

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)**

BETWEEN

DELL COMPUTER CORPORATION

**Appellant
(Appellant)**

- and -

UNION DES CONSOMMATEURS and OLIVIER DUMOULIN

**Respondents
(Respondents)**

- and -

**CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, PUBLIC
INTEREST ADVOCACY CENTRE, ADR CHAMBERS INC., ADR INSTITUTE OF
CANADA, LONDON COURT OF INTERNATIONAL ARBITRATION**

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OF CANADA, LONDON COURT OF INTERNATIONAL ARBITRATION

Intervenors

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FACTUM OF THE INTERVENOR,
ADR CHAMBERS INC.

Part I – STATEMENT OF FACTS

1. ADR Chambers Inc. either accepts as correct, or takes no issue with the Appellant's statement of facts.

Part II – QUESTION IN ISSUE

2. ADR Chambers Inc. takes no issue with the manner in which the Appellant has formulated the question for the court. The Respondent's reformulation of the question is also appropriate.

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Part III - STATEMENT OF ARGUMENT

Introduction

3. Fundamental to an analysis of the legal questions posed by the Appellant and Respondent is the overriding question of how a court should approach a case that involves an international arbitration agreement, consumer claims and class actions. It is important to keep in mind that these are three distinct issues. Not all consumer claims are class actions and not all class actions deal with consumer claims. As will be discussed below, provincial courts have not been consistent in the manner in which they have approached cases involving these three issues.
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4. Particularly with respect to international commercial arbitration, it is important that Canadian courts establish procedures that are consistent with established international commercial arbitration law and also reflect Canada's treaty obligations to other foreign nations¹. While this case deals specifically with the laws of Québec, in determining the rights of the parties in this case the Court will be determining the law for all of Canada. Each common law province and the federal government has adopted the UNCITRAL Model Law² for international commercial arbitrations seated in this country and, in substance, both the Québec code of civil procedure and the civil code of Québec replicate the provisions of the Model Law.
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5. This court must make a clear statement that arbitral proceedings are as legitimate a dispute resolution mechanism in the Canadian legal structure as a judicial proceeding. There should be no dogmatic policy refusing arbitration simply because the matter involves either consumer rights or a potential class action. The analysis to be followed by provincial courts should be the same analysis as in any

¹ *Convention on the Recognition of Foreign Arbitral Awards*, 330 U.N.T.S. 3 ("New York Convention").
² *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Annex 1.

other case involving a dispute in which a plaintiff has brought a court action in the face of an arbitration clause.

The appropriate procedure

6. The Model Law provides in Article 5 that "in matters governed by this Law, no court shall intervene except where so provided in this Law." Article 8 then provides that "a court before which an action is brought in a matter which is the subject of an arbitration agreement shall...refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed". This mirrors the language in Article II (3) of the New York Convention.³
7. In cases not involving consumers or class actions, the common law courts have developed a relatively consistent procedure for dealing with matters arising under Article 8. The applicant on a motion to stay has the onus of demonstrating there is a valid arbitration agreement and the claims being asserted in the court action fall within the terms of that agreement. The onus then shifts to the respondent to establish that the arbitration agreement is either null and void, inoperative or is incapable of being performed, failing which the court will refer the matter to arbitration.
8. Where an issue respecting the existence, validity or scope of the arbitration agreement cannot be clearly decided by the court, the court has regard to Article 16, which provides "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."⁴ As a practical matter, the court is often faced with affidavit evidence that may be conflicting, together with transcripts from cross-examinations. An arbitrator on the other hand has the ability to also call for oral

³ *Quebec Code of Civil Procedure*, R.S.Q., c. C-5, Article 940.1.

⁴ *Ibid.*, at 943.

evidence and to determine witness credibility. In such circumstances, the arbitrator is in a better position to determine the issue than the court. Under Article 16(3), where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request within 30 days that the court "decide the matter".⁵ The court has ultimate control as jurisdiction goes to the very foundation of arbitration.

9. Where it is arguable that a claim does not fall within the provisions of the arbitration agreement, or a party to the litigation is not a party to the arbitration agreement, the courts will defer the question, at first instance, to the arbitrator. Similarly, if the validity of the arbitration agreement is in question and it cannot clearly be decided by the court, the court will stay the court action and refer the matter to the arbitrator to determine the issue, subject to later review by the court. For example, in the case of *Dalimpex Ltd. v. Janicki*⁶, the scope of the arbitration agreement was referred to the arbitrator; in *Gulf Canada Resources Ltd. v. Arochem International Ltd*⁷, the issue of who was a proper party was left to the arbitrator to determine.
10. There is no principled reason why this same approach should not be followed in cases involving consumers or class actions. In this case, if the court is satisfied that, on the evidence, it can clearly come to a determination respecting the validity, scope, or existence of the arbitration agreement, it should do so. If there is any issue respecting the validity scope or existence of the arbitration agreement which, on the facts available, is arguable, the court should refer the issue to the arbitrator, subject to later court review. As will be discussed below, for the most part, common law courts have done this. Where consumer or class action litigation is involved, however, the courts appear to be reverting to a historic hostility towards arbitration agreements.

⁵ The court then decides the issue of jurisdiction *de novo*. The procedure is not an appeal of the arbitral award. *Electrosteel Castings Ltd. v. Scan-Trans Shipping & Chartering SDN BHD*, [2002] EWHC 1410; *Quebec Civil Code of Procedure*, *supra* note 3 at 943.1

⁶ (2003), 64 O.R. (3d) 1991; CanLII 1354 (BCCA) 737

⁷ (1992), 43 C.P.R. (3d) 390

E-commerce and the existence of the arbitration agreement

11. Web-based commerce knows no political or legal boundaries. A dispute resolution mechanism that fosters certainty, reliability and global recognition should be supported and indeed encouraged by the courts in Canada. Basic principles of contract law such as offer, acceptance and consensus *ad idem* are readily adaptable to the age of e-commerce. The courts have recognized that those who surf the Web and who purchase goods electronically are expected to have some basic understanding of the environment in which they are acting. A basic understanding of hyperlinks, web sites, web pages and URL addresses should be presumed. As stated by Mr. Justice Nordheimer of the Ontario Superior Court:

We are dealing here with a different mode of doing business than has heretofore been generally considered by the courts. We are here dealing with people who wish to avail themselves of an electronic environment and the electronic services that are available through it. It does not seem unreasonable for persons who are seeking electronic access to all manner of goods, services and products, along with information, communication, entertainment and other resources, to have the legal attributes of their relationship with the very entity that is providing such electronic access, defined and communicated to them through that electronic format.⁸

12. In the present case the combination of having the terms and conditions hyperlink at the bottom of each web page, together with a "terms and conditions" button being located directly next to the "purchase" button is sufficient to find that upon clicking the "purchase" button, the purchaser is also assenting to the arbitration clause contained in the terms and conditions of sale.

13. The argument of the respondent on this point is too technical. Whether clicking on a hyperlink takes a party to a new page or a new web site is really not the question. The question is whether or not the simple and direct physical act of clicking a mouse button reasonably brings the terms of the contract to the attention of the party. The consumer should expect terms and conditions of sale

⁸ *Kanitz et al. v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (S.C.J.) at 310.

to be available with the click of a mouse. Similarly, the consumer should expect to have to scroll down the page to see all of the terms. None of this is onerous. As stated in the *Rudder* decision, the fact that the entire agreement cannot be displayed at once on a computer screen does not make it materially different from a multi-page written document which requires a party to turn the pages.⁹

14. At common law, particularly in a contract of adhesion, the more onerous or unusual the term, more evidence must be adduced that the term was brought to the attention of the party.¹⁰ Arbitration agreements are in and by themselves neither onerous nor unusual. They are presumptively for the benefit of both parties. Arbitration is generally considered to be a mutually advantageous process providing for resolution of disputes in a less costly, more expeditious and in a private manner by an impartial person typically selected by the parties themselves.¹¹ Thus, where a party purchases goods online with readily accessible terms and conditions of sale that include an arbitration provision, a party should be held to those terms and conditions.
15. Each case will be decided on its facts. If the terms and conditions are clearly inaccessible or are buried in electronic fine print so that it is not reasonable to expect a purchaser to be aware of them, then the usual provisions of the common law respecting the need to demonstrate acceptance of those terms will apply before the terms will be imposed. If it is not clear from the evidence whether the plaintiff can be said to have assented to the terms of the arbitration agreement, or it is not clear whether the arbitration clause is an external clause, or whether it can be said that it is arguable that the external clause was brought to the attention of the plaintiff, then the matter should be referred to the arbitrator who can hear evidence and make a determination at first instance on the point.

⁹ *Rudder v. Microsoft Corp* (1999), 2 C.P.R. (4th) 474 at 480

¹⁰ *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (C.A.), (1978), 83 D.L.R. (3d) 400 (C.A.).

¹¹ *Keating v. The Superior Court of Alameda County*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360; 1982 Cal. LEXIS 187

16. In this case the combination of having the hyperlink to the terms and conditions at the bottom of each web page, combined with the link to the terms and conditions also being located directly next to the "purchase" button is sufficient to find that upon clicking the "purchase" button the purchaser is also assenting to the terms and conditions. Those terms and conditions made it quite clear all disputes would be resolved by arbitration.

If there is an arbitration agreement, has the respondent shown it to be null, abusive or unconscionable?

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17. Under the Model Law, if there is an arbitration agreement between the parties and if it can be said to encompass the claims at issue, then under the Model Law and the New York Convention, the onus is on the respondent to show that the agreement is null and void, inoperative, or incapable of being performed. Whether these concepts are the same as the word "null" under article 940.1 C.C.P. is not material to this argument. Under the usual test, the court will hear the evidence and if it can clearly make a decision on the point, it will do so. If it cannot, the court should refer the matter to the arbitrator for a decision at first instance. Here the issues are whether the agreement is null because it is abusive or null because it is against public policy.

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18. At common law, a contract may be unconscionable if there is found to be i) inequality of bargaining power; ii) the power was used to prey on a party; and iii) the terms of the agreement are improvident.¹²

19. There is nothing inherently unconscionable or abusive in requiring a consumer to arbitrate a claim. Presumptively it is for the benefit of both parties to have claims determined in an expeditious and relatively informal fashion. There may be cases in which an agreement to arbitrate is, by its terms, unconscionable. This will be fact specific. For example if the arbitration is to take place in a foreign country at

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¹² *Kanitz v. Rogers Cable Inc.*, *supra* note 8, quoting *Rosen v. Rosen* (1994), 18 O.R. (3d) 641 (C.A.)

great cost to the consumer using rules which are onerous, a court may find the agreement unconscionable or abusive. There are no facts in this case to support such an argument.

20. Most arbitration institutions have streamlined, efficient and cost-effective rules to deal with consumer complaints. In all arbitrations, arbitrators have a duty to treat both parties fairly and must establish procedures to permit each party to present its case and respond to the opposing party's case. Arbitrators can craft procedures to take into account any inequality that may exist where a consumer is arbitrating against a large corporation. In this case, the arbitration institution has a fully developed procedure for arbitrating consumer claims and the flexibility to provide justice to the Québec consumer. In the circumstances, there are no facts to suggest the obligation to arbitrate is, in and by itself, abusive.

Does the agreement to arbitrate violate public order or public policy?

21. The concepts of public order and public policy are not the same, however, there is a sufficient commonality in the two concepts that a decision in this case with respect to the civil law concept of public order may well have similar implications respecting the common law concept of public policy.
22. In order to find an arbitration agreement null and void or inoperative as being against public policy, it is necessary to either find a specific prohibition in the legislation, or the agreement must offend our basic concepts of justice and morality¹³. In order for legislation to oust the autonomy of the parties to craft their own dispute resolution agreement, there must be specific language to this effect. As this Court stated in the *Desputeaux* decision:

However, an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system,

¹³ *Beals v. Saldanha*, 2003 SCC 72, [2003] S.C.R. 416; *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17.

although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.

The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.¹⁴

Consumer arbitration

23. There is no specific legislation in Québec declaring the arbitration agreement at issue to be without legal effect. Ontario is the only province to restrict party autonomy by specifically passing legislation that states a consumer may not enter into an arbitration agreement respecting a consumer purchase until after the dispute has arisen.¹⁵ In the absence of any specific or direct prohibition, there is no public policy or public order rationale to restrict the ability of a consumer to enter into an arbitration agreement. A consumer may wish to arbitrate a claim with a vendor. There is nothing inherently improper with a consumer claim being arbitrated. The alternative to an arbitration agreement, particularly in web-based e-commerce, may well be an exclusive jurisdiction clause subjecting the dispute to the laws and courts of a foreign country that is not particularly advantageous to the consumer. From the other perspective, a universally recognized arbitration clause will bring certainty to a vendor for dispute resolution procedures in international commercial transactions.

Class Action arbitration

¹⁴ *Desputeaux v. Éditions Chouette (1987) inc.*, *supra*

¹⁵ *Consumer Protection Act*, 2002 S.O. 2002, Chap. 30, Sch. A, sec 7(2), 7(3); Proclaimed in force July 30, 2005

24. Similarly, there is nothing to suggest class action arbitration is against public order or would violate any common law public policy. There is no prohibition against class action arbitration in any Québec legislation. Again, only the province of Ontario has enacted legislation prohibiting a consumer from waiving rights under the *Class Proceedings Act, 1992* until after a dispute has arisen.¹⁶ Absent express legislation, there is no principled reason why class actions cannot be dealt with by way of arbitration.

10 25. Class proceedings legislation has a three fold purpose. As set out in *Hollick v. Toronto (City)*¹⁷:

20 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

30 26. There is nothing inconsistent in applying these three important advantages within the context of arbitration. Aggregating similar individual actions in a single arbitration serves judicial economy and by distributing the costs of the arbitration amongst a large number of class members access to justice is improved. Thirdly, a substantial Award has the same salutary effect as a substantial judgment against a wrongdoer. In the international context of e-commerce, international class action arbitration is the only available, viable dispute resolution mechanism to deal with disputes on a global basis that delivers the three important advantages referred to in *Hollick*.

¹⁶ *Consumer Protection Act, supra*. Section 8(1), 8(2).

¹⁷ [2001] 3 S.C.R. 158

27. The question becomes whether the arbitration agreement is broad enough in its scope to permit class action arbitration. This is a question for the arbitrator to decide. As was stated in the United States Supreme Court decision of *Green Tree Financial Corp. v. Bazzle*:¹⁸

10 The parties agreed to submit to the arbitrator “[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.” *Ibid.* (emphasis added). And the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute “relating to this contract” and the resulting “relationships.” Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (arbitration is a “matter of contract”). And if there is doubt about that matter—about the “scope of arbitrable issues”—we should resolve that doubt “in favor of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Is the prohibition respecting class actions null, abusive or unconscionable?

- 20 28. In this case, the first part of the arbitration agreement provides that any claim, whether in contract, tort, or otherwise, and including statutory, common law, intentional tort and equitable claims may be submitted to arbitration. As discussed above, absent express statutory language prohibiting it, there is no reason why the arbitrator cannot consider whether these words give the claimant a right to bring a class action within the arbitration. The second clause in the arbitration agreement provides that the arbitration will be limited solely to the dispute or controversy between the customer and Dell, the effect of which is to prohibit class action arbitration. Is this clause null, or incapable of being performed because it is abusive, unconscionable, or against public order or public
- 30 policy?

29. The question of whether the prohibition against class action proceedings is abusive or unconscionable is fact specific. In some cases the requirement that a claimant independently proceed with a claim will not be considered

¹⁸ 539 U.S. 444 (2003)

unconscionable as the amounts involved or the nature of the claim is such that no significant procedural right or advantage can be said to have been forfeited by the prohibition.

30. In the case of *Szetela v. Discover Bank*¹⁹ the California Supreme Court analyzed the facts specific to that case to determine whether or not the prohibition against class action arbitration could be said to be unconscionable. The court held:

10 Szetela argues the arbitration agreement, to the extent it prohibits class treatment of small individual claims, is unconscionable and unenforceable. We agree and therefore issue a writ of mandate directing the trial court to strike the portion of the arbitration clause prohibiting class or representative actions... The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their
20 furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored.

31. The court in the *Szetela* case was careful to point out that the question of unconscionability would be fact specific to each case and that there may well be cases in which the prohibition against a class action would not be held to be unconscionable. This occurred in the case of *Gentry v. Superior Court*²⁰, another case from California. The plaintiff claimed that the employer, Circuit City, had
30 misclassified salaried customer service managers as exempt, when instead they should have been classified as non-exempt employees entitled to overtime. The court, applying the *Szetela* reasoning found that the class action waiver clause was not unconscionable, as the case was not the type that clearly involved small

¹⁹ 97 Cal. App. 4th 1094, 118 Cal. Rptr. 2d 862 (2002).

²⁰ *Gentry v. Superior Court*, 135 Cal.App.4th 944, 37 Cal.Rptr.3d 790, 791 (Cal.App. 2006, 2006 WL 137228 (Cal. Ct. App. 2006).

amounts of damages and the plaintiff would not be prejudiced in having to arbitrate his personal claim.²¹

10 32. On the facts of this case there is nothing abusive or unconscionable in requiring the individual Respondent to only arbitrate his claim against the Appellant. The rules of the National Arbitration Forum provide a fair, efficient and cost effective means for resolving consumer disputes.²² Under Québec law, the arbitrator is required to treat both parties fairly in the proceeding. The amount involved is sufficiently significant to pursue the case by way of arbitration. Further, there is nothing in the record to suggest the individual Respondent would not proceed with the arbitration if he had to do so without the benefit of a class action.

33. On the facts of this case, the clause restricting the arbitration to the individual Respondent's case should stand. If the question is arguable, it goes to the validity of the arbitration agreement, a question that is within the arbitrator's jurisdiction to decide.

20 34. If the prohibition on class action arbitration is found to be abusive, then only that clause should fall, not the entire arbitration agreement. The question as to whether the remaining arbitration agreement is broad enough in scope to encompass class action arbitration is for the arbitrator to decide at first instance.

Is the prohibition on class actions against public policy or public order?

35. As stated above, only the province of Ontario has seen fit to enact legislation prohibiting a consumer from waiving the right to bring a class action. Unless

²¹ It must be noted that the United States has not adopted the Model Law. Under the US *Federal Arbitration Act*, (Title 9, US Code Sections 1-14, as am.) the court in many cases determines whether a matter is or is not proceed to arbitration, rather than the arbitrator. It should also be noted that in the case of *Discover Bank v. Superior Court (Boehr)*, 36 Cal. 4th 148, 30 Cal Repr.3d 76 (2005), the *Szetela* decision was said to be wrongly decided as it failed to consider the preeminence of the *Federal Arbitration Act* which took precedence over state legislation dealing with consumer contracts.

²² See *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000)

there is specific legislation prohibiting a party to waive class action rights, the courts should not consider such a waiver to be against public policy. As seen above, there may be cases in which such a clause is unconscionable given the specific facts, but to make a broad generalization that any time a consumer waives a right to class action proceedings the clause should then automatically be struck down as being against public policy is too great an intrusion into party autonomy.

36. Class proceeding legislation is procedural. As held in the case of *Bisaillon v. Concordia University*.²³

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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.

37. If a prohibition against class action proceedings is, in the particular circumstances abusive or unconscionable, the clause may be considered null or inoperative.

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There is no need to invoke the doctrine of public policy or public order to nullify the clause. The doctrines of public order or public policy are concepts of more general application. Absent specific legislative language prohibiting a party from waiving procedural rights to bring a class action, the courts should not invoke the public policy or public order doctrines as a means to nullify a clause prohibiting class action arbitration.

38. The courts in Ontario and British Columbia appear to have adopted an inconsistent approach to arbitration once an allegation is made that a party is attempting to avoid the application of provincial class action legislation through the use of a restrictive arbitration clause.²⁴ The approach in the two *National*

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²³ 2006 SCC 19

²⁴ *Smith v. National Money Mart Co.*, [2005] C43767 (M32748); 258 D.L.R. (4th) 453 (C.A.), leave to appeal to S.C.C. refused 261 D.L.R. (4th). Note this case was decided prior to the change in the Ontario

Money Mart decisions appears to be that class action legislation “trumps” arbitration and that any analysis regarding the ability to arbitrate a claim should be subsumed in and considered as part of the class action proceeding. With all due respect to the provincial courts, this approach is wrong. The courts may have come to the same decision not to stay court proceedings, but should have conducted an orderly and appropriate analysis consistent with the procedures contemplated by Articles 5, 8 and 16 of the Model Law and Canada’s treaty obligations under Article II of the New York Convention. In the case of *Ruddell v. B.C. Rail Ltd.*²⁵, the British Columbia Court of Appeal upheld the motions judge who stated:

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“... I find on balance that the class action proceeding is the preferable method of proceeding. A class proceeding is structured to deal efficiently with large numbers of claimants in a certain and efficient manner. Arbitration was not designed to respond to multi-claimant proceedings and therefore would require constant procedural modification to meet the needs of the parties.

39. This “balancing act” approach is not only inconsistent with the procedures contemplated by the Model Law and the provisions of the New York Convention, the references to arbitration not being designed to respond to multi-claimant proceedings shows a lack of appreciation for the flexibility and sophistication of the arbitral process and the arbitral institutions which, on a regular basis, administer class action arbitrations.

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PART IV- COSTS

40. ADR Chambers Inc. is an intervenor in these proceedings in order to make submissions respecting the common law perspective on these issues. The submissions are for the assistance of the court. As such ADR Chambers Inc. does not seek costs, nor should costs be awarded against it.

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Consumer Protection Act supra fn 15; *MacKinnon v. Instalons Financial Solutions Centres (Kelowna) Ltd.*, [2004] BCCA 573

²⁵ [2005] BCCA 638

PART V- ORDER SOUGHT

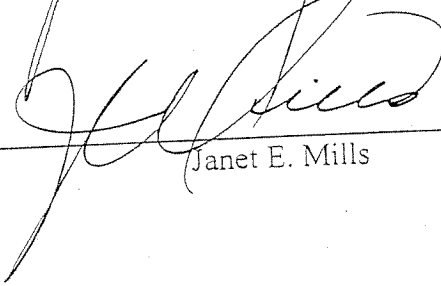
41. ADR Chambers Inc. asks this appeal be allowed and the dispute be referred to arbitration consistent with the procedures referred to above.

All of which is respectfully submitted September 14, 2006

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J. Brian Casey



Janet E. Mills

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Baker & McKenzie LLP
Counsel to ADR Chambers Inc.