public, de manière efficace et rapide et suivant les modalités que la Cour estime raisonnables, du contenu de tout jugement, jugement déclaratoire, ordonnance ou injonction prononcé contre le fournisseur sous le régime du présent article.

[59] The Court recalls that the majority in *Seidel*, above, found that a section 172 claim under the BPCPA can be initiated by parties to a contract as well as third parties regardless or whether that person has a contractual relationship with TELUS. The majority also stressed that the section 172 of the BPCPA allows the consumer or third parties to bring an action in the British Columbia Supreme Court. Also, that court may grant remedies pursuant to section 172.

[60] The Court does not accept the plaintiff's suggestion that the language and intent of section 36 of the *Competition Act* resembles the above-quoted provisions of the BPCPA. For instance, unlike section 172 of the BPCPA, section 36 makes no provision for injunctive relief or for third party claims. Likewise, the *Competition Act* does not include a provision similar to section 3 of the BPCPA stating that "Any 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". In short, the Court is of the view that the wording of the *Competition Act* does not compare to the wording of the BPCPA, and that it is accordingly not justified to draw parallels with the *Siedel* case on this basis.

[61] The Court observes, as noted by the defendant, that in the case of *Desputeaux*, the Supreme Court of Canada held that the purpose of section 37 of the *Copyright Act* was merely the jurisdiction

ratione materiae of the courts. Analogous to the *Competition Act*, section 37 of the *Copyright Act* did not specifically confer jurisdiction upon the Federal Court or provincial superior courts to the exclusion of arbitration. On this basis, and notwithstanding the fact that the *Copyright Act* is of public order, the Supreme Court of Canada accordingly decided to enforce the arbitration agreement at issue in *Desputeaux*.

[62] It is worthwhile recalling that section 37 of the *Copyright Act*, RSC 1985, c C-42, reads as follows:

PART IV	PARTIE IV
REMEDIES CIVIL REMEDIES	RECOURS RECOURS CIVILS
Concurrent jurisdiction of Federal Court	Jurisdiction concurrente de la Cour fédérale
37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.	37. La Cour fédérale, concurrentement avec les tribunaux provinciaux, connaît de toute procédure liée à l'application de la présente loi, à l'exclusion des poursuites visées aux articles 42 et 43.

[63] The Court therefore agrees with the defendant that, as in the case of *Desputeaux*, above, section 36(3) of the *Competition Act* does not confer exclusive jurisdiction to the Federal Court, but merely identifies the Federal Court as a court of competent jurisdiction to hear section 36 of the *Competition Act* claims. Put in other words, section 36 merely provides for the *ratione materiae*

jurisdiction of the Federal Court and in no way excludes arbitration as a valid forum. The plaintiff's argument in this regard accordingly fails.

4) *The Application of Section 7(5) of the Ontario Arbitration Act*

Plaintiff's Position

[64] It is the plaintiff's submission that section 7(5) of the *Ontario Arbitration Act* may be applied by the Court in the present circumstances. This provision states as follows:

Agreement covering part of dispute	Convention s'appliquant à une partie du différend
7. (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,	7. (5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :
(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and	a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;
(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.	b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

[65] Essentially, the plaintiff maintains that as it is highly likely that another class member IBO with a claim for \$1,000 or under exists – whose claim can be heard in a court in a class action proceeding according to subparagraph 11.3.9 of the Rules of Conduct – it would be unreasonable to split that claim from the plaintiff's claim of \$15,000.

Defendant's Position

[66] The defendant argues that the conditions of 7(5) of the Ontario *Arbitration Act* are in no way satisfied in the present circumstances.

[67] In particular, the defendant alleges that section 7(5) of the Ontario *Arbitration Act* is meant to capture situations where, unlike the present case, a plaintiff has multiple causes of action or where there are multiple defendants.

Analysis

[68] As gleaned from the above, section 7(5) of the Ontario *Arbitration Act* provides that, in the context of an arbitration agreement covering only part of a dispute, a court may stay the proceeding which has been submitted to arbitration and may continue to proceed with respect to other matters if it finds it reasonable to separate the matters dealt with in the agreement from the other matters at issue.

[69] In advancing its argument regarding section 7(5) of the Ontario *Arbitration Act*, the plaintiff draws parallels from the cases of *Griffin* and *Stoneleigh Motors Ltd. v General Motors of Canada Ltd.*, [2010] OJ No 1621. Having considered the parties' arguments and the case law, the Court is of the opinion that section 7(5) of the Ontario *Arbitration Act* does not apply in the case at bar for the following reasons.

[70] Firstly, in *Griffin*, the Ontario Court of Appeal upheld the trial court's decision to certify a class proceeding and to refuse to enforce an arbitration clause. The Ontario Court of Appeal also

decided not to grant a partial stay of the action in light of section 7(5) of the Ontario *Arbitration Act* on the following grounds:

[46] In my view, it would not be reasonable to separate the consumer from the non-consumer claims. We should, therefore, refuse a partial stay and allow all the claims to proceed under the umbrella of the class proceeding.

[47] Granting a stay of the non-consumer claims would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. This would be contrary to the *Courts of Justice Act*, s. 138, which provides that “[a]s far as possible, a multiplicity of legal proceedings should be avoided”, and contrary to the jurisprudence on the reasonableness of partial stays under s. 7(5) of the *Arbitration Act*.

[71] However, in *Griffin*, the plaintiffs had provided evidence that more than 400 putative class members existed and that seventy (70) percent of the claims in this case were consumer claims and thirty (30) percent were non-consumer claims. Due to the fact that the consumer claims outweighed the non-consumer claims, the Ontario Court of Appeal decided that it was “reasonable that the remaining claims should follow the procedural route that the consumer claims must take” (para 50). There is no such comparable evidence in the present case.

[72] As well, section 7(5) of the Ontario *Arbitration Act* was mentioned in the case of *Stoneleigh*, above, which dealt with the arbitrability and severability of the claims of nineteen (19) General Motors dealers that had joined together. The Ontario Superior Court of Justice determined that the claims were not arbitrable and therefore did not address the parties’ partial stay arguments. Nevertheless, the Court stated that “even if the plaintiffs’ claims were arbitral, I would not grant a partial stay for the reasons articulated by the Court of Appeal in *Griffin v. Dell Canada Inc.* ...” (para 67).

[73] The Court accordingly cannot accept the plaintiff's contention that the facts of *Griffin* and *Stoneleigh* are similar to those at issue in the present case. The Court cannot apply section 7(5) of the *Ontario Arbitration Act* because the plaintiff has only provided evidence of one claim – his own for the amount of \$15,000. In the absence of any evidence that other IBO class members with a claim of \$1,000 or less, it is not open to this Court to apply section 7(5) of the *Ontario Arbitration Act*. Absent any convincing evidence of multiple claims or multiple defendants, the issue of the reasonableness of a partial stay is simply not triggered.

[74] To conclude otherwise would mean that one could always defeat a class action waiver by merely invoking section 7(5) of the *Ontario Arbitration Act*. This would fly in the face of the Supreme Court of Canada's repeated confirmations that class action waivers are allowed and may be enforced unless prohibited by the legislator (*Bisaillon, Desputeaux, Dell, Rogers, Siedel*) - which as found earlier is not the case in the present circumstances.

Conclusion

[75] For all these reasons the Court concludes that it does not have jurisdiction. The defendant's Motion to Stay and Compel Arbitration is thus allowed and the present proceedings are stayed pursuant to section 50(1) of the *Federal Courts Act*. It follows that there is no need for this Court to address the three (3) other motions put forward by the parties.

[76] Finally and despite the fact that the Court raised a question with respect to the heading describing the defendant, there is no need to address this issue given the Court's findings in this matter.

ORDER

THIS COURT ORDERS that the defendant's Motion to Stay and to Compel Arbitration is allowed. Costs shall be awarded to the defendant.

"Richard Boivin"
Judge

ANNEX

The Federal Courts Act / Loi sur les Cours fédérales

PROCEDURE

Stay of proceedings authorized

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

- (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
- (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

Stay of proceedings required

(2) The Federal Court of Appeal or the Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown if it appears that the claimant has an action or a proceeding in respect of the same claim pending in another court against a person who, at the time when the cause of action alleged in the action or proceeding arose, was, in respect of that matter, acting so as to engage the liability of the Crown.

Lifting of stay

(3) A court that orders a stay under this section may subsequently, in its discretion, lift the stay.

PROCÉDURE

Suspension d'instance

50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

- a) au motif que la demande est en instance devant un autre tribunal;
- b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

Idem

(2) Sur demande du procureur général du Canada, la Cour d'appel fédérale ou la Cour fédérale, selon le cas, suspend les procédures dans toute affaire relative à une demande contre la Couronne s'il apparaît que le demandeur a intenté, devant un autre tribunal, une procédure relative à la même demande contre une personne qui, à la survenance du fait générateur allégué dans la procédure, agissait en l'occurrence de telle façon qu'elle engageait la responsabilité de la Couronne.

Levée de la suspension

(3) Le tribunal qui a ordonné la suspension peut, à son appréciation, ultérieurement la lever.

The Federal Courts Rules / Régles des Cours fédérales

PART 5.1

CLASS PROCEEDINGS

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

- (a) the pleadings disclose a reasonable cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
- (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- (e) there is a representative plaintiff or applicant who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
 - (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and
 - (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

PARTIE 5.1

RECOURS COLLECTIF

Autorisation

Conditions

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

- a) les actes de procédure révèlent une cause d'action valable;
- b) il existe un groupe identifiable formé d'au moins deux personnes;
- c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
- d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
- e) il existe un représentant demandeur qui :
 - (i) représenterait de façon équitable et adéquate les intérêts du groupe,
 - (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
 - (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
 - (iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

- (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;
- (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;
- (c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Subclasses

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

- (a) would fairly and adequately represent the interests of the subclass;
- (b) has prepared a plan for the

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

- a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
- b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
- c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
- d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
- e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

Sous-groupe

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

- a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;
- b) a élaboré un plan qui propose une

proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

(d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

d) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

The Competition Act / Loi sur la concurrence

PART I

PURPOSE AND INTERPRETATION

PURPOSE

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

PARTIE I

OBJET ET DÉFINITIONS

OBJET

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

PART IV

SPECIAL REMEDIES

Recovery of damages

36. (1) Any person who has suffered loss or damage as a result of
 (a) conduct that is contrary to any provision of Part VI, or
 (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

...

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

...

PART VI

OFFENCES IN RELATION TO COMPETITION

False or misleading representations

PARTIE IV

RECOURS SPÉCIAUX

Recouvrement de dommages-intérêts

36. (1) Toute personne qui a subi une perte ou des dommages par suite :
 a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
 b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[...]

Compétence de la Cour fédérale

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

[...]

PARTIE VI

INFRACTIONS RELATIVES À LA CONCURRENCE

Indications fausses ou trompeuses

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

52. (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

Proof of certain matters not required

Preuve non nécessaire

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver :

- (a) any person was deceived or misled;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

- a) qu'une personne a été trompée ou induite en erreur;
- b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;
- c) que les indications ont été données à un endroit auquel le public avait accès.

Permitted representations

Indications

(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

(1.2) Il est entendu que, dans le présent article et dans les articles 52.1, 74.01 et 74.02, la mention de donner des indications vaut mention de permettre que des indications soient données.

Representations accompanying products

Indications accompagnant un produit

(2) For the purposes of this section, a representation that is

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

- (a) expressed on an article offered or displayed for sale or its wrapper or container,

- a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public, is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un utilisateur éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Representations from outside Canada

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Indications provenant de l'étranger

(2.1) Dans le cas où la personne visée au paragraphe (2) est à l'étranger, les indications visées aux alinéas (2)a), b), c) ou e) sont réputées, pour l'application du paragraphe (1), être données au public par la personne qui importe au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Deemed representation to public

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made

Idem

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du

that representation to the public.	genre mentionné au paragraphe (1) est réputé avoir donné ces indications au public.
General impression to be considered	Il faut tenir compte de l'impression générale
(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.	(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.
Offence and punishment	Infraction et peine
(5) Any person who contravenes subsection (1) is guilty of an offence and liable	(5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :
(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or	a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;
(b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.	b) par procédure sommaire, une amende maximale de 200 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.
Reviewable conduct	Comportement susceptible d'examen
(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.	(6) Le présent article s'applique au fait de donner des indications constituant, au sens de la partie VII.1, un comportement susceptible d'examen.
Duplication of proceedings	Une seule poursuite
(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this	(7) Il ne peut être intenté de poursuite en vertu du présent article contre une personne contre laquelle une ordonnance est demandée aux termes de la partie VII.1, si les faits qui seraient allégués au soutien de la poursuite sont

section.

les mêmes ou essentiellement les mêmes que ceux qui l'ont été au soutien de la demande.

Definition of “multi-level marketing plan”

Définition de « commercialization à paliers multiples »

55. (1) For the purposes of this section and section 55.1, “multi-level marketing plan” means a plan for the supply of a product whereby a participant in the plan receives compensation for the supply of the product to another participant in the plan who, in turn, receives compensation for the supply of the same or another product to other participants in the plan.

55. (1) Pour l'application du présent article et de l'article 55.1, «commercialisation à paliers multiples» s'entend d'un système de distribution de produits dans lequel un participant reçoit une rémunération pour la fourniture d'un produit à un autre participant qui, à son tour, reçoit une rémunération pour la fourniture de ce même produit ou d'un autre produit à d'autres participants.

Representations as to compensation

Assertions quant à la rémunération

(2) No person who operates or participates in a multi-level marketing plan shall make any representations relating to compensation under the plan to a prospective participant in the plan unless the representations constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person making the representations relating to

(2) Il est interdit à l'exploitant d'un système de commercialisation à paliers multiples, ou à quiconque y participe déjà, de faire à d'éventuels participants, quant à la rémunération offerte par le système, des déclarations qui ne constituent ou ne comportent pas des assertions loyales, faites en temps opportun et non exagérées, fondées sur les informations dont il a connaissance concernant la rémunération soit effectivement reçue par les participants ordinaires, soit susceptible de l'être par eux compte tenu de tous facteurs utiles relatifs notamment à la nature du produit, à son prix, à sa disponibilité et à ses débouchés de même qu'aux caractéristiques du système et de systèmes similaires et à la forme juridique de l'exploitation.

(a) compensation actually received by typical participants in the plan; or
(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including

- (i) the nature of the product, including its price and availability,
- (ii) the nature of the relevant market for the product,
- (iii) the nature of the plan and similar plans, and
- (iv) whether the person who operates the plan is a corporation, partnership, sole proprietorship or other form of

business organization.

Idem

(2.1) A person who operates a multi-level marketing plan shall ensure that any representations relating to compensation under the plan that are made to a prospective participant in the plan by a participant in the plan or by a representative of the person who operates the plan constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person who operates the plan relating to

- (a) compensation actually received by typical participants in the plan; or
- (b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including those specified in paragraph (2)(b).

Due diligence defence

(2.2) A person accused of an offence under subsection (2.1) shall not be convicted of the offence if the accused establishes that he or she took reasonable precautions and exercised due diligence to ensure

- (a) that no representations relating to compensation under the plan were made by participants in the plan or by representatives of the accused; or
- (b) that any representations relating to compensation under the plan that were made by participants in the plan or by representatives of the accused constituted or included fair, reasonable and timely disclosure of the information referred to in that subsection.

Idem

(2.1) Il incombe à l'exploitant de veiller au respect, par les participants et ses représentants, de la règle énoncée au paragraphe (2), compte tenu des informations dont il a connaissance.

Défense

(2.2) La personne accusée d'avoir contrevenu au paragraphe (2.1) peut se disculper en prouvant qu'elle a pris les mesures utiles et fait preuve de diligence pour que :

- a) soit ses représentants ou les participants ne fassent aucune déclaration concernant la rémunération versée au titre du système;
- b) soit leurs déclarations respectent les critères énoncés au paragraphe (2).

Offence and Punishment

(3) Any person who contravenes subsection (2) or (2.1) is guilty of an offence and liable

- (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or
- (b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

Definition of “scheme of pyramid selling”

55.1 (1) For the purposes of this section, “scheme of pyramid selling” means a multi-level marketing plan whereby

- (a) a participant in the plan gives consideration for the right to receive compensation by reason of the recruitment into the plan of another participant in the plan who gives consideration for the same right;
- (b) a participant in the plan gives consideration, as a condition of participating in the plan, for a specified amount of the product, other than a specified amount of the product that is bought at the seller’s cost price for the purpose only of facilitating sales;
- (c) a person knowingly supplies the product to a participant in the plan in an amount that is commercially unreasonable; or
- (d) a participant in the plan who is supplied with the product
 - (i) does not have a buy-back guarantee that is exercisable on reasonable commercial terms or a right to return the product in saleable condition on

Infraction et Peine

(3) Quiconque contrevient aux paragraphes (2) ou (2.1) commet une infraction et encourt, sur déclaration de culpabilité :

- a) par mise en accusation, une amende dont le montant est fixé par le tribunal et un emprisonnement maximal de cinq ans, ou l’une de ces peines;
- b) par procédure sommaire, une amende maximale de 200 000 \$ et un emprisonnement maximal d’un an, ou l’une de ces peines.

Définition de « système de vente pyramidale »

55.1 (1) Pour l’application du présent article, « système de vente pyramidale » s’entend d’un système de commercialisation à paliers multiples dans lequel, selon le cas :

- a) un participant fournit une contrepartie en échange du droit d’être rémunéré pour avoir recruté un autre participant qui, à son tour, donne une contrepartie pour obtenir le même droit;
- b) la condition de participation est réalisée par la fourniture d’une contrepartie pour une quantité déterminée d’un produit, sauf quand l’achat est fait au prix coûtant à des fins promotionnelles;
- c) une personne fournit, sciemment, le produit en quantité injustifiable sur le plan commercial;
- d) le participant à qui on fournit le produit :
 - (i) soit ne bénéficie pas d’une garantie de rachat ou d’un droit de retour du produit en bon état de vente, à des conditions commerciales

reasonable commercial terms, or
(ii) is not informed of the existence of the guarantee or right and the manner in which it can be exercised.

raisonnables,
(ii) soit n'en a pas été informé ni ne sait comment s'en prévaloir.

Pyramid selling

(2) No person shall establish, operate, advertise or promote a scheme of pyramid selling.

Interdiction

(2) Il est interdit de mettre sur pied, d'exploiter, de promouvoir un système de vente pyramidale ou d'en faire la publicité.

Offence and punishment

(3) Any person who contravenes subsection (2) is guilty of an offence and liable
(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or
(b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

Infraction et peine

(3) Quiconque contrevient au paragraphe (2) commet une infraction et encourt, sur déclaration de culpabilité :
a) par mise en accusation, une amende dont le montant est fixé par le tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines;
b) par procédure sommaire, une amende maximale de 200 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

The Ontario Arbitration Act, 1991 / Loi de 1991 sur l'arbitrage (Ontario)

Court Intervention

Intervention du tribunal judiciaire

Court intervention limited

Intervention limitée du tribunal judiciaire

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with

6. Aucun tribunal judiciaire ne doit intervenir dans les questions régies par la présente loi, sauf dans les cas prévus par celle-ci et pour les objets suivants :

1. Faciliter la conduite des arbitrages.
2. Veiller à ce que les arbitrages soient effectués conformément aux conventions d'arbitrage.

arbitration agreements.

3. To prevent unequal or unfair treatment of parties to arbitration agreements.

4. To enforce awards.

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

3. Empêcher que des parties aux conventions d'arbitrage soient traitées autrement que sur un pied d'égalité et avec équité.

4. Executer les sentences.

Sursis

7. (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

1. Une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique.
2. La convention d'arbitrage est nulle.
3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.
4. La motion a été présentée avec un retard indu.
5. La question est propre à un jugement par défaut ou à un jugement sommaire.

Poursuite de l'arbitrage

(3) L'arbitrage du différend peut être engagé et poursuivi pendant que la motion est devant le tribunal judiciaire.

Conséquences du refus de surseoir

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

(4) Si le tribunal judiciaire refuse de surseoir à l'instance :

a) d'une part, aucun arbitrage du différend ne peut être engagé;

b) d'autre part, l'arbitrage qui a été engagé ne peut être poursuivi, et tout ce qui a été fait dans le cadre de l'arbitrage avant que le tribunal judiciaire ne rende sa décision est sans effet.

Agreement covering part of dispute

Convention s'appliquant à une partie du différend

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

No appeal

Décision sans appel

(6) There is no appeal from the court's decision.

(6) La décision du tribunal judiciaire n'est pas susceptible d'appel.

SOLICITORS OF RECORD

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