

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

DELL COMPUTER CORPORATION

Appellant (Respondent)

and

**UNION DES CONSOMMATEURS
OLIVIER DUMOULIN**

Respondents (Petitioners)

MOTION RECORD
OF THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST
CLINIC ("CIPPIC") AND THE PUBLIC INTEREST ADVOCACY
CENTRE ("PIAC")
ON MOTION SEEKING LEAVE TO INTERVENE
PURSUANT TO RULE 55 OF THE SUPREME COURT OF CANADA
RULES

Date: June 9, 2006

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OLIVIER DUMOULIN**

Respondents (Petitioners)

NOTICE OF MOTION FOR LEAVE TO INTERVENE
BY THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
("CIPPIC") AND
THE PUBLIC INTEREST ADVOCACY CENTRE ("PIAC")

TAKE NOTICE that the applicants hereby apply to a judge pursuant to Rule 55 of the *Supreme Court Rules* for an Order granting them leave to intervene jointly in this appeal, including:

- a) leave to file a factum of up to 20 pages in length,
- b) leave to present oral argument of up to 20 minutes, and
- c) such further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the said motion:

1. Affidavit of Philippa Lawson, sworn 09 June 2006;
2. Affidavit of Michael Janigan, sworn 06 June 2006; and
3. such further or other material as counsel may advise and may be permitted.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. Canadian consumers in general will be affected by the outcome of this case. The proposed interveners, as national public interest groups with the mandate of defending consumer interests, have a direct and genuine interest in the subject-matter of the appeal. Their members and constituents will be prejudiced if leave to intervene is not granted.
2. The proposed interveners possess distinctive and extensive expertise with respect to the issues raised by this case, which expertise will be useful to the court;
3. The submissions of the interveners will be different from those of the Respondents. The submissions will be unique, useful, and relevant to the appeal.
4. Rules 55, 57, 59.
5. Such further and other grounds as appear on our Memorandum of Argument.

DATED at Ottawa, Ontario, this 9th day of the month of June 2006.

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

DELL COMPUTER CORPORATION

Appellant (Respondent)

and

**UNION DES CONSOMMATEURS
OLIVIER DUMOULIN**

Respondents (Petitioners)

AFFIDAVIT OF PHILIPPA LAWSON

I, Philippa Lawson, of the city of Ottawa, in the province of Ontario, do solemnly declare as follows:

1. I am the Executive Director and General Counsel of the Canadian Internet Policy and Public Interest Clinic (“CIPPIC”). As such, I have personal knowledge of the facts which are contained in my affidavit, except where I have stated facts to be based on information and belief, in which case I verily believe them to be true.

The Canadian Internet Policy and Public Interest Clinic (CIPPIC)

2. CIPPIC is a national legal clinic operated by the University of Ottawa, Faculty of Law. It was established in September 2003, and is the only clinic in Canada that focuses on legal issues arising from internet use. CIPPIC's mandate is to fill voids in public policy debates, to seek to ensure balance in policy and law-making processes, and to provide legal assistance to under-represented organizations and individuals, on issues arising from the use of new technologies.
3. CIPPIC fulfills its mandate in a number of ways, including intervening before courts, tribunals, and other decision-making bodies on such issues in order to bring forward important points or perspectives that might otherwise not be represented. It also conducts research into emerging issues, provides legal information to the public through its website, and advises individual clients. The clinic thus operates both as a provider of legal information and advice to others and as an advocate in its own right.
4. In seeking to further the public interest on internet-related issues, CIPPIC attempts to identify and advocate for the appropriate balance between conflicting interests of different stakeholders. In doing so, the clinic typically provides voice to the otherwise unrepresented, or under-represented, interests of individual internet users.
5. CIPPIC reports to an internal Advisory Committee made up of University of Ottawa law faculty members (from common law and civil law sections) and alumni, as well as to an external Advisory Board composed of six highly respected and accomplished lawyers in the technology law field from across North America. The clinic's professional staff (two lawyers) also benefit from the input of *pro bono* legal counsel and other expert volunteers on projects and cases, as they are in this case.
6. CIPPIC's Executive Director, staff counsel, faculty advisors, associates, external advisors and students bring to the clinic a high combined level of knowledge and expertise on legal issues arising from new technologies. Many are internationally-recognized experts in their fields. CIPPIC's intervention in this case will benefit from

the particular expertise of certain staff, faculty, associates and advisors in Quebec civil law, arbitration law, and legal issues arising from electronic commerce.

7. Although it is a relatively young organization, CIPPIC has already influenced the development of Canadian law and policy on internet-related issues, in particular those involving copyright and privacy law. It has done so through a combination of research, public education, legislative advocacy, court interventions, and participation in policy-making forums.
8. In addition to providing public legal information and advice to individual clients, CIPPIC has made submissions to governments on various issues including consumer protection in e-commerce, consumer privacy, spam, spyware, copyright law, domain name governance, and telecommunications regulation. The clinic has been commissioned by government to conduct studies on spam, spyware and privacy, and has appeared before a Parliamentary committee examining copyright law reform. It recently published a report assessing the compliance of online retailers with data protection laws, including the requirement for consumer consent to the collection, use or disclosure of personal data.
9. CIPPIC has sought and been granted leave to intervene in two judicial proceedings to date. In each case, the court referred in its reasons to arguments put forward by CIPPIC.

BMG Canada Inc. et al v. John Doe et al, 2005 FCA 193.

BMG Canada Inc. et al v. John Doe et al, 2004 FC 488.

10. One of CIPPIC's current funded projects involves identifying and analysing unfair terms and methods in business-to-consumer electronic contracting. The clinic is collaborating with private sector lawyers, as well as an expert in behavioural science, on this project.

11. CIPPIC staff are frequently quoted in the media on consumer issues involving electronic commerce. My own expertise derives from researching, writing, and advocating on consumer protection in the online context for over eight years, at both the national and international levels. I have worked closely with consumer groups, business organizations, and governments in developing guidelines for consumer protection in the context of electronic commerce, including the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* (1999), the *Principles of Consumer Protection for Electronic Commerce: A Canadian Framework* (1999) and the subsequent *Canadian Code of Practice for Consumer Protection in Electronic Commerce* (2004). In 1999, I wrote a report entitled *Consumer Issues in Electronic Commerce*. In 2000 and 2001, I conducted studies for Consumers International on dispute resolution for consumers in the electronic environment, and wrote two reports entitled *Disputes in Cyberspace: Online dispute resolution for consumers in cross-border disputes – an international survey* (Consumers International, 2000; update in 2001).
12. Through its research and advocacy to date, as well as the experience of its staff and associates, CIPPIC has thus developed particular expertise on issues raised in this appeal, namely online business-to-consumer contracting and dispute resolution.

CIPPIC's Interest in the Appeal

13. As a clinic with national scope focusing on consumer issues arising from electronic commerce, CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will affect (a) access to justice by online consumers, (b) the legal risks that consumers face when transacting online, and (c) standards for notice in the context of business-to-consumer electronic commerce.
14. CIPPIC 's interest is distinct from that of the Respondents in that CIPPIC is concerned not with the specific class action underlying the appeal, but rather with the broad legal issues raised by the appeal and their implications for Canadian consumers and internet users generally.

CIPPIC's proposed submissions

15. If granted leave to intervene, CIPPIC intends to make the following submissions:

- a) That the class action is a procedure of public order, which procedural right consumers cannot validly waive by way of an arbitration clause in a standard form contract for sale or service;
- b) That terms contained in a web page referred to merely by the means of a hyperlink (such as Dell's "Terms and Conditions of Sale") constitute an external clause within the meaning of article 1435 of the *Civil Code of Québec*;
- c) That the simple presence of a hyperlink on a web page is not sufficient to comply with the requirements of article 1435, *C.C.Q.* or with the general duty to inform that flows from articles 6, 7 and 1375, *C.C.Q.*.

16. CIPPIC has communicated with, and will continue to communicate with, counsel for the Respondents in this appeal in order to ensure that its submissions are distinct and do not replicate those of the Respondents.

17. I make this affidavit in support of CIPPIC's request to intervene and for no other or improper purpose.

SOLEMNLy DECLARED before me
in the city of Ottawa, province of Ontario,
this 9th day of June, 2006.

Philippa Lawson

Commissioner of Oaths

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

DELL COMPUTER CORPORATION

Appellant (Respondent)

and

**UNION DES CONSOMMATEURS
OLIVIER DUMOULIN**

Respondents (Petitioners)

AFFIDAVIT OF MICHAEL JANIGAN

I, Michael Janigan, of the city of Ottawa in the province of Ontario, do solemnly declare as follows:

I am Executive Director and General Counsel of the Public Interest Advocacy Centre (“PIAC”). As such, I have personal knowledge of the facts which are contained in my affidavit, except where I have stated facts to be based on information and belief, in which case I verily believe them to be true.

PIAC is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services, consumer protection and marketplace fairness. It has individual and group members comprising, in total, close to one million Canadians. As a federal non-profit corporation, PIAC reports

to a Board of Directors comprised of 10 directors with broad geographic representation across Canada.

Since its inception in 1976, PIAC has been representing the interests of ordinary and vulnerable consumers in matters involving telecommunications, energy, financial services, transportation, privacy, and consumer protection. PIAC works closely with other consumer organizations, and is frequently called upon to represent the consumer interest in policy-making, regulatory, and law-making processes.

Over its three decades of research and advocacy on behalf of ordinary Canadians, PIAC has developed substantial expertise in consumer issues, most recently in the context of electronic commerce. PIAC staff have made submissions to governments on a variety of issues involving consumer protection, and have participated actively in numerous multi-stakeholder proceedings developing rules to guide business-to-consumer electronic commerce. PIAC has published a report on consumer issues in electronic commerce, and PIAC staff members are frequently quoted in the media on consumer issues in the electronic environment.

In late 2004, PIAC co-published a report, with Option Consommateurs, entitled *Mandatory Arbitration and Consumer Contracts*. This report was the result of extensive research and analysis on the issue of mandatory arbitration clauses in consumer contracts and consumer access to justice. Through this research, PIAC has developed particular expertise on the issue at the heart of this appeal.

PIAC's Interest in the Appeal

PIAC has a particular interest in the legal issues raised in this proceeding insofar as their determination will affect (a) access to justice by online consumers, (b) the legal risks that consumers face when transacting online, and (c) standards for notice in the context of business-to-consumer electronic commerce.

PIAC's interest is distinct from that of the Respondents in that PIAC is concerned not with the specific class action underlying the appeal, but rather with the broad legal issues raised by the appeal and their implications for Canadian consumers and internet users generally.

PIAC's Proposed Submissions

If granted leave to intervene in this appeal, PIAC intends to make the following submissions, jointly with the Canadian Internet Policy and Public Interest Clinic:

That the class action is a procedure of public order, which procedural right consumers cannot validly waive by way of an arbitration clause in a standard form contract for sale or service;

That terms contained in a web page referred to merely by the means of a hyperlink (such as Dell's "Terms and Conditions of Sale") constitute an external clause within the meaning of article 1435 of the *Civil Code of Québec*;

That the simple presence of a hyperlink on a web page is not sufficient to comply with the requirements of article 1435 or with the general duty to inform that flows from articles 6, 7 and 1375.

Through its counsel in this case, PIAC has consulted with the respondents in order to ensure that its proposed submissions are different from their planned submissions. PIAC will continue to consult with the respondents to ensure that its submissions are distinct from those of other parties.

I make this affidavit in support of PIAC's request to intervene and for no other or improper purpose.

SOLEMNLY DECLARED before me
in the city of Ottawa, province of Ontario,
this 6th day of June, 2006.

Michael Janigan

Commissioner of Oaths

IN THE SUPREME COURT OF CANADA
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BETWEEN:

DELL COMPUTER CORPORATION

Appellant (Respondent)

and

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OLIVIER DUMOULIN**

Respondents (Petitioners)

MEMORANDUM OF ARGUMENT

IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE BY THE
CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC "CIPPIC"
AND THE PUBLIC INTEREST ADVOCACY CENTRE "PIAC"

Part I – Facts

1. By way of this motion, the Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) and the Public Interest Advocacy Centre (“PIAC”) seek leave to intervene jointly in this appeal.
2. CIPPIC and PIAC are national organizations with similar mandates of furthering the public interest in matters of broad national concern, including matters involving business-to-consumer commerce and dispute resolution in the online environment. Both organizations have significant experience representing the interests of internet users

before courts, regulators, legislative committees and other government bodies – PIAC since 1976, and CIPPIC since 2003. Both organizations have engaged in extensive research and advocacy on issues of consumer protection in electronic commerce.

Affidavit of Philippa Lawson, sworn 9 June, 2006, at paras. 2-4 and 7-12

Affidavit of Michael Janigan, sworn 6 June, 2006, at paras. 2-5

3. Both organizations have developed considerable expertise on the issues raised in this appeal, through their past and present research and advocacy. CIPPIC's focus is on legal issues arising from use of the internet, while PIAC's focus is on consumer access to essential services, including dispute resolution services. Both organizations continue to work on these issues in an effort to develop fair industry practices and legal standards that serve all participants in the marketplace. As such, CIPPIC and PIAC are uniquely placed to contribute to the Court's understanding of the issues in this appeal.

Affidavit of Philippa Lawson, sworn 9 June, 2006, at paras. 2-4 and 7-12

Affidavit of Michael Janigan, sworn 6 June, 2006, at paras. 2-5

4. This appeal raises two broad issues of significant public interest which directly engage the proposed interveners' specific interests and expertise:

- a) the ability of a corporation to deny consumers their right to bring court actions, and in particular, class actions, against it through terms in a contract of adhesion that are imposed on consumers before any dispute has arisen; and
- b) the standard of notice that applies to online merchants in the context of online contracts of adhesion for consumer goods and services.

Part II – Question in Issue

5. The question raised by this motion is whether CIPPIC and PIAC should be granted leave to intervene in this appeal, and if so, on what terms.

Part III – Argument

CIPPIC's and PIAC's interest in the appeal

6. The two central issues in this motion, as with all applications for leave to intervene, are:

- a) whether the applicants have an interest in the appeal, and
- b) whether the applicants' submissions will be useful to the court and different from those of other parties.

Rules of the Supreme Court of Canada, SOR/2002-156, Rule 57.

7. As organizations whose mandates include representing consumer interests in policy and law-making forums, and whose work focuses on issues arising from consumer e-commerce, CIPPIC and PIAC have a strong interest in the outcome of this case. Their mandates and historical involvement in the development of law and policy on these issues, constitute a significant interest in the appeal.

Affidavit of Philippa Lawson, sworn 9 June, 2006, at paras. 2-4 and 7-13

Affidavit of Michael Janigan, sworn 6 June, 2006, at paras. 2-6

8. CIPPIC and PIAC support the Respondents in this case. However, their interest in this case is distinct from that of the Respondent's in that CIPPIC and PIAC are concerned not with the specific class action application underlying the appeal, but rather with the broad legal issues raised by the appeal and their implications for Canadian consumers and internet users generally.

Affidavit of Philippa Lawson, sworn 9 June, 2006, at paras. 13-14

Affidavit of Michael Janigan, sworn 6 June, 2006, at paras. 6-7

9. CIPPIC and PIAC seek leave to intervene in this appeal because of its implications for (a) access to justice by online consumers, (b) the legal risks that

consumers face when transacting online, and (c) standards for notice in the context of business-to-consumer electronic commerce.

10. Indeed, without the intervention of CIPPIC and PIAC in this case, certain arguments important to the broader public interest in electronic contracting and effective consumer redress are unlikely to be made, thus prejudicing the members and constituents of CIPPIC and PIAC.

Useful and relevant arguments, not otherwise to be made on the Appeal

11. The main issue in this case is whether, in the context of e-commerce, a large corporation may unilaterally deprive consumers of their right to bring a class action against it, through the inclusion of an arbitration clause in contractual terms that are not effectively brought to the attention of the consumer. Put more simply, the question is whether businesses may use arbitration as a “class action stopper.”

12. The Court's judgement in this case will affect a large number of consumers who enter into internet transactions. Hence, this Court would benefit from the submissions of public interest groups, such as CIPPIC and PIAC, with mandates of representing the broad consumer interest in matters of public concern.

13. Moreover, CIPPIC and PIAC will be able to bring useful submissions to this Court, as their expertise is highly relevant to the issues at stake in this case. In particular, CIPPIC has conducted extensive research concerning consumer internet transactions. On its part, PIAC has recently investigated the interaction between consumer protection and mandatory arbitration. This combined expertise will provide a highly valuable complement to Respondents' counsel expertise in the field of class actions.

Affidavit of Philippa Lawson, sworn 9 June, 2006, at paras. 10-11

Affidavit of Michael Janigan, sworn 6 June, 2006, at paras. 4-5

14. The proposed intervention will also benefit from CIPPIC's presence within the Faculty of Law of the University of Ottawa and its close link with the Law and Technology program. The interveners will be able to draw upon the expertise of

professors of both sections (civil law and common law) of the Faculty, along with significant student research capacity, to bring state-of-the-art arguments about civil law principles and comparative law.

Affidavit of Philippa Lawson, sworn 9 June, 2006, at paras. 5-6

15. CIPPIC and PIAC will bring arguments different from those that the Respondents advanced in the courts below and that the Respondents are expected to make in this Court. In particular, CIPPIC and PIAC will:

- a) draw upon their expertise in e-commerce in order to suggest to this Court how Dell could have complied with the requirements of article 1435 of the *Civil Code of Québec (C.C.Q.)*;
- b) base their submissions on general civil law principles, such as the requirement of a free and informed consent, the concept of public order (in particular, jurisdictional public order) and the duty to inform; and
- c) draw upon the results of recent comparative research regarding the relationship between e-commerce, consumer protection and arbitration.

16. If leave to intervene is granted, CIPPIC and PIAC intend to argue, in substance and without restriction, that:

- a) Quebec consumers cannot waive, by way of an arbitration clause in a contract of adhesion made prior to the dispute arising, their right to bring a class action, because:
 - i) The class action, as a special procedure, falls within jurisdictional public order, *i.e.*, procedural avenues that cannot be waived in advance by the right-holder;
 - ii) The public order character of the class action flows from the legislature's purpose in enacting that procedure, *i.e.*, improving access to justice by giving consumers a collective remedy where individual actions would be too costly

or otherwise ineffective and redressing the imbalance between consumers and businesses;

- iii) Arbitration does not offer an adequate alternative to the consumer class action, due to its individual and confidential nature, which considerably limits the precedential value and deterrent effect of arbitration awards compared to public court decisions. Private arbitration further limits consumer rights due to the absence of public funding;
 - iv) Current arbitration laws in Quebec (Book VII, Title 1, of the *Code of Civil Procedure (C.C.P.)*) were designed for commercial (business-to-business) disputes, not consumer disputes. Because these laws were drafted without taking into account the significantly different context in which consumer disputes arise, they should not be interpreted as permitting businesses to impose arbitration on consumers via pre-dispute contracts of adhesion;
 - v) In contrast to what Dell argues, article 940.1 of the *C.C.P.* permits a court to rule on the validity of an arbitration clause before the dispute is submitted to arbitration. Article 940.1 specifically sanctions this approach, especially where the arbitration clause denies recourse to a public order procedure, such as the class action;
- b) A document contained in a separate web page and referred to merely by way of a hyperlink constitutes an external clause governed by article 1435 *C.C.Q.*, because:
- i) Article 1435's purpose is to be found in article 1399 *C.C.Q.*: ensuring that consumers give a free and enlightened consent to their contracts;
 - ii) Web pages constitute the basic units of cyberspace and separate web pages constitute separate documents; this interpretation is consistent with section 4 of the *Act to establish a legal framework for information technology*, R.S.Q., c. C-1.1 which addresses a different fact situation;

- iii) Given that businesses can include any number of hyperlinked documents on their web pages, and given the considerable and unbounded amount of information that can be included in those linked documents, there is no valid analogy between separate web pages connected through hyperlinks and a multi-page document;
 - iv) Thus, a web page referred to in a hyperlink on the page where the consumer concludes a contract constitutes a separate document and falls within the concept of “external clause” in article 1435 *C.C.Q.*, requiring Dell to prove actual knowledge and consent on the consumer’s part;
 - v) This conclusion is reinforced by articles 2640 and 2642 *C.C.Q.*, which prescribe that the arbitration agreement is a separate contract and must be in writing;
- c) The simple presence of a hyperlink on a web page is not sufficient to comply with the requirements of article 1435 (“expressly bringing to the attention of the consumer”) or with the general duty to inform that flows from articles 6, 7 and 1375 *C.C.Q.*, because:
- i) Hyperlinks are easy for consumers to overlook;
 - ii) It is generally known that commercial web pages such as Dell's often contain many hyperlinked documents related to a particular transaction; it is unreasonable to expect internet users to click on each link and read each, often lengthy and dense, document in order to find out about the contractual terms that a business is trying to impose on them;
 - iii) Online businesses can take simple measures (such as pop-up windows with "print" and "save" options, scroll bars, "click to agree" buttons) to indicate clearly to consumers, in easily understandable language, the nature and practical effect of the contractual terms that they wish to impose on consumers and to ensure that consumers at least pretend to have read and agreed to particular terms and conditions before concluding the sale;

- iv) Whether a business has complied with the requirements set out above should be assessed in light of article 1399 *C.C.Q.* (which requires consent to be free and informed), articles 6, 7 and 1375 *C.C.Q.* (which ground a general duty to inform, especially in cases of informational imbalance), article 1432 *C.C.Q.*, (which mandates an interpretation favourable to the consumer in case of doubt or ambiguity), and section 9 of the *Consumer Protection Act*, R.S.Q., c. P-40.1 (which requires taking into account the condition of the parties, the circumstances in which the contract was entered into and the benefits arising from the contract for the consumer);
- v) In the case at bar, Dell did not comply with such requirements, because a consumer could easily conclude a contract without reading Dell's standard terms and conditions; moreover Dell's terms and conditions were lengthy and confusing and did not clearly convey Dell's intent to bar class actions to a consumer who clicked on them.

17. If granted leave, CIPPIC and PIAC intend to expand on these and related arguments, to the extent that the arguments are not already being made by the Respondents.

18. It should be emphasized that CIPPIC and PIAC are not arguing that consumer disputes can never be arbitrated. Indeed, CIPPIC and PIAC are of the view that *optional* arbitration is beneficial to consumers, especially in the context of internet transactions. Instead, their argument is that consumers should not be bound to arbitration before disputes arise; they should only be bound to arbitration when they have freely agreed to it after the dispute has arisen, when they are in a position to appreciate the implications of their choice, and outside the context of a "take it or leave it" contract for sale or services. Prior to the dispute arising, a consumer's right to bring a class action should always be preserved as a matter of public order recourse. This is consonant with this Court's conception of rules of protective public order, which can only be waived once a dispute has arisen.

Garcia Transport ltée v. Royal Trust Co., [1992] 2 S.C.R. 499.

19. Should this Court decide this case on CIPPIC's and PIAC's primary argument that class actions are a matter of public order, its judgement will have a stronger precedential value than if it decides the case based on article 1437 *C.C.Q.* (abusive clauses), as argued in the courts below. The former line of reasoning would be based on firm principles of general application rather than on the assessment of the specific facts of the case. In contrast, a judgement based on article 1437 *C.C.Q.* would invite lower courts to assess the validity of arbitration clauses on a case-by-case basis, thus spawning more litigation and creating uncertainty for consumers and businesses alike.

Conclusion

20. In conclusion, CIPPIC and PIAC will make submissions, based on their distinct experience and expertise in legal issues arising from consumer e-commerce, that are relevant to the case before the Court, different from arguments made by the Respondents, and useful to the Court in conducting a full analysis of the issues raised by the appeal.

21. CIPPIC and PIAC do not intend to bring new evidence and undertake to accept the record as presently constituted.

22. CIPPIC and PIAC also undertake to continue consulting with Counsel for the Respondents so as to avoid any duplication of argument.

Part IV – Costs

23. CIPPIC and PIAC are not seeking costs in this matter, and request that they be immune from any costs order.

Part V - Order Sought

24. CIPPIC and PIAC respectfully request an order granting them leave to intervene jointly, with leave to file a factum of up to 20 pages, and to make oral submissions of up to 20 minutes.

Ottawa, 09 June 2006.

M^e Mistrale Goudreau
Counsel for the Applicants, CIPPIC and PIAC

Part VI – Authorities

Cited at para.

Garcia Transport Ltée v. Royal Trust Co., [1992] 2 S.C.R. 499..... 18

Part VII - Statutory Provisions

Federal legislation

Cited at para.

Rules of the Supreme Court of Canada, SOR/2002-156

57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(a) identify the position the person interested in the proceeding intends to take in the proceeding; and

(b) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

Règles de la Cour suprême du Canada, DORS/2002-156

57. (1) L'affidavit à l'appui de la requête en intervention doit préciser l'identité de la personne ayant un intérêt dans la procédure et cet intérêt, y compris tout préjudice que subirait cette personne en cas de refus de l'autorisation d'intervenir.

(2) La requête expose ce qui suit :

a) la position que cette personne compte prendre dans la procédure;

b) ses arguments, leur pertinence par rapport à la procédure et les raisons qu'elle a de croire qu'ils seront utiles à la Cour et différents de ceux des autres parties.

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Québec legislation

Cited at para.

An Act to establish a legal framework for information technology, R.S.Q. c. C-1.1

4. A technology-based document, even when the information it contains is fragmented and dispersed in one or more media at one or more locations, is considered to form a whole if its logical structuring elements allow the fragments to be connected, directly or by reference, and if such elements ensure both the integrity of each fragment and the

Loi concernant le cadre juridique des technologies de l'information, L.R.Q. c. C-1.1

4. Un document technologique, dont l'information est fragmentée et répartie sur un ou plusieurs supports situés en un ou plusieurs emplacements, doit être considéré comme formant un tout, lorsque des éléments logiques structurants permettent d'en relier les fragments, directement ou par référence, et que ces éléments assurent à la fois

16b)

integrity of the document reconstituted as it existed prior to its fragmentation and dispersal.

Conversely, separate technology-based documents, even when combined into a single document for transmission or retention purposes, do not lose their distinct nature, if logical structuring elements ensure both the integrity of the combined document and the integrity of each separate reconstituted document.

l'intégrité de chacun des fragments d'information et l'intégrité de la reconstitution du document antérieur à la fragmentation et à la répartition.

Inversement, plusieurs documents technologiques, même réunis en un seul à des fins de transmission ou de conservation, ne perdent pas leur caractère distinct, lorsque des éléments logiques structurants permettent d'assurer à la fois l'intégrité du document qui les réunit et celle de la reconstitution de chacun des documents qui ont été ainsi réunis.

Cited at para.

Civil code of Québec

Code civil du Québec

6. Every person is bound to exercise his civil rights in good faith.

6. Toute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi. 16c)

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

7. Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi. 16c)

[...]

1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

1375. La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction. 16c)

[...]

1399. Consent may be given only in a free and enlightened manner.

1399. Le consentement doit être libre et éclairé. 16b), 16c)

It may be vitiated by error, fear or lesion.

Il peut être vicié par l'erreur, la crainte ou la lésion.

[...]

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.

[...]

1435. An external clause referred to in a contract is binding on the parties.

In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.

[...]

1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

[...]

2640. An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which

1432. Dans le doute, le contrat s'interprète en faveur de celui qui a contracté l'obligation et contre celui qui l'a stipulée. Dans tous les cas, il s'interprète en faveur de l'adhérent ou du consommateur.

16c)

1435. La clause externe à laquelle renvoie le contrat lie les parties.

15a),
16b),
16c)

Toutefois, dans un contrat de consommation ou d'adhésion, cette clause est nulle si, au moment de la formation du contrat, elle n'a pas été expressément portée à la connaissance du consommateur ou de la partie qui y adhère, à moins que l'autre partie ne prouve que le consommateur ou l'adhérent en avait par ailleurs connaissance.

1437. La clause abusive d'un contrat de consommation ou d'adhésion est nulle ou l'obligation qui en découle, réductible.

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Est abusive toute clause qui désavantage le consommateur ou l'adhérent d'une manière excessive et déraisonnable, allant ainsi à l'encontre de ce qu'exige la bonne foi; est abusive, notamment, la clause si éloignée des obligations essentielles qui découlent des règles gouvernant habituellement le contrat qu'elle dénature celui-ci.

2640. La convention d'arbitrage doit être constatée par écrit; elle est réputée l'être si elle est consignée dans un échange de communications qui en

16b)

attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party.

[...]

2642. An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.

atteste l'existence ou dans un échange d'actes de procédure où son existence est alléguée par une partie et non contestée par l'autre.

2642. Une convention d'arbitrage contenue dans un contrat est considérée comme une convention distincte des autres clauses de ce contrat et la constatation de la nullité du contrat par les arbitres ne rend pas nulle pour autant la convention d'arbitrage. 16b)

Cited at para.

Code of Civil Procedure, R.S.Q. c. C-25

940.1. Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.

Code de procédure civile, L.R.Q. c. C-25

940.1. Tant que la cause n'est pas inscrite, un tribunal, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention d'arbitrage, renvoie les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate la nullité de la convention. 16a)

La procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue tant que le tribunal n'a pas statué.

Cited at para.

Consumer Protection Act, R.S.Q. c. P-40.1

9. Where the court must determine whether a consumer consented to a contract, it shall consider the condition of the parties, the circumstances in which the contract was entered into and the benefits arising from the contract for the consumer.

Loi sur la protection du consommateur, L.R.Q. c. P-40.1

9. Lorsqu'un tribunal doit apprécier le consentement donné par un consommateur à un contrat, il tient compte de la condition des parties, des circonstances dans lesquelles le contrat a été conclu et des avantages qui résultent du contrat pour le consommateur. 16c)

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

DELL COMPUTER CORPORATION

Appellant (Respondent)

and

**UNION DES CONSOMMATEURS
OLIVIER DUMOULIN**

Respondents (Petitioners)

ORDER

UPON MOTION by the Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) and the Public Interest Advocacy Centre (“PIAC”), for an Order pursuant to

Rule 59 of the *Supreme Court of Canada Rules*:

1. **THIS COURT GRANTS LEAVE TO INTERVENE** in this proceeding jointly to the applicants, CIPPIC and PIAC, on the following terms:
 - a. CIPPIC and PIAC shall not file further evidence and will accept the record as presently constituted;

- b. CIPPIC and PIAC shall file and serve a factum not to exceed 20 pages within eight weeks of the order granting leave to intervene;
 - c. CIPPIC and PIAC may make oral submissions at the hearing of the appeal not to exceed 20 minutes;
 - d. CIPPIC and PIAC shall be added to the style of cause in this proceeding as interveners;
 - e. CIPPIC and PIAC shall not seek or be made subject to any order as to costs;
 - f. CIPPIC and PIAC shall cooperate with all other parties and interveners to expedite the hearing and avoid duplication; and
 - g. CIPPIC and PIAC shall be served with all materials filed and to be filed by other parties and interveners.
-

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT
OF APPEAL)

BETWEEN:

DELL COMPUTER CORPORATION

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and

**UNION DES CONSOMMATEURS and
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Respondents (Petitioners)

MOTION RECORD
OF THE CANADIAN INTERNET POLICY AND
PUBLIC INTEREST CLINIC ("CIPPIC") AND THE
PUBLIC INTEREST ADVOCACY CENTRE
("PIAC") ON A
MOTION SEEKING LEAVE TO INTERVENE
PURSUANT TO RULE 55 OF THE SUPREME
COURT OF CANADA RULES

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