S.C.C. File No. 31067

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

B E T W E E N:

DELL COMPUTER CORPORATION

Appellant
(Appellant)

- and -

UNION DES CONSOMMATEURS and OLIVIER DUMOULIN

Respondents
(Respondents)

- and -

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

Interveners

DELL'S SUBMISSIONS ON IMPACT OF BILL 48 ON THIS APPEAL

OSLER, HOSKIN & HARCOURT LLP
1000 de La Gauchetière Street West
Suite 2100
Montréal, Québec H3B 4W5

Mahmud Jamal
Anne-Marie Lizotte
Dominic Dupoy

Tel: (416) 862-6764 / (514) 904-5381 / 5772
Fax: (416) 862-6666 / (514) 904-8101

Counsel for Appellant,
Dell Computer Corporation

OSLER, HOSKIN & HARCOURT LLP
50 O'Connor Street
Suite 1500
Ottawa, Ontario K1P 6L2

Patricia J. Wilson

Tel: (613) 787-1009
Fax: (613) 235-2867

Ottawa Agent for Appellant,
Dell Computer Corporation

TO: THIS HONOURABLE COURT

AND TO: **LAUZON BÉLANGER**
511, Place d'Armes
Bureau 200
Montréal, Québec, H2Y 2W7

Yves Lauzon

Tel. (514) 844-4646
Fax (514) 844-7009

Counsel for Respondents,
Union Des Consommateurs and
Olivier Dumoulin

BERGERON, GAUDREAU, LAPORTE
167, rue Notre-Dame-de-I'Île
Gatineau, Québec J8X 3T3

Richard Gaudreau

Tel. (819) 770-7928
Fax (819) 770-1424

Ottawa Agent for Respondents,
Union Des Consommateurs and
Olivier Dumoulin

AND TO: **MISTRALE GOUDREAU**
University of Ottawa
Fauteux Hall, Room 200
57 Louis-Pasteur Street
Ottawa, Ontario
K1N 6N5

Mistrale Goudreau

Tel. (613) 562-5800 Ext: 3673
Fax (613) 562-5121

Counsel for the Intervener
Canadian Internet Policy and Public
Interest Clinic & Public Interest
Advocacy Centre

AND TO: **BAKER & MCKENZIE LLP**
BCE Place, P.O. Box 874
181 Bay Street, Suite 2100
Toronto, Ontario
M5J 2T3

J. Brian Casey
Janet Mills

Tel. (416) 865-6979
Fax (416) 863-6275

Counsel for the Intervener,
ADR Chambers Inc.

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin St
Box 466 Station D
Ottawa, Ontario
K1P 1C3

Brian A. Crane Q.C.

Tel. (613) 786-0107
Fax (613) 788-3500

Ottawa Agent for the Intervener,
ADR Chambers Inc.

AND TO: **FRASER MILNER CASGRAIN LLP**
1, Place Ville-Marie
Bureau 3900
Montréal, Québec
H3B 4M7

Stefan Martin
Margaret Weltrowska

Tel. (514) 878-5832
Fax (514) 866-2241

Counsel for the Intervener,
ADR Institute of Canada Inc.

FRASER MILNER CASGRAIN LLP
99 Bank Street
Suite 1420
Ottawa, Ontario
K1P 1H4

Thomas A. Houston

Tel. (613) 783-9600
Fax (613) 783-9690

Ottawa Agent for the Intervener,
ADR Institute of Canada Inc.

AND TO: **OGILVY RENAULT**
1981, avenue McGill Collège
Bureau 1100
Montréal, Québec
H3A 3C1

Pierre Bienvenu
Frédéric Bachand
Azim Hussain

Tel. (514) 847-4452
Fax (514) 286-5474

Counsel for the Intervener,
London Court of International Arbitration

OGILVY RENAULT
1600 - 45 O'Connor Street
Ottawa, Ontario
K1P 1A4

Martha A. Healey

Tel. (613) 780-8638
Fax (613) 230-5459

Ottawa Agent for the Intervener,
London Court of International Arbitration

TABLE OF CONTENTS

DELL'S SUBMISSIONS
ON IMPACT OF BILL 48 ON THIS APPEAL

A. Introduction

1. This is Dell's submission on the impact of Bill 48, *An Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts*,[1] on this appeal.

2. By way of overview, Dell respectfully submits as follows:

   (a) Bill 48 does not affect this appeal because the legislation: (i) does not affect pending cases; and (ii) does not affect Dell's vested right to arbitrate this dispute, which Dell exercised by raising a declinatory exception to the Superior Court's jurisdiction *ratione materiae* in 2003; and

   (b) Notwithstanding the enactment of Bill 48, the issues raised in this appeal remain of public importance and should be addressed by the Court.

B. Bill 48

3. The main provision of Bill 48 relevant to this appeal is s. 2,[2] which introduces, for the first time in Québec law, a prohibition of arbitration agreements in consumer contracts before a dispute has arisen, and in particular, a prohibition of pre-dispute waiver of class actions. However, Bill 48 does not render consumer disputes inarbitrable: a consumer may still agree to arbitration, but only after the dispute has arisen. Section 2 of Bill 48 provides as follows:

11.1 Est interdite la stipulation ayant pour effet soit d'imposer au consommateur l'obligation de soumettre un litige éventuel à l'arbitrage, soit de restreindre son droit d'ester en justice, notamment en lui interdisant d'exercer un recours collectif, soit de priver du droit d'être membre d'un groupe visé par un tel recours.	11.1 Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.
Le consommateur peut, s'il survient un litige après la conclusion du contrat, convenir alors de soumettre ce litige à l'arbitrage.	If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.

---

1 2nd Sess. 37th Leg, Quebec, 2006, assented to December 14, 2006 [Dell's Authorities on Impact of Bill 48, tab 1].

2 Amending s. 11 of the *Consumer Protection Act*, R.S.Q., chapter P-40.1.

4. Bill 48 was assented to on December 14, 2006, the day after the argument of Dell's appeal before the Supreme Court of Canada. Section 18 of Bill 48 provides that the provisions of the new law (including s. 2 set out above) come into force on December 14, 2006, except for certain specific provisions that come into force at later dates (between April 1, 2007 and December 15, 2007).

5. Importantly, Bill 48 does not have retroactive effect, nor do any of its provisions affect either pending cases or vested rights under contracts concluded before December 14, 2006.

C. Bill 48 Does Not Affect This Appeal

(a) Bill 48 does not affect pending cases

6. As a general rule, new legislation affecting substantive matters does not apply to pending cases. Professor P.-A. Côté states this general rule in *The Interpretation of Legislation in Canada* as follows:

> In general, new statutes affecting substantive matters do not apply to pending cases, even those under appeal. Since the judicial process is generally declaratory of rights, the judge declares the rights of the parties as they existed when the cause of action arose: the day of the tort, of the conclusion of the contract, the commission of the crime, *etc.* (emphasis added)[3]

7. This Court recently applied the "pending cases" rule in *Canada Trustco Mortgage Co. v. Canada*,[4] where on the facts of that case the Court stated that even retroactive legislation could not affect a judgment under appeal before the Court. At issue was whether a retroactive amendment to s. 245 of the *Income Tax Act*[5] applied to a case pending before the Court. The amendment received Royal Assent after the argument of the appeal but before the Court's judgment was rendered. McLachlin C.J. and Major J. for the Court ruled that such legislation did not apply to the case under appeal:

> A recent amendment to s. 245 (*Budget Implementation Act, 2004, No. 2*, S.C. 2005, c. 19, s. 52) has no application to the judgments under appeal. Although this amendment was enacted to apply retroactively, it cannot apply at this stage of appellate review, after the parties argued their cases and the Tax Court judge

---

3 P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed., 2000), p. 179 (footnotes omitted) [Dell's Authorities on Impact of Bill 48, tab 2].

4 *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 [Dell's Authorities on Impact of Bill 48, tab 3].

5 R.S.C. 1985, c. 1 (5th Supp.).

> rendered his decision on the basis of the GAAR as it read prior to the amendment.[6]

8. The pending case rule similarly applies to this appeal. The right to arbitrate is a substantive contractual right granted by the *Civil Code of Québec*, a right that Bill 48 proposes to modify for consumer cases by amending the *Consumer Protection Act*. This issue concerns the court's (and by implication, the arbitrator's) jurisdiction *ratione materiae*. Thus, since Bill 48 affects substantive matters, it must be presumed that it does not apply to this pending appeal.

9. Professor Côté notes that there are two exceptions to the pending cases rule, neither of which applies in this case.[7] The first exception is for retroactive legislation. As Professor Côté notes:

> [...] a new statute bringing substantive modification is applicable to a pending case if it retroactively modifies the law applicable on the day of the tort, the contract, the crime, *etc.* A pending case, even under appeal, can therefore be affected by a retroactive statute, and even by one enacted while proceedings are pending in appeal.[8]

The exception for retroactive legislation does not apply because Bill 48 does not have retroactive effect. Section 50 of the Québec *Interpretation Act* adopts the general presumption against the retroactivity of legislation: "No provision of law shall be declaratory or have a retroactive effect, by reason alone of its being enacted in the present tense".[9] Nothing in Bill 48 expressly or impliedly gives the legislation retroactive effect.

10. The second exception to the pending cases rule is that procedural legislation has immediate effect and applies even to pending cases. As Professor Côté notes:

---

6 Above, note 4, para. 7. The *Budget Implementation Act, 2004, No. 2*, S.C. 2005, c. 19, s. 52, was assented to on May 13, 2005. The Court heard oral argument in *Canada Trustco* on March 8, 2005 and rendered judgment on October 19, 2005.

7 In the present case, the applicable transitional law principles are those of the common law and not the civilian principles in the *Act respecting the implementation and reform of the Civil Code*, S.Q. 1992, c. 57 ("*Implementation Act*"), as Bill 48 does not concern the coming into force of the *C.C.Q.*: see *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530, para. 29, Bastarache J. [Dell's Authorities on Impact of Bill 48, tab 4]. In any event, the transitional rules in the *Implementation Act* similarly provide that pending cases are governed by former legislation: *Implementation Act*, art. 9, para. 1 ("Proceedings pending continue to be governed by the former legislation").

8 Côté, above, note 3, p. 179.

9 R.S.Q., chapter I-16, s. 50.

> Because procedural provisions apply to pending cases, the term "retroactivity" has been used by analogy with the effect of statutes affecting substantive rights. But procedural enactments do not govern the law that the judge declares to have existed: they only deal with the procedures used to assert a right, and with the rules for conduct of the hearing. It is normal that a statute dealing with trial procedure will govern the future conduct of all trials carried out under its authority. This is not retroactivity but simply immediate and prospective application.[10]

11. Professor Côté notes that the exception for procedural matters is limited in scope: the matter must be procedural *only* and not affect substantive rights. As he explains, citing as authority the decision of LeBel J.A. (as he then was) in *Boislair v. La Guilde des employés de la Cie Toastess Inc.*:

> In dealing with questions of temporal application of statutes, the term 'procedural' has an important connotation: to determine if the provision will be applied immediately, '... the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure *only* and does not affect substantial rights of the parties".
>
> It is not enough for the law to be procedural in nature. For the rule of immediate application to apply, it must, in the specific circumstances in which it will apply, affect 'procedure only', it must be a provision of 'mere procedure' or 'pure procedure'. There are cases where a change in procedure may affect the exercise of a right:
>
> > "Rules of procedure are not always rules concerning form, without any consequence for the substantive law ... in some cases, procedure is so linked with the right itself, and so radically affects it, that the survival of the existing procedure becomes an essential condition for the right itself." (emphasis added)[11]

12. Professor Côté further notes that legislation affecting the jurisdiction of courts is excluded from the exception for procedural matters. As he explains: "A statute that modifies a court's jurisdiction is not generally applicable to pending cases because '... it is well established that jurisdiction is not a procedural matter ...".[12]

13. The exception for the immediate effect of procedural legislation does not apply to Bill 48. Bill 48 is not concerned merely with procedure, but rather affects the substantive contractual right to arbitrate granted by the *Civil Code of Québec*. In addition, the Court's decision will be

---

[10] Côté, above, note 3, pp. 179-180.

[11] *Id.*, pp. 180-181, citing *Boislair v. La Guilde des employés de la Cie Toastess Inc.*, [1987] R.J.Q. 807 (C.A.), LeBel J.A. (as he then was).

[12] *Id.*, p. 183, citing *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038, p. 1040, Pigeon J.

declaratory of the parties' rights as of April 7th, 2003, when Dumoulin placed his online order. Finally, Bill 48 affects the court's jurisdiction *ratione materiae*, by restricting the ability of consumers to agree to arbitration to the exclusion of the courts before a dispute has arisen.

14. For these reasons, Bill 48 does not affect this pending appeal.

(b) Bill 48 does not affect the vested rights in this appeal

15. In addition, Bill 48 does not affect this appeal by virtue of the principle against interference with vested rights. Dell has a vested right to arbitrate any dispute with the respondent Dumoulin in connection with his computer order, a right which Dell exercised by raising a declinatory exception to the Superior Court's jurisdiction *ratione materiae* in the year 2003, more than three years before the adoption of Bill 48. Dell's vested right to arbitrate has not been affected by Bill 48.

16. This Court recently noted in *Dikranian v. Quebec (Attorney General)* that "[t]he principle against interference with vested rights has long been accepted in Canadian law".[13] In the absence of a clear indication to the contrary, it is presumed that a legislature does not intend prejudicially to affect the liberty or property of the subject. As the Court noted,[14] this principle has been codified in interpretation statutes, such as s. 12 of the Québec *Interpretation Act*.[15] The Court in *Dikranian* found that legislation at issue in that case did not affect the vested contractual rights of a student with respect to an interest exemption period for repayment of a student loan. The Court adopted Professor Côté's two criteria for a vested right: "(1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's enactment".[16] The Court found that a vested right exists where it is "vested in a specific individual",[17] and

---

13 *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530, para. 32, Bastarache J.

14 *Id.*, para. 34.

15 R.S.Q., c. I-16, s. 12: "The repeal of an act or regulations made under its authority shall not affect rights acquired, infringements committed, penalties incurred or proceedings instituted; and the acquired rights may be exercised, the infringements prosecuted, the penalties imposed and the proceedings continued, notwithstanding such repeal".

16 *Dikranian*, above, note 13, para. 37.

17 *Id.*, para. 39.

stated that "rights and obligations resulting from a contract are usually created at the same time as the contract itself".[18] In *Dikranian*, the Court found:

> [the] contract was signed and entered into before the new provisions came into force. The contract continued to produce its effects notwithstanding these provisions. The rights and obligations resulting from the contract were fixed and crystallized as soon as the contract was entered into[.] (emphasis added)[19]

17. Here, Dell similarly has a vested right to arbitrate any dispute with Dumoulin. The claimed consumer contract upon which Dumoulin brought suit was entered into, and the parties rights and obligations crystallized, when Dumoulin placed his on-line order in April 2003. There is no clear indication in Bill 48, nor any indication at all, that the legislature intended to interfere with the vested rights of parties to arbitrate that were exercised before Bill 48 came into force. Bill 48 therefore does not affect Dell's vested right to arbitrate in this case.

18. Further, while not necessary to decide in this case, on the basis of *Dikranian* it also appears that other merchants would have vested contractual rights to enforce arbitration agreements in consumer contracts that were concluded before December 14, 2006, when Bill 48 was assented to.

19. For these reasons, the rule against interfering with vested rights is also an independently sufficient basis to find that Bill 48 does not affect this appeal.

D. The Issues Raised In This Appeal Remain Of Public Importance

20. Dell further respectfully submits that, notwithstanding the enactment of Bill 48, the issues raised in this appeal continue to be of public importance and should therefore be addressed by the Court.

(a) *Prima facie* or full review?

21. The central issue on the appeal is the standard of scrutiny or review that a court should undertake when faced with a motion to refer a dispute to arbitration. Should the court conduct a *prima facie* analysis or a full review of the validity of the arbitration agreement? This issue remains important in Québec, nationally, and internationally.

---

[18] *Id.*, para. 40.

[19] *Id.*, para. 49.

22. This issue remains important in Québec, notwithstanding the enactment of Bill 48, for arbitration agreements in all cases not governed by the *Consumer Protection Act*. These include: (1) consumer contracts specifically exempted from the application of the *Consumer Protection Act*, such as: insurance and annuity contracts; contracts of sale of electricity or gas; and contracts regarding transactions governed by the *Securities Act*;[20] and (2) all other non-consumer adhesion contracts and other contracts not governed by the *Consumer Protection Act*, such as: commercial contracts, franchise agreements and construction contracts, to name but a few.

23. This issue also remains important nationally. As Casey and Mills note in their text *Arbitration Law of Canada*, the *UNCITRAL Model Law* – which forms the basis of the arbitration provisions in Québec's *Code of Civil Procedure* applicable to both domestic and international arbitrations – "has been adopted by the Federal Government, and all of the provinces, as the law which governs international commercial arbitrations taking place within their jurisdiction".[21] The *UNCITRAL Model Law* also forms the basis of the domestic arbitration legislation in eight of the ten provinces.[22] As such, the Court's ruling on the applicability of the *prima facie* test will apply across Canada and remains of public importance.

24. This issue also remains important internationally. As Professor Bachand has observed, "[c]ourts in Model Law jurisdictions are currently divided" on whether the *prima facie* test should apply.[23] While Professor Bachand correctly argues that the legislative history of the Model Law "clearly demonstrates" that the *prima facie* test should apply,[24] no national supreme court has yet addressed this issue. This Court's ruling would therefore establish an important international precedent, and is for this reason eagerly awaited by the international community, as confirmed by the intervention of the London Court of International Arbitration in this appeal.

---

20 *Consumer Protection Act*, R.S.Q., c. P-40.1, ss. 5, 6.

21 J. Brian Casey and Janet Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), p. 4 [Dell's Authorities on Impact of Bill 48, tab 5].

22 *Id.*, p. 21. The provinces are Alberta, British Columbia, Manitoba, New Brunswick, Ontario, Nova Scotia, Québec and Saskatchewan.

23 Frédéric Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006), *Arbitration International*, vol. 22, no. 3, p. 463 at p. 463 [Dell's Authorities on Impact of Bill 48, tab 6].

24 *Id.*, p. 473.

(b) Are arbitration agreements, that have the effect of waiving actions (including class actions) before the courts, contrary to public order or abusive?

25. The issue of whether arbitration agreements, that have the effect of waiving actions (including class actions) before the courts, are contrary to public order or abusive also remains of public importance. It is critical to recognize that this issue arises whether or not the relevant arbitration agreement explicitly waives the right to institute a class action before the courts: art. 2638 *C.C.Q.* defines an arbitration agreement as one providing for the resolution of disputes by arbitration "to the exclusion of the courts", and thus implicitly includes any procedure used before the courts, including the class action procedural vehicle. Thus, the question of the relationship between class actions and arbitration necessarily arises for all arbitration agreements. These questions continue to be vital in Québec outside the realm of consumer contracts. While the Court has addressed the relationship between class actions and statutory arbitration in *Bisaillon v. Concordia University*,[25] this appeal requires the Court to address, for the first time, the relationship between class actions and consensual arbitration. The Court's ruling will be relevant across Canada, as currently only Ontario and now also Québec have specific legislation prohibiting pre-dispute mandatory arbitration agreements for consumer disputes. Thus, these issues remain of public importance notwithstanding Bill 48.

26. Bill 48 also supports Dell's argument on the merits that, prior to the enactment of Bill 48, the arbitration agreement in Dell's Terms and Conditions of Sale was not contrary to public order or abusive, and further confirms that any such policy declaration should be made by the legislature rather than the courts. First, Bill 48 (including s. 2 thereof) must be presumed to have a purpose: the legislature did not speak in vain.[26] Bill 48 was intended to change the law by restricting the ability of merchants and consumers to provide for mandatory arbitration before a dispute has arisen. Under the so-called mischief rule of statutory interpretation, this is plainly the commercial practice at which Bill 48 is directed. The legislature appreciated that, unless a new law were enacted, arbitration agreements would be legally effective to preclude actions before the courts, including class actions. By enacting Bill 48, the legislature decided, as a matter of

---

[25] [2006] 1 S.C.R. 666.

[26] Québec *Interpretation Act*, s. 41: "Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit. Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit". See also Côté, above, note 3, pp. 375-381.

policy, to change the law prospectively by allowing consumers the choice of whether to arbitrate after the dispute has arisen. This confirms that the arbitration agreement in Dell's Terms and Conditions of Sale was not contrary to public order or abusive in April 2003. Second, the enactment of Bill 48 also confirms that the arguments of the respondent and the intervener CIPPIC/PIAC on the merits of the appeal are, in effect, an entreaty for the Court to legislate – to enact the terms of Bill 48 through judicial rule and to apply that legislation retroactively to this appeal. With respect, such a policy choice is for the legislature rather than the courts.

27. Finally, Bill 48 shows that *prior to* the enactment of Bill 48 consumer disputes were arbitrable, and indeed, remain arbitrable even *after* the enactment of Bill 48. Bill 48 simply defers the consumer's choice of whether to arbitrate until after the dispute has arisen.

(c) Are hyperlinked terms and conditions of sale "external" in the context of e-commerce?

28. Finally, the appropriate test for an "external clause" in the context of e-commerce remains an issue of public importance. In several recent cases this Court has recognized that the adaptation of legal rules for the Internet is of profound importance to Canadian law. This appeal raises the important question of how and when contractual terms and conditions of sale communicated by on-line merchants to consumers will be binding. While this important issue has been addressed by lower courts in Canada and the U.S., it has yet to be addressed by this Court. This important issue continues to merit clarification.

E. Conclusion

29. In conclusion, for the reasons stated above, Dell respectfully submits that Bill 48 does not affect this appeal, given the pending cases rule and given that Dell has already exercised its vested contractual right to arbitrate by raising a declinatory exception in 2003. Further, Dell respectfully submits that, notwithstanding the enactment of Bill 48, the issues raised by this appeal continue to be of public importance and should be addressed by the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

January 18th, 2007

Mahmud Jamal

Anne-Marie Lizotte

Dominic Dupoy

Osler, Hoskin & Harcourt LLP,
Counsel for Dell Computer Corporation

LIST OF AUTHORITIES

Cases

Doctrine

Legislation