

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***MacKinnon v. National Money Mart Company,***
2009 BCCA 103

Date: 20090313

Dockets: CA034967, CA036123, CA036372

Docket No.: CA034967

Between:

Kurt MacKinnon and Louise Parsons

Respondents
(Plaintiffs)

And

National Money Mart Company

Appellant
(Defendant)

- And -

Docket No.: CA036123

Between:

Kurt MacKinnon and Louise Parsons

Respondents
(Plaintiffs)

And

National Money Mart Company

Appellant
(Defendant)

And

Dollar Financial Group Inc.

(Defendant)

- And -

Docket No.: CA036372

Between:

Kurt MacKinnon and Louise Parsons

Respondents
(Plaintiffs)

And

Dollar Financial Group Inc.

Appellant
(Defendant)

And

National Money Mart Company

Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Rowles
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Neilson

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Place and Date of Hearing:

Vancouver, British Columbia
January 14 & 15, 2009

Place and Date of Judgment:

Vancouver, British Columbia
March 13, 2009

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This case is about the relationship between arbitral jurisdiction over commercial disputes on the one hand, and class action procedures for the judicial determination of such disputes, on the other. In this instance, the parties' choice of arbitration was one of the terms contained in a standard form "payday loan" contract. In some provinces, such clauses have been prohibited in consumer protection legislation, but that is not the case in British Columbia. We must therefore determine how the province's arbitral legislation applies, if at all, to actions purportedly brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "CPA") for the enforcement of alleged consumer rights — one of the main policy goals underlying that Act. The defendants say that in two recent cases originating in Quebec, the Supreme Court of Canada has resolved this issue in favour of arbitral jurisdiction, and that the same reasoning should be followed in this province. The plaintiffs respond that Quebec's arbitration legislation is materially different from that of British Columbia, and that even if the law of this province was changed by the recent decisions, the doctrine of issue estoppel applies to preclude enforcing the arbitration clause in this case, contrary to a ruling made by this court in 2004.

[2] As will be seen below, I am of the view that the Supreme Court of Canada's recent judgments 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 do extend to the law of British Columbia, and that accordingly, this court's previous holding that the certification of a class action renders an arbitration clause "inoperative", has been effectively overruled. However, I am also of the view that issue estoppel

applies to preserve this court's earlier decision and to preclude the reference of this dispute to arbitration at this stage.

CHRONOLOGY

[3] These three appeals arise in the same action, which has now been certified as a class proceeding, originally brought by Mr. MacKinnon on behalf of himself and other persons who received "Fast Cash Advances" from the defendant National Money Mart Company ("Money Mart") on or after January 1, 1996 and who repaid such advances using post-dated cheques they provided to the lender at the time the loan was made. Mr. MacKinnon alleges that the cheque-cashing fees charged by Money Mart constitute illegal interest the receipt of which is prohibited by s. 347(1)(b) of the *Criminal Code*. He seeks a declaration to that effect, an accounting, restitution, and damages, including punitive damages.

[4] Shortly after the action was commenced, Money Mart purported to elect to have Mr. MacKinnon's claims determined by arbitration in accordance with arbitration clauses, used since January 2001, in the "Fast Cash Advance" loan agreements. The clauses stated:

Any claim, dispute, or issue whether in contract, tort, or otherwise, arising out of or in connection with the Loan or this Loan Agreement or any prior or future loan agreement between the parties, including any issue regarding related fees, advertising, promotion or any oral or written statement or the absence thereof, default of payment, and/or the relationship between the parties shall, upon election by either party be resolved by binding arbitration in accordance with The Commercial Arbitration Act of BC as amended (the "Act"). No joinder or consolidation of claims with other persons are permitted without the consent of the parties hereto. In the event of a conflict between this arbitration provision and the Act, the terms of this arbitration provision shall govern.

Money Mart offered to pay the costs of the arbitration and to consider any other procedure that would be fair, efficient and cost-effective for both parties. Mr.

MacKinnon refused arbitration, taking the position that Money Mart had no enforceable right thereto.

[5] Two years after Mr. MacKinnon commenced his action, Ms. Parsons commenced a similar one, but claiming under loan agreements entered into with Money Mart prior to January 1, 2001 — i.e., agreements not containing arbitration clauses. The two actions were consolidated and Ms. Parsons was also designated as a representative plaintiff. The plaintiffs have joined Dollar Financial Group Inc. (“Dollar”), a subsidiary of which is the parent company of Money Mart, as a defendant on the basis of allegations that royalty and management fees it received from Money Mart also offended s. 347(1)(b) of the *Criminal Code*; and that Dollar engaged in a conspiracy with Money Mart to commit unlawful acts and acted with it in furtherance of a common business enterprise.

[6] The defendants appeal the following orders made by Madam Justice Brown, the case management judge in the court below:

- (a) an order dated March 14, 2007, which certified the consolidated action as a class proceeding, appointed the representative plaintiffs, defined the class of plaintiffs and common issues (reproduced as Schedule A to these reasons) and carried out other procedural steps in accordance with s. 8 of the *CPA*. (In the course of deciding whether the pleadings disclosed a cause of action for purposes of s. 4(1)(a) of the *CPA*, the case management judge also declined to decide whether s. 347(1)(b) of the

Criminal Code is unconstitutional as Money Mart contended. The defendants also challenge this ruling on appeal.);

- (b) an order dated May 13, 2008, which dismissed two motions of Money Mart for a stay of proceedings on the basis of the arbitration clauses referred to above; and
- (c) an order dated July 25, 2008, which dismissed Dollar's application for a stay (which application was also based on the Money Mart arbitration agreements) and certified the class action as against Dollar.

[7] We sat as a panel of five judges because we are being asked to overrule, or to find that the Supreme Court of Canada has effectively overruled, an earlier decision of this court in this action, dated September 24, 2004 and indexed as 2004 BCCA 473. I will refer to the decision as "*MacKinnon (C.A.)*". On that occasion, Money Mart was appealing an order of the case management judge dated February 3, 2004, refusing to stay the action in favour of arbitration pursuant to s. 15(2) of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "CAA"). (See 2004 BCSC 136, B.C.L.R. 26 (4th) 172.)

Section 15(2) provides:

In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[8] Brown J. found an apparent conflict between s. 15(2) and s. 4 of the *CPA*, which requires that the Court certify an action where certain criteria, including "preferability", are met. (Para. 13.) She concluded that staying the action would deny the plaintiffs

access to effective justice by means of a class proceeding (para. 26), but that the conflict could be resolved as follows:

These [A]cts, however, may be read harmoniously. The *Commercial Arbitration Act* (s. 15(2)) provides that the action is to be stayed unless the arbitration agreement is void, inoperative or incapable of being performed. I am satisfied that in the face of a class proceeding, the arbitration agreement is inoperative.

Mustill and Boyd in *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989) at 464 write:

The expression 'inoperative' has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void *ab initio*, has for some reason ceased to have effect for the future.

The legislature, by including "inoperative" in s. 15(2), contemplated a situation where the arbitration clause was not void or incapable of being performed, but was ineffective for some other reason. In my view, that wording applies to these circumstances: where a proceeding meets the requirements of s. 4 of the *Class Proceedings Act*, the court must certify it as a class proceeding; the arbitration clause is, therefore, inoperative. If the acts are read together in this way, they are not in conflict. In my view, this is the correct interpretation. [At paras. 30–2; emphasis added.]

[9] Money Mart appealed the dismissal, and the appeal came before five justices of this court in September 2004. Madame Justice Levine, speaking for the Court, stated that the issue before it was whether "an arbitration clause in a contract [is] inoperative where an action challenging the contract is brought as an intended class proceeding". (Para. 1.) At para. 28, she stated that "where there is an arbitration agreement, the court must consider arbitration as one of the alternative procedures", citing *Kanitz v. Rogers Cable Inc.* (2002) 58 O.R. (3d) 299 (S.C.J.), at para. 53. There, Mr. Justice Nordheimer had mentioned the possibility of arbitration involving multiple plaintiffs with similar claims. He went on to hold, however, that the plaintiffs' concerns regarding going to arbitration rather than a class proceeding could not be "elevated to the level

necessary” to render the arbitration clause “unconscionable” within the meaning of s. 7(2) of the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17. (Para. 56.) In the result, he stayed the court action.

[10] This court in *MacKinnon (C.A.)* reached a different result from that reached in *Kanitz*. The Court of Appeal agreed with Brown J.’s interpretation of “inoperative” — i.e., that where an action meets the criteria of s. 4 of the *CPA* for certification as a class action, the court must certify it and that the arbitration clause thereupon becomes “inoperative”. (Para. 48.) At the same time, the Court found the case management judge had erred in deciding the stay application prior to deciding the certification application. In the words of Levine J.A.:

... As the case management judge acknowledged, it is because certification is mandatory that the arbitration agreement is “inoperative”. Her decision to refuse the stay before deciding whether the proceeding would be certified was therefore premature.

The case management judge considered, in a preliminary way, two of the factors set out in s. 4(2) of the *Class Proceedings Act* that must be considered in determining whether a class proceeding would be the preferable procedure. These are whether other means of resolving the claims are less practical or less efficient, and whether the administration of the class proceedings would create greater difficulties than those likely to be experienced if relief were sought by other means.

It is apparent from the record that other matters required to be considered on the hearing of the certification application have not yet come before the court. In determining whether a class proceeding would be the preferable procedure, the court must consider whether common issues predominate over individual issues, whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions and whether the class proceeding would involve claims that have been the subject of other proceedings. The requirements of s. 4(1) of the *Act* must also be considered.

It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration

agreement is “inoperative”. It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the “preferable procedure” and the other requirements for certification have been met.

Thus, the applications for a stay and for certification of the class proceeding must be dealt with together. The outcomes of the two applications are interdependent: the mandatory terms of the Class Proceedings Act mean that arbitration and class proceedings cannot operate at the same time with respect to the same dispute. On the other hand, if the proceeding is not certified as a class proceeding, there may be no basis for saying that the arbitration agreement is “inoperative”. [At paras. 49–53; emphasis added.]

The Court allowed Money Mart’s appeal, but remitted the stay application to the case management judge “for reconsideration on the application for certification in accordance with these reasons for judgment.” Similar wording was incorporated into the formal order entered in late 2004. Neither party appealed the order.

[11] After further procedural steps and missteps, Mr. MacKinnon’s application for certification pursuant to the *CPA* was heard in late 2006. Notwithstanding this court’s direction that the certification and stay applications were to be dealt with together, the stay application was not re-heard at this time. Brown J. suggested at para. 11 of her reasons of May 13, 2008 that Money Mart had not pursued a stay in late 2006 because “... if the matter were certified, then the arbitration clause must be inoperative and the stay would not be granted.” She ordered the consolidation of the two actions and certified the resulting action as a class proceeding as against Money Mart. She rejected Money Mart’s argument that an avenue of “alternative dispute resolution” proposed by it would be more economical and efficient than a class proceeding, but did not refer specifically to the *CAA*. Money Mart filed a notice seeking leave to appeal the certification order on April 13, 2007.

[12] Meanwhile, in a parallel class action in Ontario, *Smith v. National Money Mart Company*, Money Mart also sought a stay, relying on the arbitration clauses in its standard form contracts. It was unsuccessful in the first instance ((2005) 8 B.L.R. (4th) 159 (S.C.J.)) and on appeal ((2005) 258 D.L.R. (4th) 453, 12 B.L.R. (4th) 29 (C.A.)). In quashing the appeal, the Court of Appeal adopted reasoning similar to that adopted by this court in *MacKinnon (C.A.)*, concluding that it was premature to attempt to stay the action prior to the certification hearing. *Smith* then proceeded to certification (2007 O.J. No. 46) and the Money Mart defendants were denied leave to appeal the certification order ([2007] O.J. No. 2160).

[13] On July 13, 2007, the Supreme Court of Canada released its decisions in *Dell* and *Rogers, supra*. I shall return to them below, but for purposes of this chronology, I note here that the Court in both instances referred potential class actions to arbitration in accordance with the arbitration provisions of the *Civil Code* of Quebec. Money Mart considered that the Supreme Court of Canada had thereby effectively overruled *MacKinnon (C.A.)*. Its appeal of the certification order came on for hearing on February 8, 2008, but the appeal was adjourned pending resolution by the court below of the outstanding stay application. The Court of Appeal ordered that any appeal from orders relating to that application were to be heard together with the appeal from the certification order.

[14] The case management judge heard the second stay application (including arguments regarding *Dell* and *Rogers*), in the instant case in April 2008, and gave oral reasons on May 13, indexed as 2008 BCSC 710. She reviewed *Dell* at paras. 12–33. In general terms, she emphasized that the Supreme Court of Canada had there been

concerned with the proper interpretation of the *Civil Code* and the *Code of Civil Procedure* of Quebec and had not considered the statutes at issue in *MacKinnon (C.A.)*, i.e., the *CPA* and *CAA*. She continued:

... Although argument was made with respect to *MacKinnon*, the Supreme Court of Canada makes no reference whatsoever to *MacKinnon*. The parties who referred to *MacKinnon* did not do so on the statutory interpretation issue, which was the crux in *MacKinnon*. So, for example, in the factum of the intervenor ADR Chambers Inc., the intervenor says:

The approach in the two national Money Mart decisions, [*MacKinnon* and *Smith*] appears to be that the class action legislation trumps arbitration.

With respect, this was not the decision of the British Columbia Court of Appeal in *MacKinnon*. Rather, *MacKinnon* addressed the proper interpretation of two pieces of legislation in British Columbia. It was not a decision that, by policy, class actions trump arbitrations. The factum of the intervenor of the London Court of International Arbitration makes the point, referring to *MacKinnon*, that “it is not necessarily inimical to the legislation's public policy objectives that class actions proceed before arbitral tribunals as opposed to courts”. This is a policy statement with which I do not take exception, but which would require a legislative amendment. This was not an issue in *MacKinnon*. Therefore, perhaps it is not surprising that the Supreme Court made no reference to *MacKinnon*. [At para. 33.]

[15] The judge rejected the proposition that *Dell* and *Rogers* had by necessary implication overruled *MacKinnon (C.A.)*. She observed that the arbitration provisions of the *Civil Code* of Quebec are normally said to “oust” the jurisdiction of the courts, whereas common law courts retain a jurisdiction to decide matters arising out of contracts containing arbitration clauses, subject to the statutory requirement to defer to arbitration unless the arbitration agreement is “void, inoperative, or incapable of being performed”. The Quebec counterpart to s. 15(2) of the *CAA* uses the word “null” — the second point of distinction pointed out by the judge below. Finally, she said, *MacKinnon*

(C.A.) was not inconsistent with the “general rule” of *Dell* that “in any case involving an arbitration clause a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator, unless it is based solely on a question of law.” In her analysis, *MacKinnon* (C.A.) had raised a question that was solely one of law, namely the proper interpretation of the *CPA* and *CAA*. (Para. 38.)

[16] With respect to the issue of *res judicata* raised by the plaintiffs, Brown J. was of the view that the matter was one of issue estoppel rather than cause of action estoppel. Even if she had found that *Dell* and *Rogers* had changed the law, however, she would not have exercised her discretion to reopen the issue and stay the action. She reasoned that Ms. Parsons’ action would continue against Money Mart in any event, since Ms. Parsons and her co-plaintiffs had not signed agreements containing arbitration clauses; that granting a stay would simply deny to class members the benefit or detriment of the determinations made in the class proceeding; and that it was “difficult to perceive an injustice to Money Mart in having matters determined by the court in one proceeding as opposed to several proceedings before an arbitrator, assuming that the individual claimants would pursue arbitration” (Para. 42.) The stay application was dismissed.

[17] On July 9, 2008, Madam Justice Prowse in chambers granted Money Mart leave to appeal Brown J.’s order of May 13. The chambers judge ordered that the stay appeal be heard at the same time as the appeal of the certification order (under docket CA034967). She declined to grant a stay pending the appeal. (See 2008 BCCA 292.)

[18] The last items to be noted in this rather tedious chronology relate to an application brought by Dollar on July 9, 2008 to have the claims against it stayed on the basis of the arbitration agreements between Money Mart and those plaintiffs who were parties thereto. Brown J. dismissed this application for her reasons of July 25, 2008. Dollar also obtained leave to appeal this order and the certification order made against it, both of which appeals were ordered to be heard together, and together with the Money Mart appeals.

ANALYSIS

[19] The primary focus of counsel's submissions over the two days in which these appeals were heard (and over the following day, in which the appeal in *Seidel v. Telus Communications Inc.* 2008 BCSC 933, [2008] B.C.J. No. 1347, 295 D.L.R. (4th) 511 was heard) was whether, as held by this court in *MacKinnon (C.A.)*, the CAA and the CPA are competing statutes whose objectives are harmonized by finding any arbitration agreement "inoperative" under s. 15(2) of the CAA where the action is certified, or whether s. 15 of the CAA is a "substantive" or "jurisdictional" provision that requires a court to defer to the parties' choice of arbitration even though their dispute has been or may be certified pursuant to the "procedural" CPA. In three cases, *Bisaillon v. Concordia University* 2006 SCC 19, [2006] 1 S.C.R. 666, *Dell and Rogers*, the Supreme Court of Canada adopted the latter view in interpreting the law of Quebec. Does the law of British Columbia mandate a similar result?

Bisaillon, Dell and Rogers

[20] In *Bisaillon*, a unionized employee of Concordia University applied to institute a class action, over which the Superior Court has exclusive jurisdiction under article 1000 of the *Code of Civil Procedure*, R.S.Q., c. C-25, to contest the administration and use of the defendant university's pension fund. He was supported by eight of the nine unions with which the university had collective agreements, but was opposed by the ninth union, which sought to have the motion dismissed on the basis that the Superior Court lacked jurisdiction. This union took the position that the dispute related to issues that were the subject of collective bargaining and implemented by collective agreement, and that therefore lay within the exclusive jurisdiction of a grievance arbitrator. (Para. 10.) Further, it said, the plaintiff's application for authorization to represent the members of the pension plan "interfered unduly with the performance by the certified unions of their respective functions in respect of most of these members" and the plaintiff was bound by a collective agreement that required that any dispute with his employer regarding the plan be resolved by the grievance procedure. This argument succeeded at the Superior Court level, but the Quebec Court of Appeal disagreed. It took the view that the pension plan "existed independently of any collective agreement" and that the grievance arbitrator did not have the necessary jurisdiction to deal with the claims of employees covered by the eight other collective agreements, or those of non-unionized employees.

[21] The Supreme Court of Canada restored the ruling of the Superior Court. Justice LeBel, speaking for the majority, formulated the issue before the Court as follows:

This appeal raises the issue of the compatibility of the class action with collective representation mechanisms in labour law, with the system for

applying collective agreements and with the procedure for resolving labour disputes through grievance arbitration. In short, can the class action be used to bypass the representation and grievance resolution mechanisms established under Quebec labour law? [At para. 13; emphasis added.]

[22] LeBel J. began by reviewing the nature of class actions under the *Code of Civil Procedure*. He noted that such actions have a “social dimension” in that their purpose is to facilitate access to justice for citizens who share common problems and who would otherwise have little incentive to apply to the courts individually to assert their rights. (Para. 16.) Nevertheless, he said, a class action is “a procedural vehicle whose use neither modifies nor creates substantive rights. ... It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so.” (Para. 17; my emphasis.) Consistent with this, the Quebec Court of Appeal had previously held that a statutory provision giving an arbitration tribunal exclusive jurisdiction over disputes between physicians and the Minister of Health prevailed over the class proceedings provisions of the *Code of Civil Procedure*. Thus the plaintiff physician could not be authorized to institute a class action in the courts: see *Carrier v. Quebec (Ministre de la Santé et des Services Sociaux)* [2000] Q.J. No. 3048. LeBel J. approved the Quebec Court of Appeal’s ruling that:

The provisions of the *Code of Civil Procedure* respecting class actions are purely procedural and do not create substantive law. It cannot therefore be concluded from the fact that a class action must [be] instituted in the Superior Court that a special scheme supplanting jurisdictional rules has been created. [At para. 20; emphasis added.]

[23] In summary, the majority in *Bisaillon* held, the class action procedure could not have the effect of conferring jurisdiction on the Superior Court over a group of cases

that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. In the words of the majority:

... Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights. Determining whether such a proceeding lies in respect of issues relating *prima facie* to the law of collective labour relations thus requires a careful review of the institutions and fundamental rules specific to this branch of law ...” [At para. 22; emphasis added.]

[24] LeBel J. then reviewed the broad outlines of the “collective representation system” in the labour law of Quebec, noting that the system takes away certain private rights from employees but permits them to negotiate with one voice with the employer through the union, which in turn must take into account the competing interests of all employees in the bargaining unit. (Para. 26.) The union’s role as the “employer’s mandatory interlocutor” requires that the union has a monopoly not only on matters referred to in the collective agreement, but also on all aspects of employee/employer relations. For this reason, LeBel J. noted, “any negotiations regarding conditions of employment that are not mentioned in the current collective agreement must be conducted by the certified union.” (Para. 28.) In this case, the dispute fell within the ambit of the collective agreement, and the potential for multiple proceedings (given that there were nine unions as well as non-unionized employees) did not pose an insurmountable problem. The majority concluded that the class action option could not be authorized, since to do so would be to “deny the principles of the exclusivity of the grievance arbitrator’s jurisdiction and of the union’s monopoly of employee representation.” (Para. 64; my emphasis.)

[25] The minority (Chief Justice McLachlin, and Bastarache and Binnie JJ.) in *Bisaillon* took the view that the plaintiff's claim was not one over which the labour arbitrator could "enjoy exclusive jurisdiction", but that instead, the essential character of the dispute transcended the collective agreement. (Para. 88.) The minority agreed with their colleagues, however, that although the plaintiff had started the case as a class action, "this cannot affect the substantive rights of those implicated therein" and that once established, "the exclusive jurisdiction of arbitrators must continue to be protected by this Court, and that employees cannot sidestep the exclusive representation of their bargaining agents." (Para. 66.)

[26] *Bisaillon* obviously engaged some policy considerations that are unique to labour law. *Dell* and *Rogers* arose in the consumer transaction field, however, and are therefore more relevant to the case at bar. At issue in *Dell* was an arbitration clause contained in the terms and conditions of sale of computer equipment sold by the defendant to the plaintiff at the retail level over the Internet. One of the questions was whether such a clause, which was accessible by means of a hyperlink, was an "external clause", in which case it was invalid unless brought to the consumer's attention at the time the contract was made. We need not be concerned with this point, which was discussed by the majority at paras. 90–104 of their reasons. A second question not directly relevant here was whether the dispute involved a "foreign element", in which case Art. 3149 of the *Civil Code* prohibited the waiving of the jurisdiction of Quebec courts in certain cases. This point was discussed at paras. 12–67 of the reasons, where the majority concluded that an arbitration clause was not "in itself" a foreign

element warranting the application of the rules of Quebec private international law.

Speaking for the majority, Deschamps J. added:

The neutrality of arbitration as an institution is one of the fundamental characteristics of this alternative dispute resolution mechanism. Unlike the foreign element, which suggests a possible connection with a foreign state, arbitration is an institution without a forum and without a geographic basis ... Arbitration is part of no state's judicial system ... the arbitrator has no allegiance or connection to any single country ... In short, arbitration is a creature that owes its existence to the will of the parties alone ...

To say that the choice of arbitration as a dispute resolution mechanism gives rise to a foreign element would be tantamount to saying that arbitration itself establishes a connection to a given territory, and this would be in outright contradiction to the very essence of the institution of arbitration: its neutrality. This institution is territorially neutral; it contains no foreign element. Furthermore, the parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate. They can choose cyberspace and establish their own rules. It was open to the parties in the instant case to refer to the *Code of Civil Procedure*, to base their procedure on a Quebec or U.S. arbitration guide or to choose rules drawn up by a recognized organization, such as the International Chamber of Commerce, the Canadian Commercial Arbitration Centre or the NAF. The choice of procedure does not alter the institution of arbitration in any of these cases. The rules become those of the parties, regardless of where they were taken from. [At paras. 51–2; emphasis added.]

[27] Deschamps J. then turned to consider whether the court, or the arbitrator, should rule first on the parties' arguments concerning the validity or applicability of the arbitration agreement. (Para. 68.) She noted that two schools of thought exist in international law — one favouring an “interventionist judicial approach” which prefers the court to settle any challenge to the arbitrator's jurisdiction immediately; and the other, known as the “competence/competence” principle, which holds that arbitrators should generally be allowed to exercise their authority to rule first on their own

jurisdiction (i.e., that they are competent to decide on their own competence).

Deschamps J. reviewed the relevant provisions of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 3 (the “*New York Convention*”) and the *UNCTRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985) Annex I (the “*Model Law*”), which was drafted to assist states in implementing the *New York Convention*. In particular, Art. II(3) of the *Convention* states:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [Emphasis added.]

and Arts. 8 and 16 of the *Model Law* state:

8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

...

16(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration

agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. [Emphasis added.]

[28] Regarding the interaction of the competence/competence principle with the exception to Art. II(3) of the *New York Convention*, Deschamps J. noted that the ability of a court to rule on whether an arbitration agreement is null and void, inoperative or unenforceable does not mean that the court must do so “before the arbitrator does.” (Para. 73.) She reviewed the various authorities and found that although there was not a consensus in the international community, the “*prima facie* analysis test”, under which the court limits itself to a *prima facie* analysis of the application and refers the parties to arbitration unless the arbitration agreement is “manifestly tainted by a defect rendering it invalid or inapplicable”, has been gaining acceptance. (Paras. 75, 77.)

[29] With respect to the law of Quebec on this issue, the relevant articles of the *Code of Civil Procedure* were as follows:

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.

...

943. The arbitrators may decide the matter of their own competence.

943.1 If the arbitrators declare themselves competent during the arbitration proceedings, a party may within thirty days of being notified thereof apply to the court for a decision on that matter.

While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.

943.2 A decision of the court during the arbitration proceedings recognizing the competence of the arbitrators is final and without appeal. [At para. 79; emphasis added.]

[30] Article 940.1 was said to incorporate the “essence” of Art. II(3) of the *New York Convention* and Art. 8 of the *Model Law*. In accordance therewith, Art. 943 reflected the competence/competence principle — although in many cases, Quebec courts had accepted or refused to give effect to arbitration clauses without considering the degree of scrutiny required. Deschamps J. rejected the idea of any distinction between arbitral jurisdiction to decide the applicability of such a clause, and deciding the validity thereof. She saw the *prima facie* analysis test as faithful to Art. 943 and to the *Model Law* and as consistent with the law elsewhere in Canada. On this point, she cited a decision of this court, *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992) 66 B.C.L.R. (2d) 113, with apparent approval at para. 82. She then formulated a “general rule” as follows:

... in any case involving an arbitration clause, a challenge to the arbitrator’s jurisdiction must be resolved first by the arbitrator. A court

should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. ...

If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process. [At paras. 84-6; emphasis added.]

[31] Beginning at para. 105, Deschamps J. considered the relationship between the arbitration clause and the class action procedure. The plaintiff in *Dell* argued that the latter engaged “public order” within the meaning of article 2639 of the *Civil Code*, which prohibits the submission of disputes concerning “matters of public order” to arbitration. The Court rejected this argument, noting that “the class action is a procedure, and its purpose is not to create a new right.” (Para. 105; my emphasis.) The material portion of the majority's reasoning was as follows:

The procedural framework for the class action was added to the *Code of Civil Procedure* in 1979. It is accepted that the class action has a social dimension: “Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights” (*Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19, at para. 16) or might lack the financial means to do so. From this perspective, the class action is clearly of public interest. However, the first introductory provision

of Book IX of the *Code of Civil Procedure* — Class Action — reminds us that, as important as it may be, the class action is only a legal procedure:

999. ...

- (d) “class action” means the procedure which enables one member to sue without a mandate on behalf of all the members.

This position was already accepted at the time Book IX was enacted:

[TRANSLATION] The class action is not a right (*jus*); it is a procedure. It is not, in itself, even a means to exercise a right, a remedy in the sense of the maxim *ubi jus, ibi remedium*. It is merely a special mechanism that is applied to an existing means to exercise an existing right in order to “collectivize” it. ...

The notion that the class action procedure does not create new rights has been reiterated on numerous occasions, including recently by this Court in *Bisaillon*, at paras. 17 and 22.

In the case at bar, the parties agreed to submit their disputes to binding arbitration. The effect of an arbitration agreement is recognized in Quebec law: art. 2638 C.C.Q. Obviously, if [the plaintiff] had brought the same action solely as an individual, the Union’s argument based on the class action being of public order could not have been advanced to prevent the court hearing the action from referring the parties to arbitration. Does the mere fact that [the plaintiff] instead decided to bring the matter before the courts by instituting a class action affect the admissibility of his action? In light of the reasons of LeBel J., writing for the majority in *Bisaillon*, at para. 17, the answer is no: “[the class action] cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so”. [At paras. 106–8; emphasis added.]

[32] Finally, the majority ruled that amendments to the *Consumer Protection Act* of Quebec, R.S.Q. c. P-40.1, enacted in December 2006 prohibiting arbitration clauses in consumer contracts did not apply retroactively to the dispute before the Court. In the result, the case was referred to arbitration and the plaintiff’s motion to authorize the institution of a class action was dismissed. (Para. 121.)

[33] The minority of the Court in *Dell* (Bastarache, LeBel and Fish JJ.) also engaged in a lengthy and learned analysis of the relevant articles of the *Civil Code* and the *Code of Civil Procedure* of Quebec, which I will not recount here. Notably for purposes of this appeal, the minority agreed that access to class actions is a procedural right that does not modify or create substantive rights, and that can generally be waived, citing *Bisaillon* at para. 226. As well, it was said that:

It is also well-established that the effect of a valid undertaking to arbitrate is to remove the dispute from the jurisdiction of the ordinary courts of law. [At para. 150.]

and that:

... the *effect* of exclusive arbitration clauses is to create a “private jurisdiction” that implicates the loss of jurisdiction of state-appointed authorities for dispute resolution, such as domestic courts and administrative tribunals. [At para. 200; emphasis added.]

Last, the minority noted that exclusive arbitration clauses and forum selection clauses operate very similarly, and that Quebec has treated them analogously. In common law provinces as well, they stated, “courts will stay their jurisdiction in the presence of either a valid forum selection clause or arbitration clause.” (Para. 135.)

[34] In *Rogers*, the plaintiff was a subscriber to a mobile telephone service agreement with the defendant Rogers Wireless. The agreement contained an arbitration clause that not only referred all disputes arising between the parties to arbitration but expressly prohibited a customer from commencing or participating in a class action against Rogers. The plaintiff applied for authorization under Art. 1003 of the *Code of Civil Procedure* of Quebec to commence a class action for himself and other subscribers

who had allegedly been overcharged for “roaming” privileges. He also alleged that the arbitration clause was abusive, contrary to Art. 1437 of the *Civil Code*. Overruling the Superior Court judge, the Court of Appeal of Quebec held that the lower court should have assessed the “validity” of the arbitration clause (i.e., whether it was “abusive”) before “renouncing” jurisdiction in favour of arbitration. (S.C.C., para. 7.)

[35] The Supreme Court of Canada allowed Rogers’ appeal. It held that since the question of abusiveness was one of fact and law and would require more than a superficial examination of evidence, the Court was required to defer to the arbitrator in accordance with the “*prima facie*” test formulated in *Dell*. As stated by Chief Justice McLachlin, “... any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator’s jurisdiction concerns a question of law alone.” (Para. 11.)

[36] We are advised that in deciding *Dell* and *Rogers*, the Supreme Court had the benefit of submissions from four interveners, one of whom was granted leave specifically to argue the “common law perspective”. The Court was obviously aware of *MacKinnon (C.A.)*, but did not comment on it or on any common law authority in its reasons in *Dell* or *Rogers*.

Post-Dell Developments

[37] Following the release of *Dell* and *Rogers*, the defendant in the *Smith Estate* litigation asked the Ontario Court of Appeal to consider whether the lower court’s decision in that case (and by implication, *MacKinnon (C.A.)*) had been overruled. The

Court of Appeal found it unnecessary to decide that issue, finding that issue estoppel applied to preserve the dismissal of the stay motion. (See 2008 ONCA 746, at paras. 28–56.) *MacKinnon (C.A.)* was followed in *Seidel v. Telus* 2008 BCSC 933, 295 D.L.R. (4th) 511, the appeal from which we heard immediately after the instant appeals. (See 2009 BCCA 104.) On the other hand, in *Frey v. BCE Inc.* 2006 S.J. No. 456; *Frey v. Bell Mobility Inc.* 2008 SKQB 79, the Saskatchewan Court of Queen’s Bench reversed its earlier decision which had applied *MacKinnon (C.A.)*. Gerein J. concluded at para. 11 of the *Bell Mobility* decision that *Dell* and *Rogers* are:

... authority for the proposition that a binding arbitration clause removes a dispute from the jurisdiction of a Superior Court and of necessity precludes participation in a class action. In addition the validity of the arbitration clause must be referred to an arbitrator in first instance.

I am bound by these cited decisions. Consequently, my decision that the class action prevails cannot stand. It follows that the certification order must be amended ... [At paras. 11–2.]

Accordingly, he ordered the partial decertification of an action that had already been certified.

[38] As the defendants note in their factum, courts in various provinces have followed or applied *Dell* and *Rogers* outside the class action context, both with respect to the relationship between arbitration and individual court actions, and the “*prima facie* test” for challenges to arbitral jurisdiction: see, e.g., *St. Joseph Corp. v. Canada (Attorney General)* (2008) 46 B.L.R. (4th) 314 (Ont. S.C.J.) at paras. 13, 20–23; *EDF (Services) Ltd. v. Appleton & Associates* [2007] O.J. No. 3281 at paras. 37–8; *GPEC International Ltd. v. Canadian Commercial Corp.* 2008 F.C. 414 at paras. 18–9; *Wheeler v. Hwang* 2007 NLTD 145 (S.C.) at paras. 19–26.

Arbitration Law in Quebec

[39] As I understand the defendants' submission in this appeal, it is not that *Dell* and *Rogers* "overturned settled case law" in British Columbia "without actually mentioning it" (see *Smith Estate v. National Money Mart Company* [2008] O.J. No. 2248 (S.C.J.) at para. 238), but rather that the Supreme Court's reasoning logically extends to the law of British Columbia. It may be therefore useful to consider, as the case management judge did, the degree of difference or similarity between the law of Quebec and that of British Columbia with respect to arbitration and class proceedings. For that purpose, it is necessary to review at some length the genesis of the relevant statutory provisions in each province and how the courts have interpreted those provisions.

[40] *Dell* itself provides much of the context with respect to the genesis of the Quebec arbitration provisions. As Deschamps J. noted, these provisions came into force in 1986 with the enactment of an *Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration*, S.Q. 1986, c. 73, referred to in *Dell* as "Bill 91". This amending statute added a new title on arbitration agreements to the *Civil Code*, consisting of only six provisions setting out some general principles relating to the validity and applicability of such agreements. (Para. 42.) It also amended the *Code of Civil Procedure*.

[41] The majority in *Dell* traced the genesis of Bill 91 from two international law sources — the *New York Convention* and the *Model Law*, both *supra*. The *New York Convention* was acceded to by Canada in 1986 and according to an article by Lord Mustill, may be "the most effective instance of international legislation in the entire

history of commercial law.” (See *Dell*, para. 39). The *Model Law* was the legislation recommended by the U.N. for adoption by states in order to standardize the rules of international commercial arbitration in accordance with the *Convention*. Legislation based on the *Model Law* was enacted by Canada in 1986 (R.S.C. 1985, c. 17 (2nd Supp.)), the same year Bill 91 was adopted in Quebec. This fact is borne out by the similarity, if not in technical language, in broad terms, between the provisions of the *New York Convention*, the *Model Law*, and the statutory provisions enacted in Quebec. I have set out a comparative table as Schedule B to these reasons; and Article II of the *New York Convention* and Arts. 8 and 16 of *Model Law* are also reproduced above at para. 27.

[42] Article 940.1 of the *Code of Civil Procedure* of Quebec states (in translation):

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. [Emphasis added.]

Article 940.3 prohibits a judge or a court from intervening “in any question governed by this Title” except as specifically provided. As was seen in *Dell*, Art. 943 provides expressly that an arbitrator may decide his or her own competence, as does Art. 16 of the *Model Law*.

[43] The plaintiffs have emphasized in their submissions to this court that Art. 940.1 refers only to nullity, rather than to an agreement being “null and void, inoperative or incapable of being performed”, the wording of the *Model Law* (and of the *CAA*, as will be seen below.) This difference was noted by the majority in *Dell* at para. 83:

Article 940.1 C.C.P. refers only to cases where the arbitration agreement is null. However, since this provision was adopted in the context of the implementation of the New York Convention (the words of which, in art. II(3), are “null and void, inoperative or incapable of being performed”), I do not consider a literal interpretation to be appropriate. It is possible to develop, in a manner consistent with the empirical data from the Quebec case law, a test for reviewing an application to refer a dispute to arbitration that is faithful to art. 943 C.C.P. and to the *prima facie* analysis test that is increasingly gaining acceptance around the world. [At para. 83; emphasis added.]

Although this may not amount to a finding that the two phrases are “legally equivalent” as the defendants suggest, the difference in wording was obviously regarded as insignificant. The Court interpreted Art. 940.1 in a manner it found to be “consistent with” Art. II(3) of the *New York Convention* and the *prima facie* analysis test. As well I note that Arts. 1416–1424 of the *Civil Code*, headed “Nature of Nullity”, reflect concepts of “absolute” and “relative” nullity that seem to correspond broadly to the concepts of void and voidable contracts, respectively, in common law jurisdictions. (A contract that is “absolutely” null, for example, may not be confirmed; one that is “relatively” null may be.)

[44] In all the circumstances, it seems likely that the difference between the wording of the exception in Art. 940.1 and that in the *Model Law* is semantic or linguistic, rather than substantive, given the common genesis of the two provisions. At the least, it is apparent the Supreme Court of Canada does not favour the making of technical distinctions on this point for purposes of Quebec law, and recognizes the desirability of interpreting the arbitration provisions on the *Civil Code* in a manner consistent with the international norms embodied in the *Model Law*. (See also *Dell*, para. 2.)

[45] The jurisdiction of an arbitrator to rule on his or her own jurisdiction is another substantive feature of similarity between the *Model Law* and the arbitration provisions in force in Quebec. Articles 5 and 16 of the *Model Law* state in part:

5. In matters governed by this Law, no court shall intervene except where so provided in this Law.

16(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. ...

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. [Emphasis added.]

The Quebec counterparts are Arts. 940.3 and 943 of the *Code of Civil Procedure*, which provide:

940.3 A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein.

...

943. The arbitrators may decide the matter of their own competence.

943.1 If the arbitrators declare themselves competent during the arbitration proceedings, a party may within thirty days of being notified thereof apply to the court for a decision on that matter.

While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award. [Emphasis added.]

[46] Again, although different terminology is used, there are marked similarities that reflect the genesis of the arbitration provisions of the *Code of Civil Procedure* in the *New York Convention* and *Model Law*. In *Dell*, as we have seen, the majority reviewed these provisions and interpreted them in a manner it described as faithful to the *prima facie* analysis test. The only exception to the “rule of systematic referral to arbitration”, Deschamps J. wrote, occurs where the challenge to the arbitrator’s jurisdiction is based solely on a question of law. In such cases, the court’s expertise in resolving such questions, together with the fact that the court is the forum to which the parties apply first when requesting referral, allows the legal question to be resolved immediately and to avoid duplication of a “strictly legal debate”. (Para. 84.) In all other cases, particularly where documents must be produced and examined to resolve the challenge to the arbitrator’s jurisdiction, the court is required to defer to the arbitral tribunal.

Arbitration Law in British Columbia

[47] In British Columbia, three statutes deal specifically with arbitrations and arbitral awards — the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154 (first enacted in 1985), the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 (first enacted in 1986), and the CAA itself. J.K. McEwen and Ludmila Herbst, authors of *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (2007) note the connection between the *Model Law* and the international arbitration statutes in this province:

... British Columbia was the first jurisdiction to adopt the Model Law anywhere in the world. British Columbia was particularly interested in attracting arbitration business as is reflected in the preamble to its

International Commercial Arbitration Act, which was essentially a reworked version of the Model Law ...

While British Columbia was at the forefront in this regard, each of the other provinces and territories, except Quebec, also enacted an International Commercial Arbitration Act. Unlike the legislation in British Columbia, which ... is a reworking of the Model Law, the other legislation in Canada simply attaches the Model Law (designated in the legislation as the “International Law” or the “International Arbitration Law”) as a schedule and makes small variations to its import in the body of the legislation enacted. ...

British Columbia took a leadership role in enacting new domestic commercial arbitration legislation as well. In this regard, the Law Reform Commission of British Columbia issued a Report on Arbitration in 1982 recommending the adoption of modernized legislation. The report has been described as the first proposal for modernizing the legislative regime then in place throughout common law Canada. Legislation influenced in part by the Model Law was drafted and enacted ...

Ontario, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick and ultimately Nova Scotia also took steps in this regard ... [At 1-9–1-10; emphasis added.]

[48] The *Foreign Arbitral Awards Act* essentially adopts and attaches the *New York Convention* as a schedule. Section 5 states that the *Act* is to prevail over any other enactment. The *International Commercial Arbitration Act* applies to arbitrations that are “international” as defined by s. 1(3). Section 8 echoes Art. 8 of the *Model Law*; it provides:

(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

(3) Even if an application has been brought under subsection (1) and even if the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made. [Emphasis added.]

[49] Section 8 was considered by this court in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992) 66 B.C.L.R. (2d) 113, where Hinkson J.A. for the majority noted that the court retains some “residual jurisdiction” to exercise on an application for a stay of legal proceedings, since it must be satisfied that the criteria set out in s. 8(1) have been met before it may grant a stay. As well, he said, a stay should not be granted if one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the agreement or if the application is out of time. (Para. 36.) However, he also enunciated what may be seen as an early version of the “*prima facie* analysis” as follows:

Considering s. 8(1) in relation to the provisions of s.16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal. [At paras. 39–40; emphasis added.]

It will be recalled that at para. 84 of *Dell*, the majority cited *Gulf Canada* to illustrate that the “*prima facie* analysis” test has been extended to cases concerning the applicability

of arbitration clauses. *Gulf Canada* was also applied by the Ontario Court of Appeal in *Dalimpex Ltd. v. Janicki* (2003) 228 D.L.R. (4th) 179, 64 O.R. (3d) 737, at para. 21.

[50] The CAA, first enacted in 1986, applies to arbitration agreements other than international arbitration agreements. Originally, s. 15 stopped short of the *Model Law* model. Perhaps reflecting the historical wariness of common law courts to arbitration clauses (see Yves Fortier, “*Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, My Lord, of Jealousy’*” (2001) 80 Can. B. Rev. 143 at 145), s. 15(3) required the court to stay the proceedings unless the party opposing the stay showed “good reason” why the court proceedings should continue in place of the arbitration. “Good reason” was defined broadly: it included that the matters in dispute were factually or legally complex, the comparative expense and delays between the court proceedings and the arbitration, whether there were other parties to the court proceedings who were not parties to the arbitration agreement, and “any other matter the court consider[ed] significant.”

[51] However, the CAA was substantially amended in 1988 by the *Miscellaneous Statutes Amendment Act (No. 2)*, 1988, S.B.C. 1988, c. 46. In particular, s. 15 was amended to resemble more closely Art. 8 of the *Model Law*. The amended s. 15 now states:

(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
- (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.
- (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure. [Emphasis added.]

As well, s. 22 was amended to provide that unless otherwise agreed by the parties to an arbitration agreement, the Rules of the British Columbia International Commercial Arbitration Centre apply to an arbitration. Finally, what is now s. 32 of the *Act* was inserted, echoing Art. 5 of the *Model Law*:

Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act. [Emphasis added.]

[52] The *CAA* does not, like the *Model Law* or the *Quebec Civil Code*, explicitly provide that an arbitrator may decide on his or her own jurisdiction. However, R. 20 of the Rules of the International Commercial Arbitration Centre states that an arbitration tribunal “may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.”

[53] In *Prince George (City) v. McElhanney Engineering Services Ltd* (1995) 9 B.C.L.R. (3d) 368, this court considered both the phrase “void, inoperative or incapable of being performed” in s. 15(2) and the question of arbitral jurisdiction generally, under the *CAA*. A judge of the Supreme Court had refused a stay application brought by the

defendant “Sims”, on the bases that the action raised broader issues against a co-defendant, McElhanney, that were interrelated with the arbitral issues between the plaintiff and Sims; and alternatively, that the risk of multiple proceedings and inconsistent results made arbitration proceedings inappropriate. The arbitration agreement was therefore found to be “inoperative”.

[54] On appeal, this court, *per* Cumming J.A., ruled that both conclusions were erroneous, and that the stay must be granted. Regarding the meaning of “inoperative”, the Court cited the comments of Kerans J.A. for the Alberta Court of Appeal in *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992) 87 D.L.R. (4th) 129, [1992] 3 W.W.R. 716, who in circumstances similar to those in *Prince George* had reasoned that:

The power to grant or withhold a reference under the *International Commercial Arbitration Act* is very limited, and the statute does not permit a decision on the test invoked by the learned chambers judge, which resembles the *forum conveniens* test. For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the method chosen by the parties. The Act directs me to hold them to their bargain. Section 2(1) of the *International Commercial Arbitration Act* makes the Convention part of the law of Alberta. It says that the Convention “applies in the Province”. The Convention, art. II, s. 3 provides that:

3. The court of a Contracting State ... *shall*, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The learned chambers judge relied upon the qualifying words. He held that an inconvenient reference was an “inoperative” one. I do not agree. It may not operate conveniently, but it cannot be said to be inoperative. The view taken by the learned chambers judge adds a gloss to the word that it cannot, in all the circumstances, reasonably bear.

It is common ground that the evident purpose of Alberta's acceptance of the Convention is to promote international trade and commerce by the certainty that comes from a scheme of international

arbitration. As Justice Potter Stewart said in *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974) at p. 516:

... uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

That purpose would not be served by adopting an interpretation that puts the entire scheme at risk. The *forum conveniens* test almost always would defeat arbitration because, as Justice Stewart said in *Scherk*, it would invite “unseemly and mutually destructive jockeying”. [At 138–9; emphasis added.]

[55] As well, Cumming J.A. in *Prince George* quoted with approval from J. Mustill and S.C. Boyd, *The Law and Practice of Commercial Arbitration in England* (1989, 2nd ed.), who wrote:

The expression ‘inoperative’ has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reasons ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be ‘inoperative’. First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise. Second ... there may be circumstances in which an arbitration agreement might become ‘inoperative’ by virtue of the common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties. But the fact that issues in the arbitration overlap issues in proceedings between the parties who are not bound by the arbitration agreement does not make the agreement ‘inoperative’. [At 464–5; emphasis added.]

The Court also quoted from J.B. Casey, *International and Domestic Commercial Arbitration* (1993) as follows:

To find that an arbitration agreement is inoperative is again to deal with a situation in which there is an agreement, but for some reason it is no longer enforceable. For example, it may be alleged that the parties have by subsequent agreement or conduct determined to suspend the operation of the arbitration agreement, or another court has declared the agreement to unenforceable... It is not sufficient to say that because the court action raises issues outside the scope of the arbitration agreement per se, or because the action involves some parties that are not parties to the arbitration agreement, that the agreement should be considered "inoperative". [At 4–14.]

[56] In connection with the jurisdiction of the court to refuse a stay where the prerequisites of s. 15(1) of the CAA have been met, the Court noted the addition of what is now s. 32 of the CAA in 1988, with the result that both it and the *International Commercial Arbitration Act* now severely restrict the power of the court to intervene in or restrain an arbitral proceeding. After quoting extensively from *Gulf Canada*, the Court in *Prince George* concluded:

... if a party is alleged to be a party to an arbitration agreement, but that party clearly establishes that it is not a party to such an agreement, the court has a residual jurisdiction to refuse a stay. This is no more than a jurisdiction to satisfy itself that the prerequisites of s. 8 of the Act have, in fact, been met. If those prerequisites clearly have not been met, then the court should refuse a stay. If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration.

In my view, nothing in the reasons of Hinkson J.A. supports the view that if any of the named litigants, on whichever side of the record they are found, are not party to the arbitration agreement, the one who is must be denied the right to invoke the arbitration clause in the agreement to which it is a party. [Paras. 53–4; emphasis added.]

See also *Pan Liberty Navigation Co. v. World Link (H.K.) Resources* 2005 BCCA 206, 253 D.L.R. (4th) 461; and *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.* (1993) 81 B.C.L.R. (2d) 359 (C.A.).

Class Proceedings Legislation in Quebec and British Columbia

[57] As we have seen, the statutory provisions relating to class actions in Quebec are contained in the *Code of Civil Procedure*. Article 1003 is germane for our purposes; it provides:

The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of the opinion that:

- (a) the recourses of the members raise identical, similar or related questions of law or fact;
- (b) the facts alleged seem to justify the conclusions sought;
- (c) the composition of the group makes the application of article 59 [representative action] or 67 [joinder of causes of action or parties] difficult or impracticable; and
- (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

In addition, Art. 4.2 states:

In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

[58] These may be compared with s. 4(1) of the *CPA*, which provides:

- (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
 - (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced 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 of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members. [Emphasis added.]

[59] Although the Quebec statute does not use the word “preferable” or “preferability”, Art. 1003 is in practical terms very similar to s. 4(1). Both contemplate that certification or authorization will be granted if the criteria are met (see *Western Canadian Shopping Centres Inc. v. Dutton* 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 37; and *Bouchard v. Agropur Coopérative* 2006 QCCA 1342, [2006] J.Q. no. 11396, at para. 37); both require that identical or similar questions be raised by the members of the class; both require that the representative plaintiff be able to perform that function adequately; 4(1)(a) seems roughly comparable to Art. 1003(a); and s. 4(1)(d) does not seem very different from Art. 1003(c) of the *Code*.

[60] At least one author, Ward K. Branch, *Class Actions in Canada* (2007) has expressed the view that the analysis performed by Quebec and British Columbia courts under these provisions is “quite similar” (4-49 – 4-50). Certainly the case cited by the author, *Comité d’environnement de La Baie Inc. v. Société d’électrolyse et de chimie Alcan Ltée*. [1990] R.J.Q. 655 (C.A.), bears out the conclusion that something resembling a preferability analysis in British Columbia is carried out by Quebec courts

under Art. 1003. I also note *Bosum v. Canada (Attorney General)* 2006 QCCS 5794, [2006] Q.J. No. 14319, where Tingley J.S.C. observed:

While article 1003 C.C.P. does not mention, as a condition of class authorization, that the “class proceeding would be the preferable procedure for resolution”, article 4.2 C.C.P. requires that litigants must insure that the proceedings they chose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action. Thus the “preferable procedure” requirement under the Ontario Class Proceedings Act discussed by Mr. Justice Winkler at paragraphs [23] to [52] of his judgment [in *Baxter & Baxter v. the Attorney General of Canada et al.* [(2006) 83 O.R. (3d) 481] are every bit as applicable to class proceedings in Quebec as they are in Ontario. [At para. 10; emphasis added.]

Tingley J. was referring to the Ontario statute, not the CPA of this province, but as Chief Justice McLachlin noted at para. 36 of *Western Canadian Shopping Centres, supra*, the Ontario class action legislation is very similar, in terms of the criteria for certification, to that of British Columbia and Quebec. The Supreme Court has also stated that the Ontario legislation is intended to provide courts with a “procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.” (My emphasis; see also *Hollick v. Toronto (City)* [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19, at para. 14.)

[61] In the circumstances, I think it unlikely that the CPA would be characterized any differently from the way in which the Court characterized the Quebec provisions in *Bisaillon* and *Dell* — i.e., as other than “procedural”.

Do Dell and Rogers Apply in British Columbia?

[62] There are, then, broad similarities, but technical differences, between the arbitration and class action legislation of Quebec and British Columbia. Both the international and domestic arbitration legislation of the two provinces have their genesis in the *New York Convention* and the *Model Law*. Both provinces have adopted a version of Art. 5 of the *Model Law*: under Art. 940.3 of the *Code of Civil Procedure* of Quebec, “A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein”, while in British Columbia, arbitral proceedings “may not be questioned, reviewed or restrained” except to the extent provided in the CAA. Article 943 of the *Code of Civil Procedure* follows the *Model Law* in expressly providing that an arbitrator may decide the matter of his or her own competence. The CAA does not contain a similar provision, but R. 20 of the *B.C International Commercial Arbitration Centre Rules* do so provide. By virtue of s. 22 of the CAA, those rules apply unless the parties to an arbitration agreement otherwise agree. The Rules are subordinate to the *Act* and any other enactment, unlike the provisions of Quebec’s *Code of Civil Procedure*.

[63] Both the Quebec and British Columbia legislation require the court to refer a dispute between the parties to an arbitration agreement, to arbitration, in the same way as Art. 8 of the *Model Law*. While s. 15 of the CAA tracks the wording of the *Model Law* exception (“... unless it determines that the arbitration agreement is void, inoperative or incapable of being performed”), Art. 940.1 of the *Code of Civil Procedure* uses the words “unless ... [the Court] finds the agreement null.” As we have seen, the law of Quebec encompasses “both absolute” and “relative” nullity, and the Court in *Dell*

indicated that a literal interpretation of the Quebec provision is in any event not appropriate.

[64] The plaintiffs emphasize that at para. 61 of her reasons in *Dell*, Deschamps J. in referring to Art. 2638 of the *Civil Code*, quoted the comments of the Minister of Justice of Quebec, made at the time Bill 91 was being debated, regarding the “ouster” of the courts.

The relevant passage of her reasons read:

The chapter on arbitration is found in the important Book Five of the *Civil Code of Quebec* on obligations. Book Five is divided into two titles, the first of which concerns obligations in general, while the second concerns nominate contracts. Chapter XVIII is the final chapter of the title on nominate contracts. It incorporates the provisions of Bill 91 enacted in 1986, which I have already discussed. It contains a general provision, art. 2638 C.C.Q., which is based on the recognition that an arbitration agreement is valid and can be set up against a party:

2638. An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.

In his commentary on this provision, the Minister of Justice stated that the essential purpose of the arbitration agreement is [TRANSLATION] “to displace judicial intervention” and that “by conferring jurisdiction on arbitrators, [one] ousts the usual jurisdiction of the judiciary”: *Commentaires du ministre de la Justice*, vol. II, at p. 1649.

Chapter XVIII also contains a provision that enumerates the cases in which the jurisdiction of the Quebec courts cannot be ousted by the parties. This provision reads as follows:

2639. Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.

An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order. [At paras. 61-2; emphasis added.]

(I note that the French version of the Court's reasons uses the verb "exclure" rather than "evincer", which translates more closely to "oust". I note also para. 62 of *Dell*, where Deschamps J. used the phrase "les parties ne peuvent écarter la compétence de tribunaux quebécois", which was translated as "the jurisdiction of the Quebec courts cannot be ousted by the parties." It may be that there is not a true equivalent in French to "oust" in the legal context.)

[65] The plaintiffs submit in any event that under Quebec law, an agreement to arbitrate is one that "ousts" the jurisdiction of the courts. In contrast, they say, the court's jurisdiction in the common law provinces is not "ousted", in the sense of 'excluded' or 'ejected' (see *Shorter Oxford English Dictionary* (6th ed., 2007)). The court retains a residual jurisdiction — where, for example, no stay is sought under s. 15(2) of the CAA: see *Boutsakis and Kakavelakis v. Boutsakis (c.o.b. Crown Travel)* 2008 BCCA 13, 77 B.C.L.R. (4th) 113 at para. 13, quoting from *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257 (C.A.) at 268–9 and 273.

[66] I do not find this distinction between the *Civil Code* provision and the common law approach to be a material one, at least for the purposes of this analysis. The effect of Art. 940.1 as interpreted in *Dell* appears to be the same under both regimes: the court must refer the matter to arbitration unless one of the exceptions applies or a challenge to the arbitrator's jurisdiction is made and can be determined solely as a question of law. In this sense, the courts in both provinces exercise some "jurisdiction". In both Quebec and British Columbia, it is the court that refers the dispute to arbitration if an action has been commenced and a party applies; and it is the court that is to decide any pure question of law if arbitral jurisdiction is challenged. In Quebec, the

party applying must do so before the case has been “inscribed on the roll”; in British Columbia, before pleadings are delivered or any other step is taken in the proceedings. (The court in this province also stays the action, but nothing hinges on this difference.) In summary, whether the arbitration statute is said to “exclude” or “oust” the court’s jurisdiction, the court must generally respect the parties’ choice of arbitration instead of judicial determination.

[67] With respect to the class proceedings legislation in the two jurisdictions, although the statutory preconditions for the institution of a class action differ in certain technical respects, they are generally similar. Most notably, the court certifies or ‘authorizes’ the action as a class proceeding if they are met. (The *CPA* uses the phrase “must certify”.) In both jurisdictions, important public policy considerations underlie the class action: as stated in *Dell*, class actions have a “social dimension”. (Para. 106.) These policy considerations have been described by courts on many occasions (see especially *Western Canadian Shopping Centres, supra*, at paras. 26–9, *per* McLachlin, C.J.C.) and were acknowledged by the Court in *Bisaillon* at para. 16. Nevertheless, both *Bisaillon* and *Dell* made it clear that the class action legislation of Quebec creates a “procedural vehicle whose use neither modifies nor creates substantive rights”. (*Bisaillon*, para. 17.)

[68] In my view, the same reasoning applies with respect to the *CPA* in this province. The various unique features of class proceedings (see *MacKinnon v. Money Mart Co.* (2006) 265 D.L.R. (4th) 214, at paras. 17–8) are essentially procedural. Class actions begin their lives as ordinary actions that are then certified if the statutory conditions are met. A class action may be decertified at a later point, in which event the proceeding may be permitted to continue as an ordinary one: s. 10(2). The *Rules of Court* apply to

the proceeding unless otherwise provided in the *Act*. In provinces where no similar legislation exists, court rules have been used to “fill the procedural vacuum”: *Western Canadian Shopping Centres*, at paras. 34–5.

[69] I return, then, to the crucial question of whether the Supreme Court of Canada’s reasoning in *Dell* and *Rogers* extends logically to British Columbia. I do not see this as raising a question of waiver as the defendants suggest, but as one of logic paralleling the question asked by the Court at para. 108 of *Dell*: if Mr. MacKinnon had brought his action solely as an individual, he could not have prevented the court in either province from staying the action and referring it to arbitration. There would, on the “*prima facie* analysis” test, be no basis for arguing, at least without reference to questions of fact and evidence, that the agreement is void, inoperative or incapable of being performed. Does the fact that Mr. MacKinnon sought to have the action certified pursuant to the *CPA* affect Money Mart’s right to a stay under s. 15(2) of the *CAA*? In my opinion, it does not. The legislative direction given to courts of law to defer to arbitral jurisdiction under s. 15(2) is just as mandatory as the counterpart provision of the *Code of Civil Procedure* of Quebec. The comment of the Federal Court of Appeal in *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Co. Ltd.* (1994) 113 D.L.R. (4th) 536, in connection with the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) is apposite:

The legislation reflects a consensus that compliance with commercial arbitration agreements is to be enforced by the courts provided they are in writing, not null and void nor inoperative nor incapable of performance. Canada and its provinces have given that consensus the force of domestic law. If there had otherwise been any arguable question as to the mandatory character of a court’s duty when art. 8 is duly invoked, s. 4(1) of the *Act* removes it. In both its ordinary meaning and in light of the object and purpose of the Act, “shall” clearly means “must”, not “may”. [At 541–2; emphasis added.]

[70] I have not overlooked the plaintiffs' contention, which the case management judge adopted in her reasons of May 13, 2008, that the stay motion raised a question of law alone, i.e., the "proper interpretation" of the CAA and CPA, and was therefore not caught by the *prima facie* test. (Similar reasoning was adopted by Perell J. in his lengthy reasons in *Smith Estate* [2008] O.J. No. 2248.) In my respectful opinion, this analysis ignores the court's characterization in *Bisaillon* and *Dell* (and implicitly, *Rogers*) of class action legislation as procedural, and incorrectly assumes that it can be used to overcome the exclusive jurisdiction of arbitral tribunals or to modify the substantive rights of parties to arbitration agreements. The lesson of the Supreme Court's three decisions is that a valid agreement to arbitrate removes the dispute from the court's purview provided one of the parties applies within the applicable time limit. Section 32 of the CAA confirms this principle.

[71] In this regard, I note a parallel between this case and *Ezer v. Yorkton Securities Inc.* 2005 BCCA 22, 207 B.C.A.C. 65, in which this court upheld a ruling of Goepel J. in the court below that gave effect to a forum selection clause, thereby precluding a class action from proceeding in B. C. The Court of Appeal stated at para. 19 of its reasons that "if the exclusive jurisdiction clause is enforceable, [the plaintiff] cannot bring any action against [the defendant] in British Columbia, including a class proceeding, and there is no action to be certified. The issues of whether a class proceeding is the fair and preferable procedure or there are common issues do not arise." (My emphasis.) (See also *Rudder et al. v. Microsoft Corp.* (1999) 2 C.P.R. (4th) 474 (Ont. S.C.J.) at paras 8–9, *per* Winkler J., as he then was.)

[72] Similarly in the case at bar, the *CPA* does not apply and the question of certification does not arise because the court is required to refer the dispute to the arbitral tribunal chosen by the parties. The fact the dispute might otherwise be suitable for certification cannot make the arbitration agreement “inoperative”. This would not only contravene s. 32 of the *CAA*; it would permit a purely procedural law to nullify the parties’ choice of a different forum — a choice which the Supreme Court has ruled must be respected as a matter of substantive law. Although I recognize that important policy objectives underlie class action legislation, I conclude that the law of British Columbia is not so different from that of Quebec as to justify a departure from *Dell* in this province.

Issue Estoppel

[73] This brings us to the plaintiffs’ more technical argument, made in the alternative, that even if *Dell* and *Rogers* had changed the law, the doctrine of issue estoppel applies to preclude this court from giving effect to the change at this point in this case.

[74] The law respecting issue estoppel is uncontroversial and was recently considered by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460. The Court affirmed the three conditions for the application of the principle, namely: (1) that the same question was decided in the earlier proceeding; (2) that the decision was a final one; and (3) the parties to the decision or their privies were the same persons as the parties in the proceedings in which the estoppel is raised, or their privies. Where these criteria are met, the law generally prohibits re-litigation and favours finality, not as a matter of “superficial or technical considerations” but as a matter that engages the “inherent jurisdiction of

Courts of law” and is of “wide and general application”: see *Johannesson v. C.P.R.*

[1922] 2 W.W.R. 341 (Man. K.B. at 344–5, aff’d. [1922] 2 W.W.R. 761 (Man. C.A.).)

Thus the Court stated in *Danyluk*:

An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [At para. 18.]

[75] The plaintiffs argue that all three criteria are met in this case. They formulate “the issue” previously decided as whether Money Mart was entitled to a stay “prior to certification and irrespective of whether [the] requirements” for certification were met. (This was how Money Mart had argued the motion at the time, as Brown J. noted at para. 7 of her reasons of May 13, 2008.) In the plaintiffs’ submission, if *Dell* and *Rogers* had not been decided and Money Mart had attempted at the certification hearing or on the appeal from it, to argue again that the judge should have stayed the action even though the criteria for certification were met, there is no question but that issue estoppel would apply. They see Money Mart’s application and this appeal as an attempt to re-argue the same question determined in *MacKinnon* (C.A.) in violation of the principle of finality in litigation. They attach no significance to the fact that this court remanded Money Mart’s renewed application for a stay at the time the appeal from the certification order came on for hearing in February 2008.

[76] Money Mart submits on the other hand that this case fails on both the first and second criteria for issue estoppel. It says that Brown J.’s refusal of a stay on May 13, 2008 did not involve the relitigation of the earlier stay motion, since the Court of Appeal

never ruled on that application after remitting it to the case management judge. Money Mart reapplied for a stay after this court released its reasons, but that application was adjourned, not dismissed, in March 2005. Thus the hearing in April 2008 was the first time the judge below had considered the stay application following the issuance of *MacKinnon (C.A.)* on September 24, 2004 (and following the certification of the action). In Money Mart's submission, this court has not yet ruled on whether a stay *per se* should have been granted — no "final determination" has been made.

[77] After much anxious consideration, I have concluded that the plaintiffs' argument must prevail on this point. It is true that Money Mart's application for a stay was remitted to the court below "for reconsideration ... in accordance with these reasons" and then dismissed by that court and duly appealed with leave, but issue estoppel focuses on the "issue" determined by the court, rather than on the order or actual disposition made by the court. As was stated in the well-known case of *McIntosh v. Parent* [1924] 4 D.L.R. 420 (Ont. C.A.):

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [At 422; emphasis added.]

[78] To similar effect, Donald J. Lange writes in *The Doctrine of Res Judicata in Canada* (2nd ed., 2004) that the test of finality for issue estoppel should not be confused with finality for the purpose of cause of action estoppel. He continues:

The test for issue estoppel is a substantive issue test where the decision affects substantive rights of the parties in respect of a matter bearing upon the merits of the cause of action, as distinct from some collateral matter. This can be readily seen in decisions in interlocutory proceedings. A decision is final in nature because it finally disposes of a substantive right raised between the parties which may or may not be determinative of the entire action. [At 86; emphasis added.]

Lange also notes that although there is no estoppel where a court of appeal grants a new trial of an entire case without restriction, the same is not true where a court of appeal in granting a new trial decides a substantive question in the litigation. That question, he writes, is taken to have been conclusively determined between the parties for purposes of the litigation. (At 99; see also *Western Canada Power Co. v. Bergklint* (1916) 54 S.C.R. 285, at 299, *per* Duff J., as he then was.)

[79] Applying these comments here, I find that this court conclusively determined in *MacKinnon (C.A.)* that Money Mart was not entitled to a stay if the action was suitable for certification under the *CPA*, and that once granted, certification would make the arbitration agreement “inoperative” for the purposes of the *CAA*. If the Court had determined only that Money Mart was not entitled to a stay *per se* at the time the original motion was heard, the Court would not have remitted the motion back to the case management judge for reconsideration in accordance with its reasons. Although in my opinion the law has now changed, the conclusion of the issue was a fundamental part of the Court’s decision and is of course the very point challenged on this appeal.

[80] Given, then, that the criteria for issue estoppel are met, the remaining question is whether this court should exercise its jurisdiction in the interests of justice to make an exception on the basis of “special circumstances”. This exception is used sparingly, but

recognizes that estoppel is intended to serve the ends of justice, not defeat them: see *Arnold v. National Westminster Bank Plc* [1991] 2 A.C. 93 (H.L.) at 109–111, per Lord Keith, quoted in *Hockin v. Bank of British Columbia* (1995) 123 D.L.R. (4th) 538 (B.C.C.A.) at 550. The onus lies on the party seeking the exercise of this discretion: see *Lange*, *supra*, at 234.

[81] The defendants contend that there is an “obvious injustice” in refusing to allow a party to benefit from a change in the law. I agree that this is regrettable. But as *Hockin* illustrates, the exception does not necessarily follow upon a change in the law; it requires that all the circumstances bearing on the justice of the case be considered. In my opinion, this is what Brown J. did in her reasons of May 13, 2008. She considered the long and tortuous course of this particular litigation; the fact that Ms. Parsons’ action would continue against Money Mart in the courts in any event; and the likelihood that granting a stay would “deny to those class members whose claims are the subject of an arbitration clause the benefit or detriment of the determinations made in the class proceedings”. (Para. 42.) She found it difficult to perceive an injustice to Money Mart in having matters determined by the court in one proceeding as opposed to before an arbitrator in several proceedings. I respectfully agree with her reasoning and since it has not been shown that she exercised her discretion on a wrong principle, I would not interfere with it.

Remaining Issues*Challenge to Section 347(1)(b) of the Criminal Code*

[82] As noted earlier, Brown J. declined, in considering the plaintiffs' certification application, to rule on the defendants' argument that s. 347(1)(b) is unconstitutional — an argument that if successful, would likely have eliminated the plaintiffs' causes of action. In Brown J.'s view, it was premature to decide this question at the certification stage, since "[i]t must be plain and obvious that a plaintiff cannot succeed before the court will refuse to certify a class action under s. 4(1)(a) of the *CPA*. ... [T]he issue of the constitutionality of s. 347(1)(b) is beyond the scope of a certification hearing." (Para. 24.)

[83] The defendants submit that the case management judge conflated two separate issues — the constitutionality of s. 347(1)(b) on the one hand, and on the other, whether the plaintiffs' pleadings disclosed a cause of action — and that she erroneously applied the "plain and obvious" test to both issues. With respect, I do not read Brown J.'s reasons in this manner. She did not decide the constitutionality issue one way or the other. She deferred it. As the plaintiffs submit in their factum, it cannot be said, and Money Mart does not purport to argue, that it is "plain and obvious" that s. 347(1)(b) is unconstitutional. That is a question of law that likely should not be decided in an evidentiary vacuum or simply on the basis of pleadings. Until it is decided, the provision is presumed to be valid.

[84] In any event, the question of whether to address the issue in the course of the certification hearing is a discretionary one best determined by the case management

judge. Again, she has not been shown to have proceeded on a wrong principle or otherwise to have erred. I would dismiss this ground of appeal.

The “Dollar” Proceedings

[85] The first ground of appeal advanced by Dollar related to the effect of *Dell* and *Rogers* on the law of British Columbia. The question of whether the claims against Dollar would be properly arbitrable had the claims against Money Mart been referred to arbitration may have been interesting, but given my conclusions above, any basis for the stay sought by Dollar falls away. I would not accede to this ground.

[86] Dollar’s second ground of appeal is that the plaintiffs’ claims against it are not appropriate for certification and in particular, that Brown J. erred in ruling that the pleadings disclose causes of action (which the defendants summarize as claims in “unjust enrichment, conspiracy and *alter ego*”) against Dollar, that the issues raised against the two defendants are “common” ones within the meaning of the *CPA*, and that a class proceeding is the preferable procedure by which to resolve the claims. The case management judge dealt with these and other arguments in her reasons of July 25, 2008. With respect to the existence of a cause of action, she ruled that this is not one of those rare cases in which the court may conclude at the preliminary stage that the plaintiffs’ claim is without merit; nor could it be said the plaintiffs’ prayer for equitable relief was bound to fail. (Paras. 14–16.)

[87] On appeal, Dollar argues that the claim for unjust enrichment cannot stand given that (in Dollar’s submission) various management and royalty agreements exist between Dollar and Money Mart, supplying a “juristic reason” for any benefit received by

Dollar from Money Mart's cheque-cashing business. This may well prove to be the case, but the facts must be proved by evidence at trial. It cannot be said at this stage the claim of unjust enrichment is bound to fail.

[88] Dollar also submits that even if some of the acts allegedly committed by Dollar amounted to a conspiracy by unlawful means, certain “essential elements” of that cause of action — in particular, an intention to injure the plaintiffs — are absent. In response, the plaintiffs contend on the basis of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* [1983] 1 S.C.R. 452 that an intention to injure may be inferred “from the fact that the defendants should have known injury to the plaintiff would ensue.” (At 472.) Again, these are arguments that must await trial, where all the relevant evidence can be adduced and all the legal arguments advanced. At this stage, provided a cause of action is disclosed in the pleadings, the criterion for certification in s. 4(1)(a) of the CPA is met. The same is true with respect to Dollar's arguments concerning the remedies of constructive trust and joint and several liability. I would dismiss this ground of appeal.

[89] Finally, Dollar contends that the case management judge erred in finding that the element of commonality of issues had been made out with respect to the common issues as certified by the Court's order of July 25, 2008 (see Schedule A to these reasons) which relate to Dollar — i.e., common issues (e), (f) and (g) relating to unjust enrichment, (j), (k) and (l) relating to joint and several liability arising from conspiracy, and (m) and (n) relating to a claim for punitive damages.

[90] In *Western Canadian Shopping Centres, supra*, McLachlin C.J.C. explained the commonality requirement as follows:

... there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be “common” only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. ... [At para. 39.]

(See also *Hollick, supra*, at para. 18.) I agree with Brown J. that the resolution of these issues is a substantial ingredient of each class member's claims against Dollar, and that their resolution is necessary to the resolution of each such claim. I would dismiss this ground of appeal.

DISPOSITION

[91] Whilst I agree with the defendants that the reasoning in *Dell* and *Rogers* has changed the law in British Columbia such that *MacKinnon (C.A.)* should now be regarded as overruled, I also conclude that issue estoppel applies to prevent the defendants from taking advantage of this change in the law. I would not make any exception to this estoppel in light of “special circumstances”, since in my view, the interests of justice would not be served by doing so. Finally, I find that the case management judge did not err in certifying the action as against Money Mart and Dollar

pursuant to s. 4 of the *CPA*, and I would therefore dismiss their appeals of the certification orders made against them.

[92] We are indebted to counsel for their able arguments.

“The Honourable Madam Justice Newbury”

I Agree:

“The Honourable Chief Justice Finch”

I Agree:

“The Honourable Madam Justice Rowles”

I Agree:

“The Honourable Mr. Justice Tysoe”

I Agree:

“The Honourable Madam Justice Neilson”

Schedule A**Common Issues**

- (a) Does the First Part Cheque Cashing Fee charged by Money Mart and paid by the Class members upon the repayment of their Fast Cash Advance loans, pursuant to Money Mart cashing the post-dated first party cheque provided to it by the Class members in order for them to obtain those Fast Cash Advance loans, in accordance with the terms of Money Mart's standard form Fast Cash Advance loan agreements, constitute interest as defined by and for the purpose of s. 347 of the *Criminal Code*?
- (b) If the answer to (a) is yes, do the Class members' standard form Fast Cash Advance loan agreements pursuant to which Money Mart has collected the First Party Cheque Cashing Fees from Class members constitute agreements to receive interest at a criminal rate, contrary to s. 347(1) of the *Criminal Code*?
- (c) If the answer to (a) is yes, has the collection by Money Mart of the First Party Cheque Cashing Fees from the Class members, pursuant to Money Mart cashing the post-dated first party cheque provided to it by Class members in order for them to obtain their Fast Cash advance loans, in accordance with the terms of Money Mart's standard form Fast Cash Advance loan agreements, resulted in the payment by class members to and the receipt by Money Mart of interest at a criminal rate, contrary to s. 347(1) of the *Criminal Code*?

- (d) If the answer to (c) is yes, has Money Mart been unjustly enriched by the collection of Money Mart's standard First Party Cheque Cashing Fees from the Class members, upon repayment by them of their Fast Cash Advance loans pursuant to the post-dated first party cheque provided by them to Money Mart in order to obtain their Fast Cash Advance loans?
- (e) If the answer to (c) is yes, has Dollar Financial received a portion of the First Party Cheque Cashing Fees collected by Money Mart in relation to the Class members' Fast Cash Advance loans?
- (f) If the answer to (d) and (e) is yes, then has Dollar Financial been unjustly enriched by the receipt of a portion of the First Party Cheque Cashing Fees collected by Money Mart?
- (g) If the answer to (d) or (f) is yes, then do Money Mart and Dollar Financial hold the benefit they have received from the collection of those First Party Cheque Cashing Fees in trust for the Class members who provided that benefit to Money Mart and Dollar Financial and are Money Mart and Dollar Financial liable to account to the Class members for the First Party Cheque Cashing Fees received from them and all profits earned therefrom?
- (h) If the answer to (b) or (c) is yes, does the provision by Money Mart of loans to Class members on terms that are prohibited by s. 347(1) of the *Criminal Code*, or that result in the payment by the Class members of interest at a criminal rate contrary to s. 347(1) of the *Criminal Code*, constitute an unconscionable act or practice within the meaning of s. 4 of the *Trade Practices Act*, R.S.B.C. 1996,

c. 457 and s. 8 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

- (i) If the answer to (h) is yes, is Money Mart liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to s. 22(1) of the *Trade Practices Act* and s. 105 and s. 171 of the *Business Practices and Consumer Protection Act*?
- (j) If the answer to (b) or (c) is yes, did Money Mart and Dollar Financial conspire to implement a scheme to provide loans to the Class members in order to earn profits at an unlawful rate of interest?
- (k) If the answer to (j) is yes, then are Money Mart and Dollar Financial jointly and severally liable for damages to those Class members who have suffered loss or damage as a result of that illegal conspiracy?
- (l) If the answer to (b) or (c) is yes, then is Dollar Financial jointly and severally liable for the acts of Money Mart in advancing loans to the Class members on terms that offend s. 347(1) of the *Criminal Code*, or by receiving interest in respect of those loans at a criminal rate, contrary to s. 347(1) of the *Criminal Code*, on the grounds that those acts were committed at the direction, under the control and with the assistance of Dollar Financial and/or were committed in furtherance of a common business enterprise carried on by Dollar Financial and Money Mart for their mutual benefit?

- (m) If the answer to (b), (c), (j), or (l) is yes, does the conduct of Money Mart and Dollar Financial justify an award of punitive or exemplary damages?
- (n) If the answer to (m) is yes, what is the amount of punitive or exemplary damages to be awarded?

Schedule B

Appendix A

British Columbia, <i>Class Proceedings Act</i>	Québec, <i>Code of Civil Procedure</i>
<p>Class Certification</p> <p>4(1) <u>The court must certify a proceeding as a class proceeding</u> on an application under section 2 or 3 if all of the following requirements are met:</p> <p>(a) the pleadings disclose a cause of action;</p> <p>(b) there is an identifiable class of 2 or more persons;</p> <p>(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;</p> <p>(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;</p> <p>(e) there is a representative plaintiff who</p> <p style="padding-left: 40px;">(i) would fairly and adequately represent the interests of the class,</p> <p style="padding-left: 40px;">(ii) has produced 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 of the proceeding, and</p> <p style="padding-left: 40px;">(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.</p> <p>(emphasis added)</p>	<p>Authorization to Institute a Class Action</p> <p>1003. <u>The court authorizes the bringing of the class action</u> and ascribes the status of representative to the member it designates if of opinion that:</p> <p>(a) the recourses of the members raise identical, similar or related questions of law or fact;</p> <p>(b) the facts alleged seem to justify the conclusions sought;</p> <p>(c) the composition of the group makes the application of article 59 [representative action] or 67 [joinder of causes of action or parties] difficult or impracticable; and</p> <p>(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately. (emphasis added)</p> <p>4.2 In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.</p>

Appendix B

	British Columbia Commercial Arbitration Act	Québec Code of Civil Procedure (C.C.P.) or Québec Civil Code (C.C.Q.)	UNCITRAL Model Law on International Commercial Arbitration
Mandatory stay of court's jurisdiction	<p>Stay of proceedings</p> <p>15(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, <u>a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.</u></p> <p>(2) <u>In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.</u> [...] (emphasis added)</p>	<p>940.1 C.C.P. Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court <u>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.</u> [...] (emphasis added)</p>	<p>Article 8 - Arbitration agreement and substantive claim before court</p> <p>1. A court before which an action is brought in a matter which is the subject of an arbitration agreement <u>shall</u>, if a party so requests not later than when submitting his first statement on the substance of the dispute, <u>refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.</u> [...] (emphasis added)</p> <p>(This provision is very similar to Art. II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention – "...<u>shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.</u> (emphasis added))</p>
No court intervention	Extent of judicial intervention	940.3. C.C.P. <u>A judge or the court cannot intervene in any question</u>	Article 5 - Extent of court intervention

	British Columbia <i>Commercial Arbitration Act</i>	Québec Code of Civil Procedure (C.C.P.) or Québec Civil Code (C.C.Q.)	UNCITRAL <i>Model Law on International Commercial Arbitration</i>
except as expressly permitted	32. <u>Arbitral proceedings</u> of an arbitrator and any order, ruling or arbitral award made by an arbitrator <u>must not be questioned, reviewed or restrained</u> by a proceeding under the <i>Judicial Review Procedure Act</i> or otherwise <u>except to the extent provided in this Act</u> . (emphasis added)	governed by this Title <u>except in the cases provided for therein</u> . (emphasis added)	In matters governed by this Law, <u>no court shall intervene except where so provided in this Law</u> . (emphasis added)
Competence- competence	22(1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration. [...] B.C. International Commercial Arbitration Centre, Domestic Commercial Arbitration Rules, Rules of Procedure Rule 20. Jurisdiction (1) <u>The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement</u> . (emphasis added)	COMPETENCE OF ARBITRATORS 943. C.C.P <u>The arbitrators may decide the matter of their own competence</u> . (emphasis added)	Article 16 - Competence of arbitral tribunal to rule on its jurisdiction (1) <u>The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement</u> . For that purpose, <u>an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract</u> . A decision by the arbitral tribunal that the contract is null and void shall not entail <i>ipso jure</i> the invalidity of the arbitration clause. [...] (emphasis added)

	British Columbia Commercial Arbitration Act	Québec Code of Civil Procedure (C.C.P.) or Québec Civil Code (C.C.Q.)	UNCITRAL Model Law on International Commercial Arbitration
Independence of arbitration agreement	<p>B.C. International Commercial Arbitration Centre, Domestic Commercial Arbitration Rules, Rules of Procedure</p> <p>20(2) A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause unless specifically found to be so by the arbitration tribunal. [...]</p>	<p>Art. 2642 C.C.Q. 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.</p>	<p>See <i>Model Law</i>, article 16(1), immediately above.</p>
Jurisdiction of arbitrators to determine questions of law	<p>Legal principles apply unless excluded</p> <p>23. An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.</p>	<p>944.10 C.C.P. <u>The arbitrators shall settle the dispute according to the rules of law</u> which they consider appropriate and, where applicable, determine the amount of the damages. [...] (emphasis added)</p>	<p>Article 28 - Rules applicable to substance of dispute</p> <p>(1) <u>The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.</u> [...] (emphasis added)</p>