SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-025282-057

DATE: December 20, 2006

THE HONOURABLE MR. JUSTICE A. DEREK GUTHRIE

I-D FOODS CORPORATION
Plaintiff
v.
HAIN-CELESTIAL GROUP INC.
Defendant

JUDGMENT

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[1] The undersigned, acting in chambers, is seized with a basic objection as to his jurisdiction to adjudicate on multiple objections raised by Plaintiff during Defendant's examination before plea of a representative of Plaintiff under article 397(1) C.C.P. The hearing on all the other objections was postponed *sine die* on October 25, 2006.

Relevant Facts

[2] Plaintiff's action, served on Defendant in New York State on April 18, 2005, alleges in part:

- that Plaintiff was the exclusive Canadian distributor of Earth's Best Baby Food and of Celestial Seasonings Brand Teas supplied by Defendant, an American

corporation, and that Defendant terminated the distributor agreement concerning baby food as of May 15, 2003 and the distributor agreement concerning the teas as of September 30, 2003;

- that these two distributor agreements were terminated by Defendant in bad faith in order to avoid it having to reimburse Plaintiff the charge backs authorized under these two agreements;

- that its action is divided into two parts:

    - a claim for authorized charge backs of $317,544 and loss of earnings of $695,027 resulting from the termination of the Earth's Best Baby Food agreement ("Baby Food Claim"); and

    - a claim for authorized charge backs of $203,056 and loss of earnings of $1,526,862 resulting from the termination of the Celestial Seasonings Brand Teas agreement ("Teas Claim").

[3] Defendant filed an appearance on April 28, 2005. It did not make a declinatory exception under article 164 C.C.P. but rather served a motion for particulars on May 31, 2005, which was granted in part June 9, 2005.

[4] On June 10, 2005, in accordance with article 151.1 C.C.P., the parties filed and the Court ratified an agreement as to the conduct of the proceedings in Superior Court.

[5] On July 19, 2005, Defendant, dissatisfied with the particulars furnished by Plaintiff, served a motion to dismiss Plaintiff's action which motion was postponed *sine die* on July 26, 2005.

[6] On July 28, August 4, 9, 10, 17 and 23, 2005, Defendant conducted a lengthy examination before plea of Plaintiff's representative, Jeanne Vetter. Multiple objections were raised by Plaintiff during this examination.

[7] On August 3, 2005, Defendant served a motion asking that the parties be referred to arbitration because of an arbitration clause contained in an agreement mentioned in the Teas Claim. On August 5, 2005, Defendant amended the conclusion of this motion to limit the referral to that part of Plaintiff's action relating to the Teas Claim.

[8] The amended motion was postponed several times but was finally argued before the Court on January 10 and 11, 2006 and on January 11, 2006, the Court rendered the following judgment (the "Arbitration Judgment"):

> "**REFERS** the parties to arbitration in accordance with the provisions of Clause 16 of the Canadian Distributor Agreement dated October 1, 1999 (Exhibit R-1) but

> only with respect to that part of Plaintiff's claim concerning Celestial Seasonings Brand Teas;
>
> **DECLARES** that, in the event the parties do not agree, within 30 days of this judgment, to proceed before a single arbitrator, the arbitration shall take place before three arbitrators appointed in accordance with Art. 941ff C.C.P."

[9] On May 5, 2006, Plaintiff's appeal from the Arbitration Judgment was dismissed by the Court of Appeal.

[10] On June 14, 2006, Plaintiff filed a notice for leave to appeal the Arbitration Judgment to the Supreme Court of Canada.

[11] On June 27, 2006, a judge of the Court of Appeal dismissed Plaintiff's motion, made under article 522.1 C.C.P., to suspend execution of its judgment. The Supreme Court of Canada has yet to render judgment on Plaintiff's motion for leave to appeal.

[12] On July 6, 2006, Justice Courteau of the Superior Court, on a motion by Plaintiff, rendered the following judgment:

> « **DÉCLARE** que les trois arbitres qui doivent être nommés selon les articles 941 et suivants du *Code de procédure civile* conformément au jugement rendu par l'honorable A. Derek Guthrie, le 11 janvier 2006, confirmé par la Cour d'appel le 5 mai 2006, seront des arbitres du Québec et, qu'une fois nommés, ils décideront du lieu où se tiendra l'arbitrage, dans le meilleur intérêt des parties, et en application de la *Loi type de la CNUDCI sur l'arbitrage commercial international*, à laquelle réfère l'article 940.6 du *Code de procédure civile*; »

[13] On November 14, 2006, Plaintiff filed a notice for extension of delays to file its *factum* with the Supreme Court of Canada.

[14] It would appear that neither Plaintiff nor Defendant has yet appointed an arbitrator in accordance with article 941 C.C.P. and that neither party has notified the other to do so under article 941.1 C.C.P.

[15] The case has not yet been inscribed for proof and hearing on the roll of the Superior Court.

Relevant Statutory Provisions

[16] The answer to the jurisdictional question presently before the undersigned depends both upon the proceedings taken by the litigants up to August 3, 2005 in this court action and upon the interpretation of the following articles concerning contractual arbitration found in the *Civil Code* and in the *Code of Civil Procedure*:

Civil Code of Québec

2638. An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.	**2638.** La convention d'arbitrage est le contrat par lequel les parties s'engagent à soumettre un différend né ou éventuel à la décision d'un ou de plusieurs arbitres, à l'exclusion des tribunaux.
2643. Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure.	**2643.** Sous réserve des dispositions de la loi auxquelles on ne peut déroger, la procédure d'arbitrage est réglée par le contrat ou, à défaut, par le Code de procédure civile.
3133. Arbitration proceedings are governed by the law of the country where arbitration takes place unless either the law of another country or an institutional or special arbitration procedure has been designated by the parties.	**3133.** La procédure de l'arbitrage est régie par la loi de l'État où il se déroule lorsque les parties n'ont pas désigné soit la loi d'un autre État, soit un règlement d'arbitrage institutionnel ou particulier.

(Underlining by the undersigned)

Code of Civil Procedure

940.1. Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.	**940.1.** Tant que la cause n'est pas inscrite, un tribunal, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention d'arbitrage, renvoie les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate la nullité de la convention. La procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue tant que le tribunal n'a pas statué.
940.3. A judge or the court cannot intervene in any question governed	**940.3.** Pour toutes les questions régies par le présent Titre, un juge

by this Title except in the cases provided for therein.

940.4. A judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties.

941. There shall be three arbitrators. Each party shall appoint one arbitrator, and the two so appointed shall appoint the third.

941.1. If one of the parties fails to appoint an arbitrator within 30 days after having been notified by the other party to do so, or if the arbitrators fail to concur on the choice of the third arbitrator within 30 days after their appointment, a judge shall make the appointment on the motion of one of the parties.

941.2. If the procedure of appointment contained in the arbitration agreement proves difficult to put into practice, a judge may on the motion of one of the parties take any necessary measure to bring about the appointment.

944. A party intending to submit a dispute to arbitration must notify the other party of his intention, specifying the matter in dispute.

The arbitration proceedings commence on the date of service of the notice.

946.4. The court cannot refuse homologation except on proof that

[…]

3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration

ou le tribunal ne peut intervenir que dans les cas où ce titre le prévoit.

940.4. Avant ou pendant la procédure arbitrale, un juge ou le tribunal peut accorder, à la demande d'une partie, des mesures provisionnelles.

941. Les arbitres sont au nombre de trois. Chaque partie nomme un arbitre et ces arbitres désignent le troisième.

941.1. Si, 30 jours après avoir été avisée par une partie de nommer un arbitre, l'autre partie ne procède pas à la nomination ou si, 30 jours après leur nomination, les arbitres ne s'accordent pas sur le choix du troisième arbitre, un juge, à la demande d'une partie, procède à la nomination.

941.2. En cas de difficulté dans la mise en oeuvre de la procédure de nomination prévue à la convention d'arbitrage, un juge peut, à la demande d'une partie, prendre toute mesure nécessaire pour assurer cette nomination.

944. La partie qui entend soumettre un différend à l'arbitrage doit en donner avis à l'autre partie, en y précisant l'objet du différend.

La procédure arbitrale débute à la date de la signification de cet avis.

946.4. Le tribunal ne peut refuser l'homologation que s'il est établi:

[…]

3° que la partie contre laquelle la sentence est invoquée n'a pas été dûment informée de la désignation d'un arbitre ou de la procédure

proceedings or was otherwise unable to present his case;	arbitrale, ou qu'il lui a été impossible pour une autre raison de faire valoir ses moyens;
[…]	[…]
5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.	5° que le mode de nomination des arbitres ou la procédure arbitrale applicable n'a pas été respecté.

(Underlining by the undersigned)

Discussion

Arbitral Jurisdiction v. Court Jurisdiction

[17] For twenty years now, arbitration tribunals have been part of the justice system of Quebec. During this period, the Quebec legislature has recognized the existence and legitimacy of the consensual "private justice system", which exists in parallel with the public court system.[1] However, the powers of an arbitration tribunal established under the terms of an arbitration clause in a contract are not the same as the powers of the Superior Court in civil matters. As Justice Thibault of the Court of Appeal points out:

> « […] Le fait que l'arbitrage consensuel fasse l'objet d'une attention du législateur au *Code de procédure civile* ne transforme pas ce tribunal privé en tribunal statutaire puisque l'arbitre ne tire pas ses pouvoirs de la loi, mais de la volonté des parties. […] »[2]

Or, as the Minister of Justice Herbert Marx (now a judge of the Superior Court) stated during the proceedings of the Assemblée nationale discussing the proposed amendments to the *Code of Civil Procedure* in 1986:[3]

> « […] Le pouvoir des arbitres se rapproche de celui des juges sauf que les arbitres tiennent ce pouvoir d'une convention privée sans être investis par l'État. »

[18] Jurisprudence recognizes certain similarities between arbitration clauses and choice of *forum* clauses in commercial contracts. However, there is a basic difference between the **jurisdiction** created under an arbitration clause and the **jurisdiction** referred to in a choice of *forum* clause. Under the terms of an arbitration clause, the arbitration tribunal does not come into existence until the appointment of the arbitrators

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1 *Desputeaux* v. *Éditions Chouette*, [2003] 1 S.C.R. 178 at 207-08, para. 42; *Grecon Dimter Inc.* v. *J.R. Normand Inc.*, [2005] 2 S.C.R. 401 at 422, para. 38

2 *Laurentienne-Vie (La), compagnie d'assurances inc.* v. *Empire (L'), compagnie d'assurance-vie*, [2000] R.J.Q. 1708 at 1712, para. 16 (C.A.)

3 Québec, Assemblée nationale, Journal des débats, No. 55 – Vol. 29 (October 30, 1986) at 3672

is completed. In a choice of *forum* clause, the alternative deciding organism is already in place.

[19] Until the procedure of the appointment of the arbitrators is properly completed, the arbitration tribunal has no legal existence,[4] i.e., until that moment there is only a **potential** jurisdiction. It should also be noted that the **jurisdiction** of Quebec arbitration tribunals is not as airtight or comprehensive as the jurisdiction of those Quebec courts listed in article 22 C.C.P.

[20] Although the Superior Court's lack of jurisdiction resulting from an arbitration clause is a lack of jurisdiction by reason of the subject matter,[5] and notwithstanding article 164 C.C.P., lack of jurisdiction cannot be declared by the Court of its own motion; it can only be raised by one of the parties to the contract containing the arbitration clause.

[21] Professor John E.C. Brierley, in his chapter on arbitration agreements in *La Réforme du Code civil,*[6] states:

> « Au long de cette étude de la convention d'arbitrage, l'on a voulu souligner que le recours à des arbitres constitue, d'une part, un substitut à l'action en justice et que, d'autre part, il assure la mise en place d'une juridiction parallèle aux tribunaux étatiques, en ce sens que les parties attribuent volontairement la connaissance de leur litige à un tribunal créé par elles-mêmes. L'arbitrage, donc, peut se concevoir comme moyen juridictionnel de régler les conflits, ce qui ne nie en rien sa nature d'origine volontaire et contractuelle. Il convient d'insister, cependant, que si la convention comporte la mise en place d'une juridiction privée qui implique l'incompétence en principe des tribunaux étatiques, ces derniers continuent néanmoins de jouir de leur droit de surveillance sur l'arbitrage.
>
> […]
>
> La deuxième condition à remplir, toujours selon l'article 940.1 C.c.p., concerne la demande, par une partie, du renvoi du litige à l'arbitrage. On peut s'attendre, en effet, de la part du défendeur à l'action qu'il manifeste sa volonté de ne pas être considéré comme ayant fait acte d'acquiescement à l'action ou de renonciation à la convention. L'incompétence du tribunal n'est que relative. Elle ne saurait être soulevée d'office par le tribunal lui-même. Le défendeur devra faire état de l'exécution de ses propres obligations découlant de la convention, c'est-à-dire au minimum qu'il a fait parvenir à l'autre partie l'avis mentionné à l'article 944 C.p.c. en y précisant ses prétentions ou sa volonté de ce faire. »
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> (Underlining by the undersigned)

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4 See *Leduc* v. *Houle* (July 22, 1996), Montréal 500-05-016120-964 (C.S.), Décarie J.

5 See *Zodiac International* v. *Polish People's Republic*, [1983] 1 S.C.R. 529 at 550

6 *« De la convention d'arbitrage—Articles 2638-2643 »* in *La Réforme du Code civil—Obligation, contrats nommés*, t. 2 (Sainte-Foy, Québec: Presses de l'Université Laval, 1993) 1067 at 1085-87

Arbitration Judgment is not Retroactive

[22] From the date of service of Plaintiff's action on April 18, 2005 up until August 3, 2005, Defendant, (a) by its motion for particulars, (b) by signing the agreement as to the conduct of proceedings in the Superior Court, (c) by its motion to dismiss Plaintiff's action following the particulars filed by Plaintiff, and (d) by proceeding to a lengthy examination on discovery of Plaintiff's representative, led Plaintiff to believe that Defendant was accepting the jurisdiction of the Court in this matter.

[23] It is true that Defendant had the right (at least up until inscription for proof and hearing) to request the Court to refer the Teas Claim part of the court action to arbitration. However, the undersigned is of the opinion that the Arbitration Judgment of the Court did not have retroactive effect back to the date of service of the action and did not annul the prior proceedings before the Court. The undersigned cannot retroactively revisit answers which were given by Plaintiff's representative to questions or undertakings which were communicated by Plaintiff up to January 11, 2006.

[24] Nevertheless, it is not up to the undersigned to decide whether the arbitrators, once they have been appointed, will or will not use, in whole or in part, the particulars already furnished by Plaintiff or the transcription of the examination on discovery of Jeanne Vetter. These are decisions that only the arbitrators have the power to make.

Inherent Powers under Articles 20 and 46 C.C.P.

[25] It must also be pointed out that, because of article 940.3 C.C.P., the undersigned cannot intervene by using the Superior Court's inherent powers under articles 20 and 46 C.C.P.

[26] The rules of procedure in the *Code of Civil Procedure* are intended to render effective the substantive law and to ensure that it is carried out. As Justice LeBel pointed out in *Lac d'Amiante Québec* v. *2858-0702 Québec Inc.*,[7] writing for a unanimous full bench of the Supreme Court of Canada:

> « De plus, le droit procédural reconnaît des pouvoirs inhérents aux tribunaux pour régler des situations non prévues par la loi ou les règles de pratique. (Voir *Société Radio-Canada* c. *Commission de police du Québec*, [1979] 2 R.C.S. 618.) Des décisions de gestion ponctuelles peuvent également être rendues nécessaires par les particularités de certains dossiers. Cependant, ces pouvoirs inhérents ou accessoires, que consacrent d'ailleurs les art. 20 et 46 C.p.c., n'accordent aux tribunaux qu'une fonction subsidiaire ou interstitielle dans la définition du contenu de la procédure québécoise. La loi prime. Les tribunaux doivent baser leurs décisions sur celle-ci. […] »

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7 [2001] 2 S.C.R. 743 at 764, para. 37

[27] A superior court's inherent powers exist to complement the statutory assignment of specific powers, not to override or replace them.[8] The undersigned does not have the inherent power to create a positive rule of civil procedure simply because he might consider it appropriate to do so.[9]

The Court of Appeal on Arbitral Jurisdiction

[28] Three years before the coming into effect of Book VII (entitled "Arbitration") of the *Code of Civil Procedure* on November 11, 1986, the Court of Appeal had held that by examining a plaintiff on discovery, defendants created a presumption that they waived the arbitration clause and accepted the jurisdiction of the Superior Court.[10] However, one year **after** the coming into effect of Book VII, the Court of Appeal decided that a delay of five months after institution of the action was **not** sufficient to create a presumption of renunciation of arbitration under an arbitration clause.[11]

[29] Two years before the coming into effect of the *Civil Code of Québec*, the Court of Appeal had two occasions to consider the effect of article 940.1 C.C.P. The case of *LaSarre (Ville de)* v. *Gabriel Aubé Inc.*[12] concerned a damage claim based on a contract with an arbitration clause. *La Sarre* had inscribed for proof and hearing before the Superior Court on December 17, 1990. However, five days earlier, defendant had served a notice of arbitration specifying the matter in dispute, appointing its arbitrator and putting *La Sarre* in default to appoint its arbitrator. Defendant had then made another motion asking the Court to suspend all proceedings and to appoint the arbitrator of *La Sarre*, which motion the Superior Court granted on July 10, 1991. In the Court of Appeal, after qualifying the dispute as presenting *« des circonstances tout à fait exceptionnelles »*, Baudouin J., speaking for the Court, held:

> « Je suis donc d'avis qu'à partir du moment où la Cour supérieure accordait la demande de nomination de l'arbitre, elle ne pouvait décréter la suspension des procédures. L'octroi de cette demande constituait, en effet, un renvoi à l'arbitrage et les tribunaux judiciaires perdaient alors leur compétence. »[13]

[30] One month later, in *Wolray Hotels Ltd* v. *Quebec City Hotel Partner-Ship*,[14] a different bench of the Court of Appeal was considering a Superior Court judgment referring the parties to an arbitration tribunal *« à être formé »*. Citing its *LaSarre* decision, the Appeal Court stated:

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8 See *MacMillan Bloedel Ltd* v. *Simpson*, [1995] 4 S.C.R. 725 at 772, para. 78
9 *Lac d'amiante Québec* v. *2858-0702 Québec Inc.*, *supra*, note 7 at para. 39
10 *Monette* v. *Couture*, [1983] C.A. 568 at 572
11 *Peintures Larvin Inc.* v. *Mutuelle des fonctionnaires du Québec,* [1988] R.J.Q. 5 at 7 (C.A.)
12 [1992] R.D.J. 273 (C.A.)
13 *Ibid.* at 280
14 [1992] R.D.J. 349 (C.A.)

> « Considérant par ailleurs que le renvoi à l'arbitrage enlève toute compétence aux tribunaux judiciaires, et que la Cour supérieure, accordant ce renvoi, n'a plus aucune compétence pour décréter la suspension des procédures; »[15]

[31] These decisions predate by two years the coming into effect of the *Civil Code of Québec* with its new articles on arbitration agreements. Furthermore, the *ratio decidendi* of each decision is limited to the narrow point that the Superior Court loses its jurisdiction to suspend the court proceedings once it refers the matter to arbitration.

[32] Recently, in *Boiler Inspection and Insurance Company of* Canada v. *Moody Industries Inc.*,[16] the Court of Appeal, citing its *LaSarre* and *Wolray Hotels* decisions, stated in a judgment penned by Tessier J.:

> « La signification à l'assureur de l'avis de l'assurée le 27 avril 2000 enclenche la procédure arbitrale (art. 944 C.p.c.). Bien qu'aucune requête ne soit présentée pour renvoi des parties à l'arbitrage, l'octroi d'une demande de nomination d'un arbitre constitue un renvoi implicite à l'arbitrage et le tribunal judiciaire perd dès lors compétence à statuer sur une question au sujet de laquelle les parties ont conclu la convention d'arbitrage, soit en l'instance la valeur des dommages.
>
> Les parties peuvent cependant renoncer d'un commun accord à l'arbitrage et décider de soumettre le litige à un tribunal judiciaire. L'inscription de la cause pour enquête et audition après contestation liée (art. 274 C.p.c.) emporte renonciation à l'arbitrage; c'est la raison pour laquelle aucun renvoi à l'arbitrage n'est permis après l'inscription (art. 940.1 C.p.c.). Ce renvoi en l'instance a lieu avant inscription pour enquête et audition, mais après conclusion de cette entente portant sur l'un des objets de l'arbitrage éventuel. »

However, Tessier J.'s remark concerning loss of jurisdiction is *obiter dicta* inasmuch as the subject matter that was to be arbitrated had already been settled by an agreement before the Superior Court's « renvoi implicite » to arbitration.

[33] Although, it has been suggested that it is inappropriate for the Superior Court, when considering the interpretation of a section of a statute, to refuse to follow an earlier decision of the Court of Appeal interpreting the same section of the statute, the undersigned believes that the situation he is now confronted with can be distinguished from these three earlier judgments for the reasons mentioned above.

"Arbitration Proceedings" v. "Procedure of Appointment"

[34] It is important to note how the following three phrases are used in certain articles of the *Civil Code* and of the *Code of Civil Procedure* concerning arbitration:

- "procedure of arbitration" (« la procédure d'arbitrage »);

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15 *Ibid.* at 350

16 [2006] R.R.A. 556 at para. 101 and 102

- "arbitration proceedings" (« la procédure arbitrale »);

- "the procedure of appointment" (« la procédure de nomination »).

When one looks carefully at the language of articles 941.1, 941.2, 942.8, 946.4(3) and 946.4(5) C.C.P., it appears that the **procedure of appointment** of arbitrators and **the arbitration proceedings** themselves deal with two different stages under an arbitration clause. The phrase "arbitration proceedings" (« la procédure arbitrale ») as used in articles 940.1, 940.4, 942.4, 943.1, 943.2 and 944.5 C.C.P., the phrase "the procedure of arbitration" (« la procédure d'arbitrage ») as used in article 2643 C.C.Q. and the phrase "arbitration proceedings" (« la procédure de l'arbitrage ») used in article 3133 C.C.Q. must mean proceedings taking place **after the appointment of the arbitrators has been completed**.

[35] As Professors J.A. Talpis and J.-G. Castel explain in their comments on article 3133 C.c.Q.:[17]

> « […] Par procédure d'arbitrage, il faut entendre tout le déroulement de l'arbitrage depuis la nomination des arbitres jusqu'à la notification de la sentence, y compris les recours, à l'exclusion de ce qui tombe dans le domaine de l'article 3121 et de la reconnaissance et de l'exécution des sentences arbitrales. »
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> (Underlining by the undersigned)

[36] It appears that the application of an arbitration clause in a contract can be triggered in two possible ways:

a. by one of the contracting parties serving the notice mentioned in article 944 C.C.P. **before** the parties have commenced an action in the courts; or

b. when court proceedings have already been instituted, by one of the parties requesting the Court, under article 940.1 C.C.P., to refer them to arbitration.

[37] If "arbitration proceedings" commence on the date of service of the notice of intention to submit a dispute to arbitration and specifying the matter in dispute, then part of article 940.4 C.C.P. does not seem to make sense. How could a court grant provisional measures **before service of the notice specifying the matter in dispute**!

[38] The second paragraph of article 944 C.C.P. seems to be somewhat of an anomaly when one looks at how the phrase "arbitration proceedings" (« la procédure arbitrale ») is used in the other articles of Book VII of the *Code of Civil Procedure* and, in particular, in subparagraphs (3) and (5) of article 946.4 C.C.P. where the phrase is juxtaposed with the phrase "appointment of arbitrators".

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[17] « *Le Code civil du Québec : Interprétation des règles du droit international privé* » in *La Réforme du Code civil*, t. 3 (Sainte-Foy, Québec: Presses de l'Université Laval, 1993) 807 at 899

[39] If the same phrase "arbitration proceedings" were to be interpreted to include everything after service of the notice of intention, articles 943 and 943.1 C.C.P. become difficult to understand. For example, how could the arbitrators, who might eventually compose the arbitration tribunal, declare themselves competent during the procedure for their appointment?

[40] To suggest that the Superior Court loses jurisdiction the moment it refers the parties to arbitration under article 940.1 C.C.P. is not quite correct. Up until the arbitration proceedings actually commence in front of the arbitration tribunal, the Court retains a kind of concomitant jurisdiction and may:

a. grant provisional measures (article 940.4 C.C.P.);

b. take measures necessary to appoint arbitrators (articles 941.1 and 941.2 C.C.P.);

c. decide on the recusation of an arbitrator (article 942.4 C.C.P.)

FOR THESE REASONS, THE UNDERSIGNED:

DECLARES that he does not have jurisdiction to adjudicate upon objections made and undertakings taken during the examination before defence of Plaintiff's representative, Ms Jeanne Vetter, which took place on July 28, August 4, 9, 10, 17 and 23, 2005 and which relate exclusively to the Celestial Seasonings Brand Teas claim portion of the present action;

DECLARES that he is not seized of any of the other objections which were all continued *sine die* on October 25, 2006;

THE WHOLE, without costs.

A. Derek Guthrie, J.S.C.

Me Edward Figlarz
Bernier Figlarz
Attorneys for Plaintiff

Me Jeremy Wisniewski
McMillan Binch Mendelsohn
Attorneys for Defendant

Date of hearing: October 25, 2006