Federal Court Cour fédérale

Date: 20150807

Docket: T-1754-09

Citation: 2015 FC 958

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 7, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

KERRY MURPHY

Plaintiff

and

COMPAGNIE AMWAY CANADA
and
AMWAY GLOBAL

Defendants

JUDGMENT AND REASONS

I. Introduction

[1] This is a motion for certification of this proceeding as a class proceeding (the Motion for Certification), in accordance with Part 5.1 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

[2] The plaintiff is a former member of the network of distributors of the defendant, Compagnie Amway Canada (Amway Canada),[1] a multi-level marketing business specializing in the sale and distribution of home, personal care, beauty and health products, and he claims to have been harmed by the defendant's business practices. More specifically, he accuses the defendant of operating under a business model that contravenes the *Competition Act*, RSC 1985, c C-34 (the Act) and argues that he is therefore entitled to claim damages from the defendant pursuant to section 36 of the Act, which gives any person who has suffered loss or damage as a result of anticompetitive conduct prohibited by Part VI of the Act the right to sue the perpetrator of such conduct for the loss or damage suffered.

[3] In this regard, the plaintiff alleges that Amway Canada recruits its distributors—who are referred to as "independent business owners" (IBOs) in Amway Canada's jargon and form the heart of the company's business structure—on the basis of false and misleading representations regarding their compensation and the fact that the company in fact operates a pyramid sales scheme, contrary to sections 52, 55 and 55.1 of the Act.

[4] The plaintiff seeks leave to undertake this proceeding on behalf of all persons resident in Canada who have distributed the defendant's products, since October 2007, excluding the

[1] Amway Global's status as co-defendant is disputed. The plaintiff alleges that Amway Global is a body corporate incorporated in the United States and headquartered in Michigan and that it is the parent company of Compagnie Amway Canada. Amway Canada argues that Amway Global is a trade mark under which it does business. For the purposes of this judgment, there is no need to consider this issue. Any reference to Amway Canada in this judgment shall therefore be taken to refer to Compagnie Amway Canada and Amway Global without distinction.

defendant's employees and their affiliates and family members.[2] The plaintiff is of the view that this class could represent up to 30,000 people.

[5] Having initially set his monetary claim and that of the class members at $15,000, the plaintiff had to reduce the claim to $1,000 because of an arbitration agreement in the contract documents signed by the parties, an agreement to which this Court—and the Federal Court of Appeal after it (*Kerry Murphy v Amway Canada Corporation and Amway Global*, 2013 FCA 38)—has given full effect, with the Court asserting jurisdiction to rule on claims of $1,000 or less.

[6] For the reasons that follow, I would dismiss the Motion for Certification.

II. **Background**

A. *Basis of plaintiff's action*

[7] The plaintiff instituted his action in October 2009 by filing a statement of claim (the Statement of Claim). This was done a few weeks after the plaintiff terminated his most recent IBO network membership contract with Amway Canada. This contract was in force from June 2008 to December 31, 2009. At the time, the plaintiff's spouse, Cheryl Rhodes, was co-plaintiff in this matter. She has since withdrawn from the case.

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2 The Statement of Claim was prepared in English. The description of the class on behalf of which the plaintiff wishes to bring the class action is described as follows: "All persons resident in Canada who distributed defendant's products, since October 2007, excluding the defendant's employees and their affiliates and family members".

[8] In the judgment cited above ruling on the applicability and enforceability of the arbitration agreement in respect of the plaintiff's original claim (*Kerry Murphy v Compagnie Amway Canada and Amway Global*, 2011 FC 1341 [*Murphy*]), Justice Richard Boivin (now judge of the Federal Court of Appeal) described Amway Canada's business model in the following terms:

> [6] 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".
>
> [7] 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.

[9] The plaintiff, as I have already mentioned, submits in the Statement of Claim that Amway Canada violated sections 52, 55 and 55.1 of the Act in two ways: first, by recruiting its IBOs on the basis of false and misleading representations regarding their prospects for financial success and, more specifically, their compensation; and second, by operating a scheme of pyramid selling. The relevant portions of these three provisions read as follows:

False or misleading representations	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;	a) qu'une personne a été trompée ou induite en erreur;
(*b*) any member of the public to whom the representation was made was within Canada; or	b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;
(*c*) the representation was made in a place to which the public had access.	c) que les indications ont été données à un endroit auquel le public avait accès.
. . .	[…]
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

(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 (*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.

Assertions quant à la rémunération

(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.

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

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.

received by typical participants in the plan, having regard to any relevant considerations, including those specified in paragraph (2)(*b*).

Due diligence defence

Défense

(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

(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*) that no representations relating to compensation under the plan were made by participants in the plan or by representatives of the accused; or

a) soit ses représentants ou les participants ne fassent aucune déclaration concernant la rémunération versée au titre du système;

(*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.

b) soit leurs déclarations respectent les critères énoncés au paragraphe (2).

. . .

[…]

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

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*) 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;

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*) 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;	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*) a person knowingly supplies the product to a participant in the plan in an amount that is commercially unreasonable; or	c) une personne fournit, sciemment, le produit en quantité injustifiable sur le plan commercial;
(*d*) a participant in the plan who is supplied with the product	d) le participant à qui on fournit le produit :
(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 reasonable commercial terms, or	(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 raisonnables,
(ii) is not informed of the existence of the guarantee or right and the manner in which it can be exercised.	(ii) soit n'en a pas été informé ni ne sait comment s'en prévaloir.
. . .	[…]

(1) False and misleading representations

[10] In this regard, the plaintiff alleges that Amway Canada promotes its business model by emphasizing the unlimited opportunities for an IBO to develop a lucrative business that will ensure the IBO's financial independence, freedom and success, whereas in reality, in his view, nearly all IBOs lose money or earn a zero or negative net income.

[11] More specifically, he submits that Amway Canada's representations regarding IBOs' compensation do not meet the requirements of section 55 of the Act. On this point, he argues that said representations are based not on real data regarding the compensation that a "typical participant" in its multi-level marketing plan actually receives, or is likely to receive, as said section requires, but on outdated figures based on the "gross" income of an "active" participant, that is, on figures that do not account for the operating costs incurred by IBOs and that rely on a sampling of IBOs that is not representative of the "typical participant".

[12] The plaintiff argues on this point that the information on the compensation of a "typical participant" should be representative of the smallest income range earned by more than 50% of the participants in such a marketing plan, an approach which, unlike what Amway Canada does, excludes compensation data from the handful of participants earning a high income.

[13] He therefore alleges that Amway Canada is violating not only section 55 of the Act, but also section 52, by knowingly or recklessly making representations to the public that are false or misleading in a material respect related to the promotion of its business interests.

(2) Amway's business model is in the nature of a scheme of pyramid selling

[14] The plaintiff alleges that Amway Canada's multi-level marketing plan has the following two characteristics of a scheme of pyramid selling. First, this system links an IBO's membership or access to the full benefits of the plan, such as performance bonuses, to the monthly purchase of a significant quantity of Amway products at a price higher than cost, which is contrary to paragraph 55.1(*b*) of the Act.

[15] Second, the plaintiff alleges that IBOs cannot avail themselves of a buy-back clause, or one that allows them return products in saleable condition, on reasonable commercial terms. According to the contract between an IBO and Amway Canada, the IBO cannot return products to Amway Canada after buying them from the company. Rather, buy-back is allegedly left entirely up to the discretion of the IBO from whom the products were purchased, and ultimately to the discretion of Amway Canada, and is conditional on terminating the membership contract of the IBO seeking the buy-back, which is contrary to paragraph 55.1(*d*) of the Act. According to the plaintiff, the formal requirements to be met are such that they discourage IBOs from availing themselves of said buy-back clause, which once again is contrary to this provision.

(3) Right to recovery of loss or damage suffered

[16] The plaintiff submits that subsection 36(1) of the Act confers the right to claim and recover loss or damage resulting from what he views as the anti-competitive conduct of Amway Canada. He alleges that between June 2008 and August 2009, the period during which his most recent IBO network membership contract with Amway Canada was in effect, he suffered losses totalling $15,000. Subsection 36(1) reads as follows:

Recovery of damages	Recouvrement de dommages-intérêts
36. (1) Any person who has suffered loss or damage as a result of	36. (1) Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	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,
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.	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.

B. ***Procedural history***

[17] The procedural history of this action is already rather extensive, which explains why, despite having been instituted nearly six years ago, we are still only at the stage where we must decide whether it can go forward as a class proceeding and certain preliminary motions are still pending.

[18] When the Statement of Claim was filed, as we have seen, in October 2009, Amway Canada reacted by submitting a number of preliminary motions, including one to have the case dismissed, or permanently stayed, on the basis that the plaintiff's claim is subject to a compulsory binding arbitration process under the contract he signed when he joined Amway Canada as an IBO.

[19] Amway Canada submits that it is up to the arbitrator described in the arbitration agreement, not this Court, to rule on the scope, validity and enforceability of said agreement. In a judgment dated July 2, 2010, Justice Robert Mainville (now a judge on the Quebec Court of Appeal), who managed the proceeding as required under Rule 384.1, rejected this argument and concluded that this issue is within the jurisdiction of the Court (*Cheryl Rhodes and Kerry Murphy v Compagnie Amway Canada et Amway Global*, 2010 FC 724). That judgment was appealed, but Amway Canada discontinued its appeal a few months later.

[20] In the meantime, in June 2010, the plaintiff filed the Motion for Certification. This motion was eventually scheduled to be heard at the same time as the motion to stay proceedings

based on the arbitration agreement. The Court was also asked to rule on this same occasion on two other preliminary motions filed by Amway Canada: one to strike some affidavits and exhibits filed in support of the Motion for Certification, and the other for a confidentiality order regarding responses to certain undertakings made during the cross-examination of one of Amway Canada's affiants.

[21] In addition to his own and that of his spouse, Ms. Rhodes, the plaintiff filed three affidavits in support of the Motion for Certification:

a. The affidavit of Bruce A. Craig, a former deputy attorney general in the Wisconsin Department of Justice, who states that in this capacity, between 1967 and 1997, he was involved in several cases dealing with companies operating schemes of pyramid selling in the United States, including Amway, whom the state of Wisconsin accused of attracting distributors through false representations regarding their compensation;

b. The affidavit of Robert Fitzpatrick, an American who presents himself as an expert on the multi-level marketing industry, and who attempts to show that, as is the case in the United States, the vast majority of people who join Amway Canada's IBO network, whose business model is allegedly similar to that of the American parent company, incur more expenses than can be covered by the income generated; and

c. The affidavit of William Powell, who says that he was a member of Amway Canada's IBO network on two occasions, between 1994 and 1998 and between 2002 and 2007, and claims that he was never able to generate any net income, on either occasion.

[22] Amway Canada responded by filing the following:

a. An affidavit by Gary VanderVen, who at the time held the position of Director, Business Conduct and Rules and Business Support Materials Administration at Amway Corporation's office in Ada, Michigan;

b. An affidavit by Jeff W. Johnson, who at the time held the position of National Sales Manager – Canada & Caribbean at Amway Canada;

c. The affidavit and expert report of Anne T. Coughlan, a marketing professor at the Kellogg School of Management of Northwestern University, in Illinois; and

d. Affidavits from Merel Weber, Ronald Maintland, Youngio Han, Oksoo Han, Jay Morrow, Kimberly D. Coles, Garry Coles and Esmon Emmons, eight members of Amway Canada's IBO network who testify about their experience as members and, in certain cases, about discussions they may have had with the plaintiff regarding his relationship with Amway Canada.

[23] On November 23, 2011, Justice Boivin, who took over as case management judge, decided, as we have seen, that the arbitration agreement was applicable and enforceable with respect to the plaintiff's claim and therefore stayed the proceeding, as permitted under subsection 50(1) of the *Federal Courts Act*. In the circumstances, he found that there was no need to rule on the other three motions. Although he allowed the motion to stay proceedings, he stated that the Court nevertheless had jurisdiction to proceed with claims not exceeding $1,000 (*Murphy*, above at para 28).

[24] Dissatisfied with that judgment, the plaintiff filed an appeal, but it was dismissed by the Federal Court of Appeal on February 14, 2013 (*Kerry Murphy v Amway Canada Corporation and Amway Global*, 2013 FCA 38). A few days later, he applied to the Court to amend his claim so as to reduce the quantum to $1,000 and thereby lift the stay of proceedings issued on November 23, 2011. Amway Canada objected to that application, arguing that the stay was final in nature and therefore could not be lifted.

[25] In an order dated October 9, 2013, Justice Boivin lifted the stay of proceedings, on condition that the plaintiff's amended claim—with which he proceeded on October 17, 2013—in fact limits the claim to $1,000 or less and that the plaintiff formally wave his right to bring a claim for the remainder before an arbitrator, as he otherwise would have been allowed to do under the arbitration agreement between the parties. This time, Amway Canada was dissatisfied with the decision, so it appealed to the Federal Court of Appeal to have the permanent nature of Justice Boivin's stay from November 2011 recognized. That appeal was dismissed on May 27, 2014 (*Compagnie Amway Canada and Amway Global v Kerry Murphy*, 2014 FCA 136).

[26] The preliminary issue related to the presence of an arbitration agreement in the contract between the parties being settled, the Court must now decide whether the plaintiff's action can be certified as a class proceeding.

[27] Two other preliminary motions remained pending while this issue was being settled: the motion by which Amway Canada was trying to have the affidavits and exhibits submitted in support of the Motion for Certification struck, and the motion for a confidentiality order regarding the responses to certain undertakings made during the cross-examination of one of its affiants. Given the conclusions I have reached in respect of the Motion for Certification, there is no need to dispose of the other two motions.

[28] Amway Canada also announced its intention to challenge the constitutionality of section 36 of the Act on the grounds that it is *ultra vires* Parliament. The parties nonetheless agreed to link the necessity of debating this issue to the outcome of the Motion for Certification.

C. *Conditions for certifying class proceeding*

[29] According to Rule 334.16, a class proceeding will be certified where the following conditions are met:

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.

[30] To succeed in having a proceeding certified as a class proceeding, a party must show that it has met each and every one of these conditions. However, once this burden has been discharged, the Court has no discretion in the matter and must grant certification (*Buffalo v Samson Cree Nation*, 2008 FC 1308, [2009] 4 FCR 3 [*Samson*], at paras 34-35; affirmed by the Federal Court of Appeal, *Buffalo v Samson Cree Nation*, 2010 FCA 165).

[31] Rule 334.18, meanwhile, sets out the factors that cannot be used to justify not certifying a proceeding as a class proceeding. The Court cannot refuse to issue such a certification on the grounds that the relief claimed (i) includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact, (ii) relates to separate contracts involving different class members, or (iii) are sought for different class members.

[32] In addition, under Rule 334.18, the fact that the precise number of class members or the identity of each member is not known, or that the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members, cannot serve as grounds for refusing to certify a proceeding as a class proceeding.

[33] Moreover, as the Court noted in *Samson*, above, it must always be remembered that determining whether a proceeding should be certified as a class proceeding is a procedural

matter. The issue is therefore not whether the litigation can succeed, but rather how the litigation should proceed (*Samson*, at para 12).

[34] Finally, a motion for certification of a proceeding as a class proceeding must be examined by considering the underlying objectives of class proceedings. These objectives—judicial economy, access to justice and behaviour modification—were articulated as such by the Supreme Court of Canada in *Hollick v Toronto (City)*, 2001 SCC 68 [2001] 3 SCR 158 [*Hollick*], a case instituted under Ontario class action legislation (*Class Proceedings Act, 1992*, S.O. 1992, c. 6), which inspired in large part the drafting of Part 5.1 of the Rules (*Samson*, at para 41):

> [15] 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. . . .

III. Issues

[35] At issue here is whether the Motion for Certification met the criteria set out in Rule 336.16.

[36] Amway Canada argues that the plaintiff did not meet any of these criteria.

IV. Analysis

A. *Do the pleadings disclose a reasonable cause of action?*

[37] It is trite law that the onus is on the plaintiff to establish "some basis in fact" for each of the conditions listed in Rule 334.16(1), except for the condition that the pleadings disclose a reasonable cause of action, which must instead be assessed in accordance with the standard applicable to motions to strike. According to that standard, the pleadings disclose a reasonable cause of action unless it is "plain and obvious" or "beyond reasonable doubt" that the proceeding, "assuming all facts pleaded to be true", cannot succeed (*Samson*, above at paras 32 and 43; *Hollick*, above at para 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477, at para 63; *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, at page 980).

[38] In particular, neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case (*Hunt*, above at page 980).

[39] In the present case, the question whether there is a reasonable cause of action must therefore be analyzed on the basis that that the facts alleged in the Statement of Claim are true. The evidence filed by one party or the other in the Motion for Certification is, in principle, of no assistance to me at this stage of the examination of said Motion (*Le Corre v. Canada (Attorney General) et al*, 2005 FCA 127, at paras 12 to 18 and 25; *Bédard v Canada (Attorney General)*, 2007 FC 516, at paras 70 and 80; *Bédard v Kellogg Canada Inc.*, 2008 FCA 125). I find that the following passage from *Tiboni et al v Merck Frosst Canada Ltd et al* (Court File No. 04-CV-45435 CP0 – July 27,

2008), rendered by the Ontario Superior Court of Justice, gives a good summary of the approach to be adopted when determining whether the proceeding that a party wants to have certified as a class proceeding discloses a reasonable cause of action:

> [56] The requirement in section 5(1)(a) is to be considered on the basis of the pleading alone. The question is whether material facts that constitute a cause of action have been pleaded. Evidence is inadmissible and it must be assumed that—unless manifestly incapable of proof—the allegations of fact in the statement of claim will be proven at trial. Moreover, unless it is plain and obvious that the existence of a cause of action would be rejected on the basis of the allegations of fact, the requirement in section 5(1)(a) will be found to be satisfied.

[40] The plaintiff is of the view that the Statement of Claim indisputably discloses a reasonable cause of action, insofar as the following is alleged therein:

a. the action is based on subsection 36(1) of the Act, which provides that any person who has suffered loss or damage as a result of conduct that is contrary to any provision of Part VI of the Act may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage suffered, together with any additional amount that the court may allow;

b. Amway Canada engaged in conduct that is contrary to sections 52, 55 and 55.1 of the Act, all of which are provisions of Part VI;

c. more specifically, Amway made false representations concerning the prospects for financial success and compensation for IBOs and unlawfully operates a scheme of pyramid selling; and

d. the plaintiff, as an IBO, suffered damage as a result of this conduct.

[41] Amway Canada disagrees. It raises several defences, most of which draw support from the cross-examination of the plaintiff on the affidavit he signed in support of the Motion for

Certification and from the evidence that Amway Canada itself filed in response to said Motion, which at this stage of the analysis, however, as we have just seen, is not permitted. My analysis will therefore be strictly limited to the contents of the Statement of Claim (*Bédard v Canada (Attorney General)*, above at para 80; *Tiboni*, above at para 56).

(1) Limitation

[42] First of all, Amway Canada submits that the plaintiff's action is time-barred and therefore clearly certain to fail. On this point, it notes that under paragraph 36(4)(*a*) of the Act, an action based on conduct that is contrary to any provision of Part VI must be brought within two years of the date of the conduct in question. It argues that the cross-examination of the plaintiff has established that, before joining Amway Canada's IBO network in June 2008, the plaintiff had joined that network twice, in 1999 and 2002, and that he had done so on the same conditions, on the strength of the same representations and on the basis of the same business model as in June 2008, such that his action should have been brought within two years of his initial signup in 1999.

[43] However, it is well established that, under the Rules, a limitation period cannot be considered as a basis for striking an action and, therefore, cannot be used to establish, at this stage, that an action has no chance of succeeding. Under the Rules, the effect of a statute of limitation must be pleaded in defence, so as to allow the opposing party to argue that its cause of action was not time-barred when the action was brought by proving, for example, the recurrence of the wrongful conduct (*Watt v Canada (Transport Canada)*, Docket No. A-448-97 – Federal Court of Appeal – January 21, 1998 – application for leave to appeal to the Supreme Court of

Canada dismissed – 231 NR 396n; *Kibale v Her Majesty the Queen* (1991), 123 NR 153 (FCA)). In the present case, even if I could consider the fact that in June 2008 the plaintiff was already on his third contract of membership in Amway Canada's IBO network, it would clearly be premature to discount this possibility.

(2) False and misleading representations

[44] On this point, Amway Canada submits that on its very face, the plaintiff's action reveals flagrant contradictions that undermine any reasonable chance of success. It argues that the plaintiff cannot criticize it for giving the impression that most IBOs generate substantial revenue while at the same time stating in its brochures and information guides for the public and in its contracts with its IBOs that the average gross monthly income of an "active" IBO is $181. It further submits that the whole question of whether the information regarding IBOs' compensation complies with the requirements of subsection 55(2) of the Act is irrelevant because, in its view, the plaintiff became a member of its network not because of, but in spite of, this information.

[45] At this stage of the analysis, where I must assume the facts alleged in the Statement of Claim to be true and must be satisfied, on this basis, that the plaintiff's action is manifestly improper, I cannot agree with these arguments. According to my understanding of the Statement of Claim, the plaintiff is criticizing Amway Canada for painting a glowing picture of the prospects for financial success for those who join its IBO network when the vast majority of IBOs lose money, as was the case for him, and the average monthly revenue advertised by Amway Canada, while modest, is still inaccurate and masks the fact that the vast majority of

IBOs lose money. As I understand it, paragraph 35 of the Statement of Claim states that if this reality had been presented to him as Amway Canada was obliged to do, in his opinion, under the Act, he would not have joined the IBO network in June 2008 and consequently would not have incurred the losses and damage that he allegedly suffered. Regarding this last point, the plaintiff alleges the following at paragraph 11 of the Statement of Claim:

> As distributors of the Defendants products, Plaintiffs never made any net income: they lost money despite having invested resources, time and energy. In fact, since June 2008, the Plaintiffs have lost over $15,000;

[46] When accepted as true, I cannot agree that these recriminations, in light of sections 52, 55 and 36 of the Act, have no chance of being accepted, in whole or in part, in a judgment on the merits.

[47] In the alternative, Amway Canada argues that the plaintiff's allegations that the information it disseminates regarding the IBOs' compensation—namely, that the average gross monthly income is $181—does not comply with subsection 55(2) of the Act are without merit, for the following reasons:

a. Subsection 55(2) does not require Amway Canada to take into account the attrition rate of newly recruited IBOs—which, according to the plaintiff, is 50%—when putting together this information;

b. The concept of "active participant", on which said information is based, amply fits the concept of "typical participant" referred to in subsection 55(2) and is sufficiently inclusive such that the advertised average gross monthly income of $181 would be an underestimate;

c. Subsection 55(2) concerns only the compensation that IBOs can expect to receive, not the operating expenses that they are likely to incur to generate revenue, such as the cost of purchasing Amway products or training materials for IBOs;

d. In any event, said expenses were taken into account when putting together the information on IBOs' compensation, since this information concerns only "gross" IBO income; and

e. An IBO is under no obligation to purchase Amway products or training materials, be it terms of preset quantitative or monetary thresholds or otherwise, and therefore is under no obligation to incur operating expenses, which under Amway Canada's sales model are left entirely up to the discretion and good judgment of the IBO.

[48] In my opinion, these arguments, as attractive as they may seem at first glance, require a foray into the merits of the case. They are based on Amway Canada's own conception of subsection 55(2) of the Act, particularly on the concepts of "compensation under the plan" and "typical participants", whereas this provision does not appear to have been the subject of judicial interpretation as of yet. They are also based on its own vision of its business model and its relationship with IBOs, which is a question of mixed fact and law greatly contested by the plaintiff.

[49] A determination of whether this disclosure by Amway Canada regarding IBO compensation is contrary to the requirements of subsection 55(2) also requires a judicial definition of the "compensation actually received" by a typical participant, or of compensation "likely to be received", having regard to the "relevant considerations" listed in that paragraph, for example, the nature of the product, including its price and availability, and the nature of the relevant market for the product, as well as the characteristics of the multi-level marketing plan in

question and similar systems and the legal form of the business operation. This question also requires a legal interpretation of what constitutes fair, reasonable and timely disclosure based on information within the knowledge of the operator, and all of these concepts must be applied to the facts of the case, which in the matter at hand assumes an intimate knowledge of the characteristics of Amway Canada's business model and its relationship with its IBOs in general and with the plaintiff in particular.

[50] It is my view that, in the present case, this issue cannot be resolved at this initial stage of analyzing the conditions under Rule 334.16(1). It requires debate of the facts and law and, consequently, the merits of the case. As we have already seen, the issue in the Motion for Certification is not whether the litigation can succeed, but rather how the litigation should proceed (*Samson*, above at para 12), even if there is the potential for Amway Canada to present a strong defence against the plaintiff's action (*Hunt*, above at page 980).

[51] Clearly, it will be up to the plaintiff, at the appropriate time, to prove that Amway Canada conducted itself in a manner contrary to sections 52 and 55 of the Act, but for the time being, I am not satisfied that it is "plain and obvious" or "beyond reasonable doubt" that the plaintiff's action, based as it is on said sections, is certain to fail.

(3) Scheme of pyramid selling

[52] The same considerations come into play with regard to whether the plaintiff's allegations that Amway Canada operates a multi-level marketing plan with two characteristics of a scheme of pyramid selling, namely those described in paragraph 55.1(1)(*b*) and subparagraph 55.1(1)(*d*)(i) of the Act, disclose a reasonable cause of action.

[53] Paragraph 55.1(1)(*b*) of the Act states that a multi-level marketing plan becomes a scheme of pyramid selling, which is prohibited by the Act, where 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". The plaintiff alleges that, under Amway Canada's business model, performance bonuses are contingent on buying a large quantity of Amway products. Deriving the full benefits of this business model, such as the benefit of climbing the ladder within the system, is thus linked to requirements to buy, which is indicative of a scheme of pyramid selling as contemplated in paragraph 55.1(1)(*b*).

[54] On this point, Amway Canada reiterates that, apart from a mandatory membership fee, IBOs are not subject to any other condition of participating in its multi-level marketing plan, including a condition to buy a specified amount of Amway products.

[55] Once again, I cannot say that the plaintiff's action, when considered from the perspective of paragraph 55.1(1)(*b*) of the Act, is obviously, or beyond a reasonable doubt, certain to fail.

Assuming the plaintiff's allegations on this subject to be true, I find that the issue in this case is not so much whether not being required to buy products to join the ranks of a multi-level marketing plan, or to renew his participation, is a satisfactory response to the prohibition set out in paragraph 55.1(1)(*b*), but whether being required to buy a specified amount of product in order to be eligible for the plan's monetary bonus scheme, when a person has joined the plan in hopes of generating income, as the plan operator's advertising invites us to do, contravenes this prohibition.

[56] In my opinion, the language of paragraph 55.1(1)(*b*) does not outright preclude this line of inquiry, the resolution of which assumes, again, that evidence of Amway Canada's business model and its relationship with its IBOs will be required. The allegations in the Statement of Claim that are based on this provision of the Act therefore, in my view, disclose a reasonable cause of action.

[57] The same is true of the allegations based on the other characteristic of a scheme of pyramid selling that Amway Canada is accused of having, namely, as prohibited by paragraph 55.1(1)(*d*)(i) of the Act, the lack of a buy-back guarantee or a right to return products in saleable condition on reasonable commercial terms.

[58] On this point, the plaintiff alleges that even though Amway Canada offers a buy-back guarantee, it cannot be exercised on reasonable commercial terms, insofar as the guarantee, on the one hand, applies only to the IBO from whom the products were bought, not to Amway Canada and, on the other hand, is strictly discretionary and is conditional on terminating the

contract between Amway Canada and the IBO that wishes to avail himself or herself of said guarantee. Amway Canada has a very different reading of its buy-back/return guarantee and argues this guarantee, in terms of protection, goes well beyond the requirements of paragraph 55.1(1)(*d*)(i) of the Act.

[59] Amway Canada may be right, but it will have to plead this in defence and, if need be, prove it at trial since, assuming the allegations in the Statement of Claim to be true, this component of the plaintiff's grievances does not seem to me to be obviously certain to fail. Clearly, there will have to be a debate on the exact nature, scope, effects and modes of implementation of Amway Canada's buy-back/return guarantee, as well as on the scope of paragraph 55.1(1)(*d*)(i) of the Act, particularly with regard to the notion that the guarantee may be exercised, to the benefit of the participant exercising it, on "reasonable commercial terms".

[60] In conclusion, I am satisfied that the plaintiff's action, if the facts are assumed to be true, does not appear to be definitively certain to fail. That being said, more is required, as we have already seen, to allow this action to continue as a class proceeding. The four other conditions listed in Rule 334.16(1) must also be met. It is also at this stage of the analysis that the evidence submitted by the parties in support of or against the Motion for Certification comes into play.

[61] It also bears repeating, before undertaking this second segment of the analysis, that the burden of establishing that these other conditions have been met is on the plaintiff (*Samson*, above at para 32). This burden, however, does not require that the plaintiff meet these conditions

on a balance of probabilities standard. It is enough for the plaintiff to establish "some basis in fact" for each of these conditions (*Pro-Sus Consultants*, above, at paragraph 102).

B. ***Is there an identifiable class of two or more persons?***

[62] The plaintiff seeks to represent the following class:

> All persons resident in Canada who distributed Defendants products, since October 23rd, 2009 excluding Defendants' employees and their affiliates and family members.

[63] He acknowledges that he must establish that this class consists of at least two persons and can be defined by reference to objective criteria. On this point, he argues that, according to the evidence in the record, mainly his cross-examination on affidavit, this class consists of at least 30,000 persons. As for the definition of the class, he asserts that it could not be defined more narrowly without arbitrarily excluding people who share a common interest in the resolution of the common issues. He adds that there is a rational connection between these issues and all the IBOs covered by the definition he proposes.

[64] Amway Canada replies that, for this condition to be met, the class of persons that the plaintiff wishes to represent must be experiencing the same problems that he is. It argues that the plaintiff was unable to identify, be it in his pleadings or during his cross-examination on affidavit, any other Amway Canada distributor who felt aggrieved by the anti-competitive practices of which he complains.

[65] The argument is supported by the case law and carries some weight.

[66] In *Sun-Rype v. Archer Daniels Midland*, [2013] 3 SCR 454, 2013 SCC 58, at para 67, the Supreme Court of Canada reminds us that certifying a class proceeding without identifying two or more persons who will be able to demonstrate that they have suffered loss at the hands of the alleged perpetrator of reprehensible conduct—in this case, conduct contrary to Part VI of the Act—"subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs who have suffered harm but for whom it would be impractical or unaffordable to bring a claim individually".

[67] In my opinion, Justice Strathy of the Ontario Superior Court of Justice correctly summarized the state of the law on this issue in *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42, in which the plaintiff sought to have a class proceeding certified on behalf of some 3 million purchasers of sunscreen manufactured by the defendant, on the basis that the defendant had made false representations regarding the effectiveness of its product. In that case, the defendant was criticized for, among other things, not providing proof "of a class of 'two or more persons' who assert a claim". Justice Strathy, after giving an overview of the case law, disposed of this argument in the following terms:

> [128] The second concern is more fundamental. The defendants submit that there is no evidence of "two or more persons" who assert a claim, as required by s. 5(1)(b) of the *C.P.A.* They say that this criterion has not been satisfied because there is no evidence that anyone other than Mr. Singer asserts a claim in relation to the wrongs alleged in this proceeding. While the plaintiff's counsel has provided some information that other individuals have recently contacted his firm, or responded to a website, there is no evidence about these individuals, no evidence that they ever purchased the defendants' products or that they actually wish to assert a claim against the defendants.
>
> [129] The defendants rely on the observations of Winkler, J., as he then was, in *Lau v. Bayview Landmark Inc.* [1999] O.J. No. 4060, 40 C.P.C. (4th) 301 (S.C.J.) at para. 23:

> [A] Class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. *The record before the court must contain a sufficient evidentiary basis to establish the existence of the class* [emphasis added].

[130] The defendants also refer to the decision of Nordheimer, J. in *Bellaire v. Independent Order of Foresters,* [2004] O.J. No. 2242, 5 C.P.C. (6th) 68 (S.C.J.) at para. 33:

> In my view, before the extensive process of a class proceeding is engaged, it ought to be clear to the court that there is a real and subsisting group of persons who are desirous of having their common complaint (assuming there to be a common complaint) determined through that process. The scale and complexity of the class action process ought not to be invoked at the behest, and for the benefit, of a single complainant.

[131] The issue was raised in *Chartrand v. General Motors Corp.* 2008 BCSC 1781 (CanLII), [2008] B.C.J. No. 2520, in which the plaintiff sought to certify an action on behalf of owners of GM vehicles with allegedly defective parking brakes. Martinson J. declined to certify the action, holding that there was no evidence that two or more people had a complaint about the product or that it had caused them any loss or that the manufacturer had been enriched. There was evidence that the regulatory requirements had been met and there was no evidence of complaints by the regulator. The putative plaintiff was not even aware that there was an issue until she was contacted by counsel. Martinson J. described the identifiable class requirement as an “air of reality test”, testing the reality of the linkage between the plaintiff’s claim and the proposed class: *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790 (Can LII), 22 B.L.R. (3d) 46, aff’d 2003 BCCA 87 (CanLII), 10 B.C.L.R. (4th) 234; *Nelson v. Hoops L.P., a Limited Partnership*, 2003 BCSC 277 (CanLII), [2003] B.C.J. No. 382, aff’d 2004 BCCA 174 (CanLII), [2004] B.C.J. No. 618. This requires not simply that there be a theoretical link between the claim, the class and the common issues, but that there be a demonstrated link in fact to two or more *bona fide* claimants.

[132] Martinson J. noted that in many products liability cases, the link between the class and the common issues will be obvious

and will be reflected by recalls, public safety alerts and complaints. She concluded at paras. 67 and 68:

> In this case, there have been no complaints in British Columbia to GM or Transport Canada about the alleged defective parking brake system. No regulatory body in Canada or the United States has expressed concern over the safety of the parking brake system on the automatic proposed class vehicles. *There is no evidence that GM has been unjustly enriched. There is also no evidence of anyone wanting to participate in the class proceeding; Ms. Chartrand herself was recruited to participate.*
>
> *There is no air of reality to the assertion that there is a relationship between the proposed class, being the owners of the automatics in question, and the proposed common issues that arise in Ms. Chartrand's negligence and unjust enrichment claims.* [Emphasis added].

[133] Other cases have expressed the concern that the plaintiff is required to show that the claim is more than idiosyncratic: *Ducharme v. Solarium de Paris Inc.*, [2007] O.J. No. 1659, 48 C.P.C. (6th) 194, (S.C.J.), aff'd [2008] O.J. No. 1558 (Div. Ct.); *Zicherman v. Equitable Life Insurance Co. of Canada* (2000), 47 C.C.L.I. (3d) 39, [2000] O.J. No. 5144 (S.C.J.).

. . .

[135] Finally, in Lambert v Guidant Corp. (2009), 72 C.P.C. (6th) 120, [2009] O.J. No. 1910 (S.C.J.), Cullity J. observed that not every case will require evidence that there is a group of putative class members waiting in the wings. The nature of the claims and the circumstances of the case may permit the court to infer the existence of a class looking for a solution. Cullity J. suggested, however, that the analysis of the issue is best considered together with the other factors that bear on the exercise of the court's discretion in the "preferable procedure" analysis. In that case Cullity J. was prepared to give plaintiff's counsel leave, if required, to file evidence to establish that other putative class members had expressed interest in the proceeding.

[136] It has been suggested that on a motion for certification the court plays an important gate keeping function to ensure that the proceeding is in fact suitable for certification: *Arabi v. Toronto-*

> *Dominion Bank* (2006), 30 C.P.C. (6th) 164, [2006] O.J. No. 2072 (S.C.J.), aff'd. (2007), 2007 CanLII 56527 (ON SCDC), 53 C.P.C. (6th) 135, [2007] O.J. No. 5035 (Div. Ct.); 2038724 *Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 2009 CanLII 23374 (ON SCDC), 96 O.R. (3d) 252, [2009] O.J. No. 1874. In this case, there **is no evidence of a class of two or more people seeking access to justice.** In a case where all the other requirements of s. 5(1) of the *C.P.A.* had been met, it might be appropriate to follow the approach of Cullity J. in *Lambert v Guidant Corp*., but in my view this is not such a case. (**Emphasis added.**)

[68] The state of the law in Quebec appears to be similar: it is not enough for the applicant to define the class, however big it might be; the applicant must also be able to show that at least one member of the class has expressed complaints similar to his or her own (*Hébert c Kia Canada Inc et al*, 2014 QCCS 3968, at paras 20 to 46).

[69] In the present case, one thing is clear: none of this was done. Surprisingly, the Statement of Claim and the affidavit signed by the plaintiff in support of the Motion for Certification are silent on this point. The same is true of the Motion itself. There is the affidavit of William Powell, but he self-declared as not belonging to the class defined by the plaintiff. At the outset, there was also the plaintiff's spouse, Ms. Rhodes, but she withdrew from the case in circumstances that remain unclear. When questioned about the number of persons who had registered with his counsel, the plaintiff gave vague and speculative answers.

[70] Is this a case where I should presume, as counsel for the plaintiff invited me to do at the hearing, that there is at least one other person in the class proposed by the plaintiff who wishes to bring an action similar to his before the courts? I do not think so. While there is evidence in the record that Amway's business model had come under the scrutiny of the authorities in certain

U.S. states and in Great Britain, there is no such evidence for Canada. In particular, there is no evidence that complaints or applications for inquiry have been made to the Commissioner regarding the conduct of which the plaintiff complains, nor do I have any evidence that there has been a movement of any kind to denounce this sort of conduct. Yet the evidence in the record shows that Amway Canada has been doing business, as either Amway Canada Corporation or Quixtar Canada Inc. / Quixtar Canada Corporation, since 1962. Moreover, the record does not contain any surveys of IBOs showing that the plaintiff is not the only one to find Amway Canada's business model to be anti-competitive and injurious.

[71] As I have already mentioned, this action was instituted nearly six years ago, and it has been over five years since the Motion for Certification was filed. Amway Canada cross-examined the plaintiff in March 2011 and responded in writing to the Motion for Certification in September 2011, noting at that time this potentially fatal flaw in the Motion for Certification. Justice Boivin also remarked on this flaw in his judgment dated November 23, 2011, finding that the Arbitration Agreement applied to the plaintiff's initial claim (*Murphy*, above at para 73). It appears that the plaintiff did not see fit to nip this problem in the bud by shoring up his case in this regard.

[72] I note that the plaintiff was required to show that there is more than a theoretical link between the proposed class, his claim and the issues he believes are common to all the members of the class. Although he did not have to name every class member (*Sun-Rype*, above at para 59), he had to at least establish some basis in fact for a link "to two or more *bona fide* claimants" (*Singer*, at para 131). He did not do so. In the circumstances, I find that this is fatal to his case.

[73] Amway Canada also raised a number of arguments regarding the definition of the class, stating, among other things, that the class was far too general and deficient in many respects. In light of my finding that the plaintiff has failed to show that at least one other member of the proposed class also claims to have been injured by the anti-competitive conduct of which he complains, I find that there is no need to dispose of these arguments.

C. *Do 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?*

[74] It should go without saying that there cannot be any common questions where an identifiable class of two or more persons has not been established. Consequently, the review of the Motion for Certification could very well end here because, as I have already stated, each and every condition prescribed by Rule 334.16(1) must be met for the Motion to be allowed. However, even assuming such a class exists, I find that the plaintiff's action does not raise any common questions, at least with regard to the part of the action based on false or misleading representations. Here is why.

[75] The "common question" test underpins the notion that individuals who have legal claims in common ought to be able to have those claims resolved in one proceeding, on a basis of access to justice, economic use of judicial resources and behaviour modification, so as to avoid duplication of fact-finding or legal analysis (*Pro-Sys Consultants*, above at paras 106 to 108; *Singer*, above at para 138).

[76] A "common question" is one whose resolution is determinative of each class member's claim, although it is not essential that all the class members be identically situated *vis-à-vis* the opposing party or that the common questions predominate over the non-common ones. And while it is not necessary that the common questions predominate over issues affecting only individual members, the class members' claims must, however, share a substantial common ingredient that is examined by comparing the significance of the common issues in relation to individual issues. Finally, a common question must be such that success for one class member must mean success for all, although not necessarily to the same extent (*Pro-Sys Consultants*, above at para 108).

[77] The plaintiff submits that his argument in this regard is simple and indisputable, insofar as the false and misleading representations that Amway Canada is accused of making were directed at all the members of the proposed class. In particular, he argues that all IBOs are deemed to have relied on said representations when they signed their IBO network membership contracts with Amway Canada, which contracts contain an express statement of the average gross monthly income of IBOs, and that there is evidence that they all lost money during the period described in the class definition. He adds that paragraph 52(1.1)(*a*) of the Act creates an individual statutory presumption of causality that exempts class members from having to prove that they were misled or deceived by said representations.

[78] Consequently, the plaintiff is of the opinion that his action raises sufficiently significant common questions such that their resolution would advance the case effectively by making it

possible, for example, to dispose of the question of Amway Canada's liability in respect of all the class members. These questions were stated as follows:

> Throughout the period starting October 23rd, 2007 until present:
>
> > Did the Defendants operate, in Canada, a multi-level marketing plan within the meaning of section 55(1) of the *CA* (*Competition Act*)?
> >
> > Did the Defendants make representations to class members relating to compensation that distributors might receive?
> >
> > In the affirmative, did the Defendants knowingly or recklessly make a false or misleading representation to the public in contravention of section 52 of the *CA*?
> >
> > Did the Defendants provide class members with fair, reasonable and timely information relating to compensation actually received by typical participants in the plan or with respect to compensation likely to be received by typical participants?
> >
> > Did the Defendants breach sections 52(1), 55(2) and/or 55(2.1) of the *CA*?
> >
> > What remedies are available to distributors under section 36 of the *CA*?
> >
> > Are class members entitled to the collective recovery of aggregate damages?

[79] In my opinion, Amway Canada is correct in saying that the claims based on allegations of false representations do not readily lend themselves to the class proceeding process because of the inherent difficulty in framing one or more common questions, which stems from the fact that, in order to succeed, this sort of claim requires evidence of a causal relationship between the false representation that led the member to act to his or her detriment and the loss or damage that the member allegedly suffered. This difficulty is rooted in the fact that this burden of proof requires

considering the individual situation of each class member, thereby creating a significant imbalance between the non-common questions and questions that could qualify as common ones.

[80] This problem was aptly described, in my view, by Justice Cumming of the Supreme Court of Ontario in *Williams v Mutual Life Insurance of Canada*, 2000 CanLII 22704 (ON SC), where he wrote the following at paragraph 22 of his decision:

> [22] Negligent misrepresentation is a cause of action that is very problematic in seeking certification of a common issue for class members. Proof is generally dependent upon a multitude of circumstances specific to the individual members. The result of the trial of any one alleged misrepresentation to a claimant cannot generally stand proof of the cause of action to any other claimant. The outcome class members' claims based upon alleged negligent misrepresentations depends upon a myriad of individual evidentiary factors. See for example: *Carom v. BreX Minerals Ltd*. (1999) 44 O.R. (3d) 173 at p. 211, 46 B.L.R. (2d) 247 (S.C.J.), affd (1999), 46 O.R. (3d) 315 at pp. 316-17, 6 B.L.R. (3d) 82 (Div. Ct.); *Controltech Engineering Inc.* v. *Ontario Hydro*, [1998] O.J. No. 5350 (Gen. Div.) at paras. 12-27, affd [2000] O.J. No. 379 (Div. Ct.); cited with approval in *Hollick v. Metropolitan Toronto (Municipality)* (1999), 1999 CanLII 2894 (ON CA), 46 O.R. (3d) 257 at p. 268, 181 D.L.R. (4th) 426 (C.A.), leave to appeal granted [2000] S.C.C.A. No. 41; *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 1998 CanLII 14721 (ON SC), 42 O.R. (3d) 776 at pp. 779-80, 788, 86 C.P.R. (3d) 1 (Gen. Div.); *Mouhteros v. DeVry Canada Inc.* (1998), 1998 CanLII 14686 (ON SC), 41 O.R. (3d) 63 at pp. 70-71, 22 C.P.C. (4th) 198 (Gen. Div.).

See also: *McKenna v. Gammon Gold Inc*. 2010 ONSC 1591, at para 47.

[81] At paragraph 39 of his reasons, Justice Cumming noted the important distinction between a common cause of action and a common issue:

> [39] The causes of action are asserted by all class members. But the fact of a common cause of action does not in itself give rise to a common issue. A common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant. While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy.

[82] The same principles apply whether it is a case of false representations at common law or one governed by section 36 of the Act, since in both cases, evidence that the member acted, to his or her detriment, on the strength of the alleged false representations and suffered loss or damage is one of the necessary ingredients for an action against the person who made those representations (*Singer*, above at para 153).

[83] Furthermore, the structure of section 36 of the Act is clear on this point: it is not enough to show that the person against whom the claim is made acted contrary to a provision of Part VI of the Act; it must also be proved that loss or damage resulted from this. When the impugned conduct takes the form of false and misleading representations, evidence of this same causal relationship—a false representation, reliance on it by a member to his or her detriment, and damage or loss—is required, such that the success of one member of the class does not necessary imply the success of all the members.

[84] This is also, I believe, the conclusions to which Justice Strathy came in *Singer*, above, when he found that the common question of whether section 52 of the Act had been violated did nothing to advance the resolution of the class members' claims. Noting that section 52 did not create a cause of action, Justice Strathy wrote as follows:

> [181] Common issue 10 asks:
>
> > Can it be established that under Section 52 of the *Competition Act* the Defendants made materially false and misleading representations to the public which stated a level of performance of their products which was untrue and/or failed to disclose to the Class the true effectiveness and quality of the products?
>
> [182] The answer to this question, on its own, does nothing to advance the plaintiff's claim, because s. 52 of the *Competition Act* does not create a civil cause of action. The answer might advance the resolution of a claim under s. 36 of the *Competition Act*, since a breach of section 52 a necessary prerequisite to such a claim. Answering the question would require an examination of a wide range of products and a variety of representations concerning each product, over a lengthy time period. The answer to this question would not, however, advance the resolution of the claims of class members, because a court would have to find that the plaintiff suffered a loss caused by the breach and this could only be accomplished on an individual basis. . . .

[85] In the case at hand, the evidence shows that people who join Amway Canada's IBO network do so for different reasons and motivations—such as going into business, supplementing their income, buying Amway products for personal use or consumption at the discounted price offered to IBOs, becoming part of a social network, etc.—and are brought into it through different sources and contacts, such as an IBO, a friend, a relative, the Internet, Amway literature or an information session. The choices that these people will make once they have joined this network could be influenced by fellow IBOs at formal or informal meetings, the IBOs who recruited them, their sponsors or "up-line" distributors in the network, family members or friends.

[86] Therefore, the answer to the question of whether, and to what extent, if any, Amway Canada's alleged false and misleading representations tainted the proposed class members' decision to join the IBO network, or influenced their decisions once they were in that network, will depend in large part "upon an examination of the unique circumstances with respect to each class member" (*Williams*, above at para 39).

[87] To paraphrase the judgment of the Supreme Court of Ontario in *Moutheros v DeVry Canada Inc*., 1998 CanLII 14686 (ON SC), even assuming that the component of this action dealing with Amway Canada's alleged false and misleading representations lent itself to the framing of common questions, this would be but the beginning, and not the end, of the litigation (*Moutheros v DeVry Canada Inc*., at para 31).

[88] I am therefore of the opinion that the members' claims, insofar as they are based on sections 52 and 55 of the Act, do not raise common questions.

[89] Moreover, like Amway Canada, I do not think that paragraph 52(1.1)(*a*) of the Act, which provides that someone who wants to establish that an offence has been committed under section 52 of the Act does not have to prove that any person was deceived or misled, changes anything. First, this provision has limited application. It is relevant only to the cases contemplated in subsection 52(1) of the Act; it does not apply to those contemplated in section 55. Second, it does not exempt class members from having to prove a causal connection between the false and misleading representations and the loss or damage claimed, since the right to recover this loss or damage is based, as we have seen, not on subsection 52(1) but on

section 36 of the Act. As we have also seen, such a causal connection is one of the constituent elements of such an action, which means that, where subsection 52(1) is in issue, it is not enough to establish that this provision has been breached; it must also be shown that claimed loss or damage was suffered as a result of that breach (*Singer*, above at para 107).

[90] Ultimately, the burden remains the same whether the action brought under section 36 is based on subsection 52(1) or section 55 of the Act. The consequences in terms of the test for assessing whether there are common questions are also the same.

[91] That said, the situation is different, however, with regard to the allegations relating to the operation of a scheme of pyramid selling, insofar as the dimension of the false and misleading representations does not come into the equation. These allegations are, rather, a question of structure, that is, a question of whether the membership contracts of the participants' in a multi-level marketing plan contained elements distinguishing this system, otherwise legal, from a scheme of pyramid selling, otherwise illegal.

[92] The plaintiff argues that the claims of the members of the class that he proposes raise, in this regard, the following common question:

> Did the Defendants establish, operate, advise or promote a scheme of pyramid selling in contravention of section 55.1 of the *CA*?

He also raises these related alternative questions:

> What remedies are available to distributors under section 36 of the *CA*?
>
> Are class members entitled to the collective recovery of aggregate damages?

[93] He believes that the answer to the main question will decide, in respect of all the class members, the issue of Amway Canada's liability in this regard. Amway Canada made no submissions specifically addressing this question, or at least, it did not do so by distinguishing the two situations, situations which, in my view, require different treatment.

[94] At any rate, for the purposes of this judgment, I am prepared to recognize that the question proposed by the plaintiff regarding the members' claims based on section 55.1 of the Act qualifies as a common question.

D. *Is a class proceeding the preferable procedure for the just and efficient resolution of the common questions of law or fact?*

[95] This criterion is governed by Rule 334.16(2), which states as follows:

Matters to be considered	Facteurs pris en compte
(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	(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*) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
(*b*) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(*c*) the class proceeding would involve claims that are or have been the subject of any other proceeding;	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*) other means of resolving the claims are less practical or less efficient; and	d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(*e*) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[96] In light of these factors, I find, again assuming that an identifiable class of at least two persons exists, that a class proceeding is not the preferable procedure for resolving this dispute, at least with regard to the members' claims based on sections 52 and 55 of the Act. In particular, this criterion assumes that there are common questions to be resolved. I have concluded in analyzing the common questions criterion that there were none or that, at least, they do not predominate over questions affecting only individual members.

[97] Moreover, it can be assumed that a significant proportion of members has a legitimate interest in bringing separate proceedings, in light of the arbitration agreement, since the present

action requires them to waive the benefits of this alternative dispute resolution mechanism and limits them to claiming $1,000.

[98] Finally, if the plaintiff is seeking to [TRANSLATION] "expose the fraudulent conduct of Amway Canada" and [TRANSLATION] "uncover the truth about all the people who have been swindled and caught in this well-orchestrated trap", Parliament has set up a complaint mechanism overseen by a specialized agency, the Commissioner of Competition, that can investigate and put a stop to the alleged anti-competitive conduct and, where appropriate, impose severe fines on Amway Canada. The evidence in the record shows that this alternative, which is surely easier to manage and less expensive for the class members than a class proceeding, was not even considered.

[99] These same considerations apply just as much to the members' claims based on the alleged operation of a scheme of pyramid selling, except for the factor relating to the predominance of the common question, which in this case works in favour of the plaintiff, if we accept that this component of the action raises such questions.

[100] However, even if we do accept that a class proceeding is the appropriate recourse, having regard to claims based on these allegations, I find that the plaintiff, as the representative of the class, does not meet the requirements of Rule 334.16(1)(*e*).

E. *Does the plaintiff, as representative, meet the requirements of Rule 334.16(1)(e)?*

[101] The final criterion that must be met to certify a case as a class proceeding concerns the ability of the plaintiff to act as the representative of the class. This requires that the plaintiff show (i) that he would fairly and adequately represent the interests of the class; (ii) that he 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) that he 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) that he provides a summary of any agreements respecting fees and disbursements between him and the solicitor of record.

[102] In *Western Canadian Shopping Centres Inc. v. Dutton* [2001] 2 SCR 534, 2001 SCC 46, at para 41, the Supreme Court of Canada noted that the proposed representative need not be typical of the class or the best possible representative, but the court assessing this criterion should "be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class".

[103] The plaintiff submits that he has prepared an effective litigation plan, that he is not in a conflict of interest with any other class members and that he has provided a summary of the agreements respecting fees and disbursements that he entered into with his counsel in June 2010.

[104] He is also of the opinion that it is beyond doubt that he is capable of adequately representing the interests of the class. He notes in this regard that counsel for Amway examined

him for 10 hours, which allowed him to comment frankly on [TRANSLATION] “how the pyramid system set up by Amway had turned his life and the lives of others upside down”, how [TRANSLATION] “he had been brought to his knees by the sales techniques of Esmon Emmons” and how Amway’s [TRANSLATION] “representatives” had interfered in his private life, to the point of lying to his spouse about the circumstances surrounding the signing of the membership contract dated June 5, 2008.

[105] Finally, the plaintiff submits that it is inappropriate for Amway Canada to attack his credibility, given how it has behaved to date in this case.

[106] I do not think that this is sufficient as proof, given the evidence that counsel for Amway Canada brought to light during the cross-examination on affidavit of the plaintiff. This evidence discloses a set of facts that cast serious doubt on the plaintiff’s ability to vigorously and capably prosecute the interests of the class that he wants to represent, a class that he estimates at more than 30,000 people.

[107] The cross-examination revealed the following:

a. In his affidavit the plaintiff wilfully lied regarding the circumstances surrounding the signing of the membership contract dated June 5, 2008;

b. This proceeding was instituted at the behest of his spouse, Ms. Rhodes, whereas until he signed his affidavit in June 2010, he did not claim to have been wronged by Amway Canada;

c. He never contacted the office of the Commissioner of Competition;

d. He never contacted other IBOs in Canada to find out whether they shared his grievances with Amway Canada;

e. He was unable to give any details regarding the agreement respecting fees and disbursements that he entered into with his counsel, particularly with regard to the sort of fees agreed;

f. He was unable to give any details regarding the litigation plan either;

g. He did not know whether anyone had registered with his counsel for the class proceeding he wants to bring;

h. He could not explain some of the key concepts in his proceeding, such as the difference between the average compensation of an "active participant" and the compensation actually received by a "typical participant";

i. He confused a multi-level marketing plan with a scheme of pyramid selling;

j. He was unaware that the motions related to his case were supposed to be heard in October 2011 and that certain pleadings had been prepared in French, a language that he cannot read; and

k. He did not know at what procedural stage his case was.

[108] Amway Canada also submits that the litigation plan prepared by the plaintiff is, on its face, inadequate insofar as it sets out only the broad procedural steps in his action and is silent on certain steps that the courts generally expect to find in such a plan. Indeed, I note upon reading the plaintiff's litigation plan that it contains nothing—or nothing particularly specific—regarding (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence; (ii) the collection of the relevant documents from members of the class as well as others; (iii) the management of documents produced by all parties; (iv) mechanisms for

responding to inquiries from class members; (v) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries; (vi) the need for experts and, if needed, how those experts are going to be identified and retained; and (vii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues (*Samson*, above at para 151).

[109] This set of factors leaves me perplexed as to the efforts made by the plaintiff to prepare the case, to understand, in even a general sense, the ins and outs of it and to enquire about its progress, be it for himself or for the members he wishes to represent. In addition, there is the fact that when the Motion for Certification was heard, the plaintiff had already known for at least three months that there was no evidence that there was at least one other person willing to bring before the courts the same grievances that he had with Amway Canada. As I have already stated, this lack of evidence—which is potentially fatal to the Motion for Certification—was noted by Justice Boivin in his judgment dated November 23, 2011 (*Murphy*, above at para 73). It is surprising to say the least that no attempt was made to nip this problem in the bud. And there is also the matter of the false testimony in his affidavit, which calls its probity into question.

[110] For all these reasons, I am not satisfied that the plaintiff is able to adequately represent the interests of the class proposed in the Motion for Certification.

[111] The Motion for Certification will therefore be dismissed. Amway Canada seeks costs. However, I find that it has not shown that the circumstances of this case warrant departing from

the principle established by Rule 334.39(1) to the effect that no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the motion for certification of the proceeding as a class proceeding is dismissed, without costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1754-09
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PLACE OF HEARING:	MONTRÉAL, QUEBEC
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