Federal Court		Cour fédérale

Date: 20100505

Docket: T-1754-09

Citation: 2010 FC 498

Montréal, Quebec, May 5, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

CHERYL RHODES and
KERRY MURPHY

Plaintiffs

and

COMPAGNIE AMWAY CANADA and
AMWAY GLOBAL

Defendants

REASONS FOR ORDER AND ORDER

[1] The Plaintiffs have initiated a proposed class proceeding in this case, and for this purpose have submitted a statement of claim challenging the Defendants' distribution system as a multi-level marketing plan and a pyramid scheme which does not comply with sections 52, 55 and 55.1 of the *Competition Act*, R.S.C. 1985, c. C-34. They are consequently seeking to recover from the Defendants, pursuant to section 36 of the *Competition Act*, their resulting losses and damages estimated at $15,000. For the purposes of a class action based on the same or similar cause of

action, the Plaintiffs also purport to represent all persons resident in Canada who distributed the Defendants' products since October 23, 2007, excluding the Defendants' employees and their affiliates and family members.

[2] The Defendants have answered these proceedings with a motion seeking an order dismissing or permanently staying the action on the basis that the Federal Court has no jurisdiction, as the matter is subject to compulsory binding arbitration under the terms of an arbitration agreement subscribed to by the parties. The Defendants seek to have this motion heard and adjudicated prior to any other matter in these proceedings.

[3] At the request of the Court, the Defendants have also indicated that they intend to bring at least three other preliminary motions in the event their motion for dismissal based on the arbitration agreement is unsuccessful, namely a) a motion submitting that section 36 of the *Competition Act* is not applicable for constitutional reasons such that the Federal Court has no jurisdiction to entertain the Plaintiffs' claims; b) a motion to strike in part the statement of claim, and seeking principally to strike the defendant Amway Global from the action; and c) a motion to obtain further particulars.

[4] In response, the Plaintiffs have brought a motion for directions under Rule 54 of the *Federal Courts Rules*, SOR/98-106 seeking an order setting an agenda to hear and decide upon the Plaintiffs' eventual motion for certification as a class proceeding. The Plaintiffs assert they will be in a position to submit such a certification motion sometime in June of this year. The Plaintiffs

specifically request that the Defendants' motion to dismiss on the basis of the arbitration agreement be heard and decided at the same time as their motion for certification as a class proceeding.

[5] The parties were heard on the Plaintiffs' motion for directions in Montréal on April 16, 2010. This order only concerns the Plaintiffs' motion for directions.

Position of the parties

[6] The Plaintiffs argue that the Defendants are seeking a system of "litigation by instalment" with a motion to dismiss based on the arbitration agreement, and if unsuccessful, a motion to dismiss on constitutional grounds, all to be heard *in limine litis*.

[7] The Plaintiffs are of the view that this Court has a broad discretion to set the agenda of the proceedings, and that it should do so in a manner which ensures a fair and prompt hearing of all the motions and arguments of both parties. This can best be achieved by dealing with the various motions of the Defendants at the same time as the hearing and decision on the Plaintiffs' motion for certification as a class action. The Plaintiffs add that in Canadian common law jurisdictions, the usual practice is to decide preliminary motions at the class action certification stage of the proceedings, including motions concerning lack of jurisdiction based on the terms of arbitration agreements. They refer in this regard to the recent Ontario Court of Appeal decision of *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 64 B.L.R. (4th) 199, [2010] O.J. No. 177 (QL).

[8] The Plaintiffs recognize that a legal controversy exists between the Court of Appeal of Ontario and the British Columbia Court of Appeal concerning the availability of class action proceedings in common law jurisdictions where an arbitration agreement applies to the dispute. Indeed, in *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, 304 D.L.R. (4th) 331, [2009] B.C.J. No. 468 (QL), the British Columbia Court of Appeal has held that the judgments of the Supreme Court of Canada based on Quebec legislation in *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921 extend to the law in British Columbia, and that accordingly the previous holdings of the court that the certification of a class action renders an arbitration clause inoperative have been effectively overturned. That issue will be finally determined soon by the Supreme Court of Canada since the *MacKinnon* decision is currently before that court. However, the Plaintiffs argue that irrespective of the outcome of that Supreme Court of Canada appeal on the merits, in *MacKinnon* the issue was heard and decided at the certification stage of the class action proceedings and not as a preliminary matter decided before certification. Consequently, the same approach should be taken here to decide the Defendants' motion to dismiss.

[9] The Defendants argue that motions challenging the very jurisdiction of the Court to hear a proceeding, be it a class action or any other action, should be and are decided *in limine litis*. The Defendants refer to numerous cases in which this principle has been upheld, most notably the decisions of this Court in *Galarneau v. Canada (Attorney General)*, 2005 FC 39, 306 F.T.R. 1, [2005] F.C.J. No. 42 (QL) and in *Merchant Law Group v. Canada (Canada Revenue Agency)*, 2008

FC 1371, 338 F.T.R. 181, [2008] F.C.J. No. 1767 (QL). This is also the principle adopted by the Quebec Court of Appeal in *Société Asbestos Limitée v. Lacroix*, 2004 CanLII 21635 (Qué C.A.).

[10] Consequently, the Defendants argue that their motion to dismiss based on the arbitration agreement should first be heard and decided before this Court proceeds with any other matter in the litigation.

Analysis

[11] Two competing schools of thought exist concerning the proper management of class action proceedings where the jurisdiction of the court to entertain the proceedings is questioned. One school takes a pragmatic approach to the issue, while the other takes a principled approach.

[12] The first school usually requires that the jurisdictional issue be decided at the same time as the certification of the class action. This avoids a multiplicity of hearings and reduces the number of eventual appeals, thus theoretically ensuring that the proceedings are dealt with in a timely manner while also ensuring a more efficient use of limited judicial resources.

[13] In general, courts of common-law jurisdiction in Canada have favoured this approach, concluding that, having regard to the purposes and objectives of class proceedings, motions to certify the class action should normally take precedence over other preliminary motions, including motions questioning the jurisdiction to entertain the class action which can be properly decided at the certification stage. The review of the case law on this issue carried out by Justice Hansen in

Campbell v. Canada (Attorney General), 2008 FC 353, [2008] F.C.J. No. 456 is instructive in this regard, as are some of the cases referred to by the Plaintiffs in their argument: see particularly *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (S.C.J.) (QL) at para. 59. However, this is not an absolute rule in Canadian common-law jurisdictions. Other considerations can result in a different approach in appropriate circumstances.

[14] The following comments from *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (S.C.J.) (QL) at paras. 11, 12 and 14 summarize the approach in Ontario and, by extension, in other Canadian common-law jurisdictions:

> Prior to certification, an action commenced under the CPA is nothing more than an intended class proceeding: *Logan v. Canada (Minister of Health)* (2003), 36 C.P.C. (5th) 176 (S.C.) at para. 23, aff'd 71 O.R. (3d) 451 (C.A.) (See also: *Boulanger v. Johnson & Johnson Corp*. (2003), 64 O.R. (3d) 208 (Div. Ct); *Attis*, supra at para 14.) In the pre-certification period it is not clear whether a proceeding will ultimately be certified. Further there is an element of fluidity in respect of the class definitions and the common issues. Accordingly, motions brought prior to certification may turn out to have been unnecessary, over-complicated or incomplete.
>
> Moreover, courts will not always have sufficient information to adequately determine motions at the pre-certification stage. This is particularly apparent with respect to the Jurisdictional Motions. In several recent cases it has been held that the certified common issues in a class action can serve as a basis for the proper assumption of jurisdiction by the court over extra-provincial parties. (See. : *Harington v. Dow Corning Corp* (2000), 193 D.L.R. (4th) 67 (B.C. C.A.); *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (S.C.), (2000), 52 O.R. (3d) 20 (Div. Ct.), leave to appeal denied, [2001] S.C.C.A. No. 88, S.C.C. Bulletin, 2001, p. 1539.) The thrust of *Harrington* and *Wilson*, in relation to the jurisdiction determination, is that where a class action involving intra-provincial plaintiffs could be certified, and the common issues

> forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a "real and substantial connection" of the non-residents to the forum in relation to the action. Thus, the underpinnings of a successful certification motion could have a direct bearing on the jurisdictional analysis. On the other hand, if the certification motion fails, the jurisdictional motion will in all likelihood be rendered moot. Therefore, it would be pointless to hear the jurisdiction motion in advance of the certification motion in that, at least to this extent, all of the necessary information relevant to jurisdiction is not presently available.
> […]
> Admittedly, there are instances where, as indicated in both *Attis* and *Moyes*, there can be exceptions to the rule that the certification motion ought to be the first procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly. (See: *Moyes*, supra at para. 12; *Re Holmes and London Life v. London Life Insurance Co. et al*. (2000), 50 O.R. (3d) 388 (S.C.) at paras. 7-8; *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.), at para. 15, leave to appeal dismissed [2002] S.C.C.A. No. 446; *Segnitz v. Royal and SunAlliance Insurance Co. of Canada*, [2001] O.J. No. 6016 (S.C.); *Stone v. Wellington County Board of Education* (1999), 29 C.P.C. (4th) 320 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 336.); *Vitelli v. Villa Giardino* (2001), 54 O.R. (3d) 334 (S.C.); *Pearson v. Inco* (2001), 57 O.R. (3d) 278 (S.C)).

[15] The other school views the jurisdiction of a court to entertain a class action as a fundamental matter which must be decided as soon as it is raised. In this approach, the issue of jurisdiction is one of public order which cannot be ignored, even if deciding the matter at a preliminary stage may

result in an appeal which will increase the time required to litigate the class action in the event the court is found to have jurisdiction. This is so since it would be legally unacceptable for a court to entertain an action over which it has no jurisdiction, even if this would be more efficient.

[16] This second school reflects the approach applied by the courts in Quebec. The Quebec Court of Appeal has indeed clearly taken the position that, in the context of class action proceedings, motions challenging the jurisdiction of the court should be decided prior to certification since they raise issues of public order: see in particular *Société Asbestos Limitée v. Lacroix, supra* at paras. 20 to 27.

[17] I am of the view that it is not necessary to choose between the two schools as the parties to this litigation have implicitly invited me to do.

[18] The order in which motions are heard and decided within class action proceedings is to be determined on a case by case basis taking into account the circumstances at hand and the issues which are raised in each case. I see no reason to set out as a predetermined principle cast in stone that motions challenging the jurisdiction of the Court must be heard and decided prior to certification. Likewise I see no reason to decide that such motions must always or usually be heard at the certification stage of the proceedings. Rather, each case is to be decided within its particular context, and this context will guide the scheduling order of the motions raised in the course of the class action proceedings.

[19] Rule 334.16(1)(a) of the *Federal Courts Rules* allows for the certification of a class proceeding if "the pleadings disclose a reasonable cause of action". Rule 334.11 provides that, to the extent they are not incompatible with the rules relating to class proceedings, the rules applicable to actions apply in such proceedings. Rule 221(1)(a) allows for an action to be dismissed at any time on the ground that it "discloses no reasonable cause of action [...]". The similarity between Rule 334.16(1)(a) and Rule 221(1)(a) leads me to conclude that lack of jurisdiction arguments may be determined either within the context of the hearing for certification, or as a separate matter to be heard on a distinct motion prior to certification. There is however no rule or principle giving priority to Rule 221(1)(a) over Rule 334.16(1)(a) or vice versa. In these circumstances, the decision to hear and to determine the jurisdictional issues prior to or during the class action certification stage falls under the discretionary authority of this Court to manage the proceedings before it.

[20] I find support for this approach in the decision of this Court in *Campbell v. Canada (Attorney General), supra*. In *Campbell*, a case similar to the one here, a motion to strike a statement of claim prior to the certification of a class action was brought forward, and the issue to be decided, as here, was whether that motion to strike should be heard prior to the motion for certification. Though Justice Hansen did conclude that the motion to strike should be heard and determined prior to the certification motion, she so decided on the basis of the particular circumstances of the case and not on the basis of some overriding, preordained legal principle. As noted by Justice Hansen at paragraph 23 of that decision:

> It is evident from the jurisprudence that although, in principle, a certification motion ought to take precedence over other preliminary motions, in the end, the order of the proceedings will be determined on the basis of the circumstances of the particular case.

[21] The decisions of this Court in *Galarneau v. Canada (Attorney General), supra*, and in *Merchant Law Group v. Canada (Canada Revenue Agency), supra*, have also concluded that a motion to strike on jurisdictional grounds should be heard prior to the motion for certification. Though these cases did refer approvingly to the Quebec Court of Appeal decision in *Société Asbestos, supra*, they did so not because that decision was binding, but rather on the basis that its reasoning "is persuasive and applicable in the case at bar": *Merchant Law Group, supra* at para. 19. These decisions can thus be viewed as haven been decided on the basis of the circumstances at hand in each case.

[22] There can indeed be circumstances where it would be preferable to decide a jurisdictional challenge at the certification stage of a class action or even after the class action has been certified. As an example, in this case, it may well be preferable to have the Defendants' proposed jurisdictional challenges based on constitutional considerations decided, if need be, after the certification of the class action has been determined, since this could avoid a constitutional debate at the certification stage, with attending interventions of the Attorney General of Canada and perhaps provincial attorneys-general, on a matter which may never be certified.

[23] Consequently, I am strongly of the view that the order in which motions are heard and decided within class action proceedings, including motions challenging the jurisdiction of the Court to entertain the proceedings, is to be determined on a case by case basis taking into account the circumstances of each case and the issues which are raised in each case.

[24] In this case, the Defendants have convinced me that their preliminary motion challenging the jurisdiction of the Court on the basis of the arbitration agreement should be heard prior to the motion for certification of the class action.

[25] Indeed, the Plaintiffs filed their statement of claim as a proposed class action on October 23, 2009, but have not acted upon that claim since its filing. The Plaintiffs could have submitted their motion for certification as a class action, but they have chosen not to do so. Counsel for the Plaintiffs now asserts that such a motion may be submitted next June; however, there is no certainty this will indeed be done. Had a motion for certification as a class action been submitted in this case and a date set for a hearing on that motion, I may have been inclined to decide the motion to dismiss on jurisdictional grounds at the same time as the motion for certification. However, these are not the circumstances at hand, and I fail to see why the Defendants should be impeded from having their motion to strike heard by this Court when the Plaintiffs have yet to submit their motion for certification.

[26] In addition, the Defendants' motion may bring an end to the proceedings in their entirety or may result in a narrowing of the scope of the case for certification. The Plaintiffs themselves recognize that if the Defendants are successful in having the arbitration agreement applied to their claim, they may be required to limit their damages in a class action to an amount not exceeding $1,000.

[27] For these reasons, I conclude that the motion to dismiss should be heard and determined as soon as practicable, and in any event prior to the hearing of the eventual motion for certification the Plaintiffs may be submitting in this case.

[28] An order will consequently issue regarding the scheduling of the motion to dismiss.

[29] Costs on this motion shall follow the cause.

ORDER

THIS COURT ORDERS that:

1. Unless otherwise directed by a judge of this Court, the Defendants' Motion to Stay and to Compel Arbitration dated April 7, 2010 shall be heard in Montréal on Friday, June 18, 2010 at 9:30 am for a maximum duration of three and a half hours.

2. The Defendants' Amended Motion Record as filed in the records of the Court is recognized as filed with the Court and served on the Plaintiffs.

3. The Plaintiffs shall complete all cross examinations, if any, on affidavits included in the Defendants' Motion Record on or before May 21, 2010 and shall submit to the Court and provide a copy to the Defendants' counsel of their Respondents' Motion Record on or before May 28, 2010.

4. The Defendants shall complete all cross-examinations, if any, on affidavits included in the Plaintiffs' Motion Record on or before June 11, 2010.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1754-09
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APPEARANCES:

André Lespérance Careen Hannouche	FOR THE PLAINTIFFS
Robert Torralbo Claude Marseille	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

TRUDEL & JOHNSTON Montréal, QC	FOR THE PLAINTIFFS
LAUZON BÉLANGER INC. Montréal, QC	
BLAKE CASSELS & GRAYDON LLP Montréal, QC	FOR THE DEFENDANTS