

CANADA

SUPERIOR COURT
(Class Action)

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

UNION DES CONSOMMATEURS

No.: 500-06-000806-162

Plaintiff

-and-

COREY MENDELSON

Designated Person

-v.-

SIRIUS XM CANADA INC.

Defendant

-and-

ATTORNEY GENERAL OF QUEBEC

Impleaded Party

DEFENCE

IN SUPPORT OF ITS DEFENCE, THE DEFENDANT SIRIUS XM CANADA INC. RESPECTFULLY SUBMITS THE FOLLOWING:

1. The Defendant Sirius XM Canada Inc. (the "**Defendant**") denies the allegation in paragraph 1 of the *Originating Application of a Class Action Lawsuit* dated July 12, 2018 (the "**Application**").
2. With respect to the allegations in paragraphs 2 and 3 of the Application, the Defendant refers to the judgment rendered by this Court on February 23, 2018, as corrected on March 27, 2018 (the "**Authorization Judgment**"), denying anything not in conformity therewith.
3. The Defendant admits the allegations in paragraphs 4 to 6 of the Application.
4. The Defendant denies as drafted the allegation in paragraph 7 of the Application. As for the qualification of the term of the contract, it is a legal issue that will ultimately have to be ruled upon by this Court.
5. The Defendant admits the allegation in paragraph 8 of the Application.

6. The Defendant denies as drafted the allegation in paragraph 9 of the Application. More specifically, the fact that a given subscriber is categorized as a “non-commercial subscriber” by the Defendant’s Terms and Conditions, Exhibit P-2, is in no way indicative that such subscriber meets the legal criteria to be a “consumer” under the *Consumer Protection Act*, CQLR c P-40.1 (the “CPA”).
7. The Defendant denies the allegation in paragraph 10 of the Application.
8. The Defendant denies as drafted the allegation in paragraph 11 of the Application, adding that it is a “merchant” under the CPA only insofar as it contracts with “consumers” under the CPA.
9. Paragraph 12 of the Application does not contain any factual allegation.
10. The Defendant denies the allegation in paragraph 13 of the Application.
11. With respect to the allegation in paragraph 14 of the Application, the Defendant refers to the Terms and Conditions, Exhibit P-2, denying anything not in conformity therewith.
12. The Defendant denies the allegations in paragraphs 15 and 16 of the Application, adding that Section 11.2 CPA does not apply, and in any event has not been breached, in the present instance.
13. The Defendant denies the allegations in paragraphs 17 to 21 of the Application, adding that communications such as those filed under Exhibit P-3 are not subject to the requirements of Section 11.2 CPA.
14. The Defendant denies the allegation in paragraph 22 a) of the Application.
15. The Defendant admits the allegations in paragraphs 22 b) and 22 c) of the Application.
16. The Defendant denies the allegations in paragraphs 22 d) to 22 f) of the Application, adding that such notices are not subject to the requirements of Section 11.2 CPA.
17. With respect to the allegations in paragraphs 22 g) and 22 h) of the Application, the Defendant refers to Exhibit P-4, denying anything not in conformity therewith.
18. The Defendant denies the allegation in paragraph 22 i) of the Application, adding that a billing reminder was in fact sent to Mr. Corey Mendelsohn (“**Mr. Mendelsohn**”) at least 30 days before the beginning of the 2015-2016 billing period, as appears from a copy of said notice communicated as **Exhibit D-1**.
19. The Defendant denies as drafted the allegation in paragraphs 22 j) of the Application, adding that the sum of \$41.06 was in fact refunded to Mr. Mendelsohn.
20. With respect to the allegations in paragraph 22 k) and 22 l) of the Application, the Defendant refers to Exhibit P-5, denying anything not in conformity therewith.
21. With respect to the allegation in paragraph 22 m) of the Application, the Defendant refers to Exhibit P-6, denying anything not in conformity therewith.
22. The Defendant has no knowledge of the allegation in paragraph 22 n) of the Application.

23. The Defendant denies the allegations in paragraphs 22 o) and 22 p) of the Application.
24. The Defendant has no knowledge of the allegation in paragraph 23 a) of the Application.
25. The Defendant denies as drafted the allegation in paragraph 23 b) of the Application.
26. With respect to the allegation in paragraph 23 c) of the Application, the Defendant refers to Exhibit P-3, denying anything not in conformity therewith.
27. The Defendant denies the allegations in paragraphs 23 d) to 23 f) of the Application, adding that such notices are not notices subject to the requirements of Section 11.2 CPA.
28. With respect to the allegation in paragraph 23 g) of the Application, the Defendant refers to Exhibit P-8, denying anything not in conformity therewith.
29. The Defendant denies the allegation in paragraph 23 h) of the Application, adding that such notices are not notices subject to the requirements of Section 11.2 CPA.
30. With respect to the allegations in paragraphs 23 i) and 23 j) of the Application, the Defendant refers to Exhibit P-9, denying anything not in conformity therewith.
31. With respect to the allegation in paragraph 24 of the Application, the Defendant refers to Exhibit P-10, denying anything not in conformity therewith.
32. The Defendant denies the allegations in paragraphs 25 to 27 of the Application.
33. Paragraph 28 of the Application does not contain any factual allegation.
34. The Defendant denies the allegations in paragraphs 29 and 30 of the Application.
35. With respect to the allegations in paragraphs 31 and 32 of the Application, the Defendant refers to Exhibits P-12 and P-13, denying anything not in conformity therewith.
36. The Defendant denies the allegations in paragraphs 33 to 37 of the Application.
37. The Defendant denies the allegations in paragraphs 38 to 42 of the Application.
38. With respect to the allegations in paragraphs 43 and 44 of the Application, the Defendant refers to Exhibit P-14, denying anything not in conformity therewith, adding that if there has been any violation of the CPA, which is denied, no punitive damages are warranted in this matter.

AND FOR FURTHER DEFENCE, THE DEFENDANT RESPECTFULLY SUBMITS THE FOLLOWING:

39. The Application is based on a purported violation by the Defendant, in the context of alleged “unilateral” increases in subscription fees for its satellite radio and internet radio services, of Section 11.2 CPA.
40. The class of members on behalf of which the Application was authorized to be filed reads as follows:

“All persons in Quebec who entered into subscription contracts for satellite or internet radio services provided by Sirius XM Canada inc. and whose subscription fees were unilaterally increased by Sirius XM Canada inc. since September 1, 2013 without proper notice.”

I. SECTION 11.2 CPA DOES NOT APPLY TO THE DEFENDANT

41. The Defendant submits that Section 11.2 CPA cannot constitute the basis for a claim against it as this provision does not apply to the practices put in place by the Defendant, as further explained below.
42. Moreover, given the federal nature of the Defendant’s activities, this provision is unconstitutional or otherwise inapplicable to it.

A. INAPPLICABILITY OF SECTION 11.2 CPA TO THE DEFENDANT’S PRACTICES

43. The Defendant’s business model essentially consists in offering to persons who purchase or lease a vehicle equipped with a SiriusXM satellite radio receiver, a complimentary satellite radio subscription, included with the purchase or the lease of their vehicle, for a limited trial period during which they can enjoy, for free, the use of the Defendant’s satellite radio services.
44. During this trial period, class members were provided by the Defendant with notices informing them of the upcoming expiry of their complimentary trial subscription, and offering them the possibility to continue their subscriptions as self-paying subscribers by entering into a contract with it, either by registering online or through the Defendant’s call center agents, and by selecting a billing plan and providing credit card payment information. Such contracts provide for automatic billing based on the billing terms selected by the subscribers (i.e. monthly, quarterly, semi-annually, annually or multi-annually, depending on what the subscribers have chosen).
45. An example of the Defendant’s offer to enter a contract to become a self-paying subscriber appears from a sample of such notice addressed to Ms. Denise Greffe (“**Ms. Greffe**”), whose case is specifically dealt with in the Application, communicated as **Exhibit D-2**:

“Tout d’abord, nos félicitations pour votre achat d’un Kia Soul. Maintenant que vous avez passé quelques jours à vous familiariser avec votre nouveau véhicule, nous espérons que vous en appréciez toutes les caractéristiques.

Nous espérons aussi que vous avez découvert que votre véhicule est doté d’une caractéristique additionnelle bien spéciale : un essai de trois

mois de SIRIUS, sans aucun frais de votre part. Ceci représente une valeur de 14,99\$ par mois pendant trois mois.

(...) Notez que votre période d'essai sans frais de trois mois prend fin le 14 septembre 2012.

Vous abonner à SIRIUS : pour poursuivre votre écoute sans interruption, choisissez simplement un forfait d'abonnement mensuel, trimestriel ou annuel et appelez-nous au 1 866 635-9632 (vous devez avoir en main votre code de radio SIRIUS qui est inscrit au haut de cette lettre) ou remplissez et postez-nous le formulaire ci-dessous. Bien sûr, rien ne vous sera facturé avant la fin de votre période d'essai sans frais.

Oui, je désire conserver SIRIUS dans mon véhicule KIA Soul. À l'échéance de ma période d'essai sans frais de 3 mois, veuillez m'inscrire au forfait d'abonnement récurrent que j'ai coché ci-dessous :

Mon forfait	Coût*	Total du versement	Carte de crédit: <input type="checkbox"/> VISA <input type="checkbox"/> MASTERCARD <input type="checkbox"/> AMERICAN EXPRESS
Mensuel	14,99 \$	<input type="checkbox"/> Carte de crédit : 17,23 \$ (taxes et frais applicables inclus)	<input type="text"/>
Trimestriel	44,97 \$ <small>Cela ne représente que 14,99 \$ par mois.</small>	<input type="checkbox"/> Carte de crédit : 51,70 \$ (taxes et frais applicables inclus)	Numero de carte de credit: <input type="text"/>
Annuel	164,89 \$ <small>Cela ne représente que 13,74 \$ par mois. Vous épargnez 14,99 \$</small>	<input type="checkbox"/> Carte de crédit : 189,58 \$ (taxes et frais applicables inclus)	Date: <input type="text"/>

Date d'expiration: Signature:

Adresse de courriel:

Denise Greffe
SID/ESN : 047594297385

Veuillez fournir à SIRIUS votre adresse de courriel afin que nous puissions vous tenir au courant des nouveautés de programmation et de programmes. Une copie sera envoyée à votre fournisseur de services de facturation et de compte.

(...)

Votre compte sera facturé automatiquement, au total, en fonction du montant total du forfait d'abonnement que vous avez choisi, de façon récurrente, au tarif de facturation alors en vigueur. Taxes et frais applicables en sus. Une carte de crédit valable est exigée pour tous les abonnements. Tous les frais ainsi que la programmation peuvent être modifiés. [Emphasis added]

46. Typically, class members would also receive, during their complimentary trial subscription period, additional offers to contract allowing them to benefit from an initial time-limited promotional discount off the regular price (the “Discounted Price”), as appears from samples of such notices addressed to Ms. Greffe, communicated *en liasse* as **Exhibit D-3**, one of which reads as follows:

“OFFRE SPÉCIALE DE LANCEMENT:

4,99\$*

Par mois pendant vos trois premiers mois.

(taxes et frais applicables en sus) Normalement 14,99\$ par mois.

(...)

Gardez SIRIUS en marche. Appelez-nous ou remplissez et postez-nous ce formulaire dans l'enveloppe-réponse ci-jointe.

Oui, je désire conserver le service SIRIUS dans mon KIA Soul après l'échéance de ma période d'essai sans frais de 3 mois. Veuillez m'inscrire au forfait récurrent que j'ai choisi ci-dessous (l'offre spéciale n'est proposée que pour la première entente).

Mon forfait	Coût	Total du versement
Mensuel	14,99 \$	<input type="checkbox"/> Carte de crédit : 17,23 \$ (Taxes et frais applicables inclus)
Trimestriel SANS IQ	4,99 \$ par mois Trois premiers mois = 14,97 \$	<input type="checkbox"/> Bonne affaire ! Carte de crédit : 17,21 \$ \$ (Taxes et frais applicables inclus)
Annuel	164,89 \$ Cela ne représente que 13,74 \$ par mois Vous épargnez 14,99 \$	<input type="checkbox"/> Carte de crédit : 189,58 \$ (Taxes et frais applicables inclus)

Carte de crédit : VISA MASTERCARD AMERICAN EXPRESS

Numero de carte de crédit : _____ Date : _____

Date d'expiration : _____ Signature : _____

Adresse de courriel : _____

Denise Greffe
SID/ESN : 047594297385

Veuillez fournir à SIRIUS votre adresse de courriel afin que nous puissions vous tenir au courant des nouvelles de programmation et autres services. Votre paiement sera débité à partir de la facture et le compte.

Composez simplement le 1 866 635-9632 ou postez-nous le formulaire ci-dessous. Bien sûr, rien ne vous sera facturé avant la fin de votre période d'essai sans frais.

Votre compte sera facturé automatiquement, au total, en fonction du montant total du forfait d'abonnement que vous avez choisi, de façon récurrente, au tarif de facturation alors en vigueur. Taxes et frais applicables en sus. Une carte de crédit valable est exigée pour tous les abonnements. Tous les frais ainsi que la programmation peuvent être modifiés. [Emphasis added]

47. Such offers to contract sent to potential subscribers clearly disclose the regular price applicable to the services and the fact that said regular price would be automatically billed to them, in full, on a recurring basis at the beginning of the next applicable billing periods (i.e. monthly, quarterly, semi-annually, etc.).
48. Hence, those who chose to continue their subscriptions to the Defendant's services by becoming self-paying subscribers (i) agreed in advance, when entering into the subscription contracts, to pay the full amount for their next billing periods at the expiry of the complimentary trial period or Discounted Price period, as the case may be, and (ii) provided their credit card information for that purpose.
49. The offering of limited duration Discounted Prices was not limited to persons who contracted with the Defendant during, or immediately after the expiry of, their complimentary trial subscription, but also to persons who became self-paying subscribers by contracting with the Defendant in different circumstances.
50. For example, in the case of Mr. Mendelsohn, the alleged "unilateral" price increase from \$99.62 for the 2013-2014 billing period to \$233.55 for the 2014-2015 billing period, mentioned at paragraph 23 p) of the Application, is in fact merely the result of the expiry of the limited duration Discounted Price, and the subsequent agreed-upon automatic billing at the regular price for the annual billing period selected by Mr. Mendelsohn, as appears from the billing reminder communicated as Exhibit P-3, the relevant excerpts of which read as follows:

"Your SiriusXM subscription renews on October 5, 2014

Dear Corey,

(...)

Because we want you to keep listening to all that you've come to love, your current Annual subscription will automatically renew on October 5, 2014 at \$203.13 billed to the credit card we have on file.*

Also, please note that, due to changes in Canadian legislation, we are restructuring our Music Royalty Fee (MRF) that you already pay as part of your current SiriusXM subscription. As a result, the monthly standard subscription price for the Select package will be \$18.26 per month on a primary subscription and \$12.26* on a secondary subscription effective on renewals after August 24th, 2014 for the copyright and regulatory fees associated with broadcasting our content. This fee is just one way in which you, as a SiriusXM customer, help support a wide range of music and entertainment content.*

(...)

**Plus applicable taxes Your total price per month consists of a service price of \$15.99/month or \$9.99 for secondary subscriptions. and a \$2.27 Music Royalty Fee and administrative fee (MRF), plus applicable taxes The MRF is applied to help fund contributions to Canadian content and music copyright license fees payable by SiriusXM Canada on approximately 14% of your service price and other administrative cost. The MRF is not a tax or charge the government requires SiriusXM Canada to collect and is subject to change. (...) Your account will automatically be billed in total in advance according to the total cost of the payment plan selected and on a recurring basis according to the then applicable billing rates." [Emphasis added]*

ACCOUNT DETAILS

Your SiriusID/ESN:

055789557776

Your account number:

3559424335

Your SiriusXM Package:

SIRIUS Select

Your Plan Term: Annual

Your Renewal Date:

October 5, 2014

Your Renewal Rate:

\$203.13*

51. Similarly, in the case of Ms. Greffe, the so-called "unilateral" price increase from \$91.41 for the 2012-2013 billing period to \$197.88 for the 2014-2015 billing period (paragraph 23 j) of the Application) is also merely the result of the expiry of the limited duration Discounted Price and the agreed-upon subsequent automatic billing at the regular price, as appears from the billing reminder communicated as **Exhibit D-4**, the relevant excerpts of which read as follows:

"Dear Denise,

We're writing today because it's time to renew your SiriusXM subscription. For your convenience, and to make sure you continue to enjoy all the great music and entertainment you love, your subscription to SiriusXM will renew at your current 1 year term to the credit card we have on file.

**YOUR ACCOUNT
INFORMATION**

Name: Denise Greffe
 ESN: 047594297385
 Account Number: 3445451997
 Plan: 1 year
Renewal Date: September 14, 2013
Renewal Rate: \$187.53*
 Package: Sirius Select

(...)

* Plus applicable taxes. Total price per month consists of a service price of \$15.99/month and a \$0.97 administrative fee, including a Music Royalty fee which includes a Music Royalty fee collected by SOCAN of 6% of the service price, plus applicable taxes.

** The Canadian Music Royalty Fee (MRF) will be added beginning with renewals beginning after October 1, 2012.

(...)

Your account will automatically be billed, in total, in advance according to the total cost of the payment plan selected on a recurring basis according to the then applicable billing rate. (...) [Emphasis added]

52. Such pre-arranged billing terms to follow expiry of limited duration Discounted Price periods are therefore not "amendments" to the subscription contracts, much less "unilateral amendments", and consequently Section 11.2 CPA simply does not apply.
53. While not being required to do so under the CPA, the Defendant did issue to class members, at least 30 days prior to the expiry of billing periods, including Discounted Prices periods, notices reminding them of the date on which their Discounted Price periods expired and that their credit card would automatically be billed in advance, for the agreed-upon regular price for the billing period selected.
54. These billing reminders expressly disclosed the amount that would be billed to the class members on the first day of their respective next billing period. Examples of such billing reminders can be found at Exhibit P-3 in support of the Application, as appears from the examples sent to Ms. Greffe and Mr. Mendelsohn, reproduced above at paragraphs 50 and 51 above.
55. The class members' agreement to pay the regular price at the expiry of their limited duration Discounted Price, is further evidenced by the customer agreements issued to them following the conclusion (often by phone) of their subscription contracts, the whole as appears, for instance, from the customer agreement dated February 23, 2018 between Ms. Greffe and the Defendant, communicated as **Exhibit D-5**:

"(...) You will be charged \$39.31 on 23/02/2018 for your Services, and a summary of the details can be found below:

SUBSCRIPTION 1	
RADIO ID/ESN/ USERNAME	P1WC6A00
PACKAGE	XM SELECT
DESCRIPTION	120+ SATELLITE RADIO CHANNELS OF COMMERCIAL-FREE MUSIC, NEWS, TALK AND SPORTS ^{1/2020}
PAYMENT PLAN LENGTH	6 MONTHS
BILLING PERIOD	23/02/2018 - 23/08/2018
PRICE	\$34.10
PRORATED AMOUNT(S)	\$0.00
SUBTOTAL	\$34.10
TAXES	\$5.12
TOTAL	\$39.31
TOTAL CHARGE:	\$39.31*
TOTAL PRICE/MONTH (EXCLUDING TAXES): YOU SAVED:	\$5.70 \$75.37

1/2020

(...)

Your next billing period

The charges for your next billing period are listed below. The Credit Card we have on file will automatically be charged at the next billing date listed below and will automatically be charged again at the beginning of each subsequent billing period unless you cancel your Services. To cancel any of your Services, you may call us at 1-855-854-4632 prior to your next billing period.

SUBSCRIPTION 1	
RADIO ID/ESN/ USERNAME	P1WC6A00
PACKAGE	XM SELECT
DESCRIPTION	120+ SATELLITE RADIO CHANNELS OF COMMERCIAL-FREE MUSIC, NEWS, TALK AND SPORTS ^{1/2020}
PAYMENT PLAN LENGTH	6 MONTHS
NEXT BILLING DATE	23/08/2018
PRICE	\$109.56
TAXES	\$16.41
TOTAL	\$125.97
TOTAL BILLING PRICE: TOTAL BILLING PRICE/MONTH (EXCLUDING TAXES):	\$125.97* \$18.26

1/2020 For more details, visit xm.com/caplan

(...)

Your Cancellation: You may cancel this Agreement at any time and at your discretion by providing us notice. You may call us at 1-855-854-4632 to cancel this Agreement or any of your Services.

Upon such cancellation, you will be responsible for payment of the price of the Services provided to you up to and including the cancellation date calculated at the rate provided in this Agreement. You will be entitled to a refund of any subscriptions fees paid in advance and for which no Services are provided following the effective date of cancellation.”
[Emphasis added]

56. In addition, class members often called in to re-negotiate the agreed-upon subscription fees with the Defendant. These attempts to re-negotiate occurred throughout the class period, including following the receipt of the aforementioned billing reminders.
57. In such cases, the Defendant would typically agree to grant new limited duration Discounted Prices varying from one subscriber to another, and the subscriber would consent – again – to pay the already agreed-upon regular price for the subsequent billing periods, as described above.
58. As a matter of fact, both Mr. Mendelsohn and Ms. Greffe re-negotiated, at least on one occasion, their agreed-upon subscription fees during the class period.
59. For example, Mr. Mendelsohn called the Defendant on or about November 25, 2015 to re-negotiate the subscription fees for his then-current billing period. As a result, Mr. Mendelsohn (i) agreed to benefit from a new limited duration Discounted Price, (ii) was accordingly refunded the amount of \$41.06 to reflect such a new agreement (or bilateral modification) and (iii) agreed to be billed the applicable regular price for the subsequent billing periods.
60. As for Ms. Greffe, she re-negotiated the subscription fees in June 2017, as appears from the email exchange communicated as Exhibit P-10. The agreement whereby Ms. Greffe agreed to benefit from a new limited duration Discounted Price was officialized on or about August 16, 2017, when she called the Defendant and was refunded the amount of \$120.96 for the 2017-2018 billing period.
61. On or about November 23, 2017, Ms. Greffe called the Defendant, after having changed vehicles, and benefited once again from a complimentary trial subscription offered in association with her new vehicle, as well as a subsequent limited duration Discounted Price.
62. Finally, Ms. Greffe called the Defendant again on or about July 17, 2018, following receipt of the billing reminder as her new Discounted Price was about to expire, to re-negotiate the agreed-upon regular price. As a result, Ms. Greffe benefitted from another limited duration Discounted Price and agreed to pay the applicable regular price for the subsequent billing periods.
63. Considering the above, the increases from the limited duration Discounted Prices to the agreed-upon regular price are not “amendments”, let alone “unilateral amendments” to which Section 11.2 CPA would apply.
64. Likewise, Section 11.2 CPA does not apply to modifications resulting from the re-negotiation of subscription fees by members throughout the class period, as discussed above.

65. Alternatively, even if the so-called modifications of the subscription contracts were subject to the requirements of Section 11.2 CPA, which is denied, the Defendant submits that it complied therewith.

i. The Defendant's Terms and Conditions in force until January 5, 2018

66. The previous version of the Defendant's Terms and Conditions (Exhibit P-2), which were in force until January 5, 2018, contained the following provisions (i) specifying the elements of the subscription contract that may be amended unilaterally by the Defendant, and (ii) providing for the subscriber's right (in addition to that already provided at Section 214.6 CPA) to cancel such contract at any time if such changes are not acceptable or for any other reason:

"2. CHANGE IN TERMS

A) CHANGES TO TERMS.

Due to the evolving nature of our business, its competition, and the requirement and costs of programming suppliers, we reserve the right to unilaterally change the terms on which we offer the Services from time to time, as we believe appropriate, including the rates, fees and charges. Any changes or modifications will be effective on at least thirty (30) days' notice to you, and such changes shall become effective once you use the Service after such thirty (30) day period (which use shall be deemed to conclusively indicate acceptance of such changes).

If we make any such changes, we will post a notice on our Site that these Terms have changed and the effective date of such change and provide you with a description of such changes and a means for you to respond should you not accept such changes and therefore wish to terminate your subscription. We may also send you an entirely new set to replace these Terms. YOU ALWAYS HAVE THE RIGHT TO CANCEL THESE SERVICES AT ANY TIME IF CHANGES TO THESE TERMS ARE NOT ACCEPTABLE TO YOU. IF YOU ELECT NOT TO CANCEL YOUR SERVICES AFTER RECEIVING OUR NOTICE OF A CHANGE, YOUR CONTINUED RECEIPT OF SERVICES FROM US WILL CONSTITUTE ACCEPTANCE OF THE CHANGED TERMS. IF YOU NOTIFY US THAT YOU DO NOT ACCEPT SUCH TERMS, THEN WE WILL CANCEL YOUR SERVICES AS PROVIDED IN SECTION 8.

(...)

7. PAYMENT

In return for receiving our Services, you agree to pay as follows:

A) SUBSCRIPTION FEE.

(...) Our subscription fees and other charges and fees are subject to change upon providing notice to you as set out in Subsections 2(a) and 12(a) of these Terms. (...) [Emphasis added]

67. The billing reminders discussed above, which were sent at least 30 days prior to the expiry of billing periods, disclosed the amount that would be automatically billed to the subscribers' credit cards at the beginning of their next billing period.
68. Such disclosure effectively allowed the class members to cancel their subscription contract, at no charge, or even to re-negotiate their subscription fees, if they so chose.
69. Furthermore, as seen *inter alia* in the sample billing reminders sent to Ms. Greffe and to Mr. Mendelsohn for the billing periods starting on September 13, 2013 and October 5, 2014, respectively (see paragraphs 50 and 51 above), the Defendant also disclosed to the class members, *inter alia*, at least 30 days in advance, the one-dollar fee increase to the regular price from \$14.99 to \$15.99 (before taxes), as well as the changes in the structure of the Music Royalty and Regulatory Fee, formerly the Music Royalty Fee ("MRF").
70. The MRF is an amount that is included in the subscription fees for Quebec resident subscribers that is collected to offset the royalties the Defendant is required to pay to third-parties, namely (i) the Society of Composers, Authors and Music Publishers of Canada (SOCAN), (ii) Re:Sound, (iii) the Canadian Musical Reproduction Rights Agency (CMRRA), and (iv) the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), as well as Canadian Content Development (CCD) contributions and other regulatory fees.
71. The Defendant's right to pass on those charges to the class members, and the subscribers' consent to pay for these charges, was, in fact, expressly provided for in the then-applicable Terms and Conditions (Exhibit P-2), and therefore does not constitute an amendment:

"7. PAYMENT

In return for receiving our Services, you agree to pay as follows:

(...)

C) ADMINISTRATIVE FEES.

(...)

2. Music Royalty Fee: Subscriptions which include music channels are charged a monthly Music Royalty Fee on each Receiver. For further details on this fee see FAQs (about-music-royalty-and-regulatory-fees)."

ii. The Defendant's Terms and Conditions in force after January 5, 2018

72. On January 5, 2018, the Defendant modified its Terms and Conditions from those communicated as Exhibit P-2 to those communicated as Exhibit P-14, the relevant excerpts of which now read as follows:

"Please note: This Customer Agreement applies to SiriusXM Canada subscribers whose subscriptions commenced on or after January 5, 2018. This Customer Agreement also applies to subscribers who have renewed, upgraded, or modified their subscriptions on or after January 5, 2018.

(...)

B. MODIFICATION TO TERMS:

1. Amendment to Terms:

Applicable only to Residents of Québec:*

Due to the evolving nature of our business, its competition, and the requirement and costs of programming suppliers, SiriusXM Canada may from time to time amend each of the clauses of the Agreement, including subscription fees, other charges and fees and the nature of the Services. SiriusXM Canada will send you, at least thirty (30) days before the amendment comes into force, a written notice drawn up clearly and legibly, setting out the new clause only, or the amended clause and the clause as it read formerly, the date of the coming into force of the amendment and your cancellation rights. You may refuse this amendment and cancel the Agreement thus amended without cost, penalty, or cancellation indemnity, but after payment of the amounts owed for use of the Service up to the cancellation date, if the amendment entails an increase in your obligations or a reduction in SiriusXM Canada's obligations, by sending SiriusXM Canada a notice to that effect, via its customer service (Subsection L(1)), no later than thirty (30) days after the amendment comes into force.

Subscription plans will, unless we receive notice from you to the contrary, continue automatically at the expiry of their billing period at then current rates, payable in advance. Except for subscription plans whose billing term is less than six (6) months, we will inform you of the expiry date of your billing period by means of a written notice sent between the 90th and 60th day before such expiry date. A notice will be sent to you in accordance with Subsection L(1) advising you of the pending continuation of your subscription and the effective date of the new billing period.

(...)

H. CANCELLATION:

(...)

2. Your Cancellation:

(...)

Only applicable to Residents of Québec:*

You may cancel this Agreement at any time and at your discretion by notifying us in accordance with Subsection L(1), via telephone during our normal business hours, or by notifying us at the address provided above under "Contacting SiriusXM Canada". Your cancellation will become effective on the sending of the notice or the future date specified in the notice. For security purposes, we may require you to provide certain information to validate your identity prior to cancelling your Services.

Upon such cancellation, you will be responsible for payment of the price of the Services provided to you calculated at the rate provided in your subscription plan. You will be entitled to a refund of any Subscriptions fees paid in advance and for which no Services were yet provided."

73. The Defendant also modified its billing reminder notices as of January 5, 2018, as appears from a sample of such new billing reminder notices communicated as **Exhibit D-6**, the relevant excerpts of which now read as follows:

"Dear Denise,

This is a notification of your upcoming automatic billing period(s) for the SiriusXM Canada Services listed below. The charges for your next billing period are in the table below and the Credit Card we have on file will automatically be charged on the next billing date(s) set out below. Further, you will automatically be charged again at the beginning of subsequent billing periods unless you cancel your Services. To cancel any of your Services, you may call us at 1-844-324-2149.

SUBSCRIPTION 1	
RADIO ID/ESN/ USERNAME	P1WC6A00
PACKAGE	XM SELECT
DESCRIPTION	120+ SATELLITE RADIO CHANNELS OF COMMERCIAL-FREE MUSIC, NEWS, TALK AND SPORTS ¹
PAYMENT PLAN LENGTH	6 MONTHS
NEXT BILLING DATE	AUG 23, 2018
PRICE	\$109.56
TAXES	\$16.41
TOTAL	\$125.97
TOTAL BILLING PRICE:	\$125.97
TOTAL BILLING PRICE/MONTH (EXCLUDING TAXES):	\$18.26

¹For more details, visit siriusxm.ca/plans.

Your Services continue to be subject to your Agreement with us which we sent you when you signed up for the Services, along with any subsequent amendments or modifications to your Services. If you have any questions, please refer to your Customer Agreement and our Customer Agreement Terms (also available at siriusxm.ca/terms) or you can reach us at 1-888-539-7474 or care@siriusxm.ca.

You can also visit siriusxm.ca/myaccount to review or make changes to your billing and payment information."

74. Throughout the class period, the Defendant's Terms and Conditions did not breach Section 11.2 CPA, if applicable.

B. CONSTITUTIONAL ARGUMENTS

75. To the extent that Section 11.2 CPA applies in this case, the Defendant submits that such provision is *ultra vires* the powers of the Provincial legislature, constitutionally inapplicable or inoperative.
76. The Defendant provides its subscribers satellite and internet radio entertainment and exclusive programming available in their cars, at home and on their mobile devices. As such, the Defendant is a broadcasting communication undertaking subject to the *Broadcasting Act*, SC 1991, c 11, the *Radiocommunication Act*, RSC, 1985 c. R-2, and the exclusive jurisdiction of the *Canadian Radio-television and Telecommunications Commission* (“CRTC”).
77. Broadcasting undertakings fall under exclusive Federal jurisdiction as per sections 92 (10) (a), 91 (29) and 91 *in limine* of the *Constitution Act*, 1867.
78. More specifically, the supply, provision and modalities of broadcasting communication services are at the heart of the communication activities of these undertakings, and these activities are specifically governed by, *inter alia*, the *Broadcasting Act*, the *Radiocommunication Act* and their regulations.

i. The Constitutional Invalidity of Section 11.2 CPA (“Pith and Substance”)

79. Sections 11.2 to 11.4 of the CPA were adopted under the *Act to amend the Consumer Protection Act* and other legislative provisions, L.R.Q., c. P-40.1.
80. Both the purpose and the effect of Section 11.2 CPA are to govern specifically the terms of the Defendant’s contracts, as well as its activities and the provision of its services.
81. The explanatory notes to the law itself expressly state that its purpose is to “*provide for a special regime with respect to contracts for the sequential performance of remotely delivered service*”. Moreover, the legislative debates leading to the adoption of these provisions confirm that the clear legislative intent was to target communications companies directly.
82. Therefore, Section 11.2 CPA is *ultra vires* the powers of the Provincial legislature since its *pith and substance* is to regulate broadcasting communication services, including the Defendant’s services, which falls under the exclusive jurisdiction of the Federal legislature (see in particular *Rogers Communications Inc. v. Châteauguay (City of)*, [2016] 1 SCR 467; *Directeur des poursuites criminelles et pénales c. Telus Communications inc.*, 2019 QCCQ 2143; *Directeur des poursuites criminelles et pénales c. Bell Canada*, 2019 QCCQ 2144).

ii. Inapplicability of Section 11.2 CPA pursuant to the Doctrine of Interjurisdictional Immunity

83. Section 11.2 CPA is also constitutionally inapplicable to the Defendant pursuant to the doctrine of interjurisdictional immunity, since its application “*would have the effect of impeding the exercise of an activity within the core of a federal power*” within the meaning of the Judgment: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536, at para. 46 (i.e. because it would impair the core of the federal broadcasting jurisdiction).

84. It is well established that the regulation of the pricing, availability and quality of services is part of the “*basic and irreducible minimum*” of the federal power over telecommunications (*Bell Canada v. Quebec (CSST)*, [1988] 1 SCR 749).
85. The application of Section 11.2 CPA would therefore have the effect either of restricting or even preventing the Defendant from modifying the rates and other core elements of its broadcasting communication services during the term of its contracts, which would not only hinder, but could cripple the management of those aspects that are at the heart of the Federal power over broadcasting communications. As such, the provision at issue is constitutionally inapplicable to the Defendant.

iii. Section 11.2 CPA is Inoperative pursuant to the Doctrine of Federal Paramountcy

86. The intrusion of Section 11.2 CPA in the satellite radio sector, which is subject to the *Broadcasting Act*, the *Radiocommunication Act* and the resulting CRTC orders and policies, further creates a real operational conflict with federal legislation and runs counter to Parliament’s intention in adopting this legislation. In such circumstances, it is established that provincial legislation must give way to federal legislation that is constitutionally paramount.
87. The intention of Parliament in enacting the *Broadcasting Act* and the *Radiocommunication Act* was clearly to create a unified and coherent legislative regime from coast to coast, under the umbrella of a single regulator, the CRTC.
88. The application of Section 11.2 CPA to the Defendant, and to other federal corporations operating in a similar field, would necessarily have the effect of breaking this unitary regime and would therefore run counter to the clearly expressed intention of Parliament.
89. Such provision is consequently inoperative with respect to the Defendant’s activities because of the doctrine of Federal paramountcy.

II. PRESCRIPTION OF CERTAIN CLAIMS

90. On June 19, 2017, the Authorization Application was amended to modify the class description as follows:

Description of the class in the September 16, 2016 version of the Proceedings	Description of the class in the June 19, 2017 version of the Proceedings as per the Class Modification
“All persons in Quebec who, <u>since September 1, 2013</u> , entered into subscription contracts for satellite or internet radio services provided by Sirius XM Canada Holdings Inc. and/or Sirius XM Canada Inc. (collectively, “Sirius XM”), and whose subscription fees were unilaterally increased by Sirius XM.”	“All persons in Quebec who [...] entered into subscription contracts for satellite or internet radio services provided by Sirius XM Canada Holdings Inc. and/or Sirius XM Canada Inc. (collectively, “Sirius XM”), and whose subscription fees were unilaterally increased by Sirius XM <u>since September 1, 2013</u> .”

91. This Court authorized this modification in the Authorization Judgment and this specific conclusion was appealed by the Defendant on the basis of prescription.
92. The Court of Appeal, while appreciative of the seriousness of the argument raised by the Defendant regarding the prescription of certain claims, dismissed the application for leave to appeal, mentioning that this issue could be dealt with appropriately by the judge hearing the present claim on the merits:

[7] D'autre part, à l'audience, il ressort des observations des avocats que, si, en effet, certaines réclamations pouvaient (peut-être) être prescrites (à savoir, les réclamations de membres ayant contracté avec la requérante avant le 1^{er} septembre 2013 et ayant reçu un avis d'augmentation avant le 19 juin 2014), cette prescription n'affecterait que quelques réclamations individuelles, encore que leur nombre soit difficile à évaluer à ce stade, l'action n'étant pas prescrite à l'endroit du groupe généralement considéré, même si les réclamations de certains de ses membres pouvaient l'être. Or, ce genre de situation n'a rien d'inusité ni d'inacceptable et trouvera sa solution sur le fond du litige et dans le processus de recouvrement des réclamations, le cas échéant.

93. In the present case, the filing of the Authorization Application on September 1, 2016, suspended the three-year limitation period for the claims of the potential members included in the original class description.
94. However, the claims of the newly added members (i.e. those not already included in the original class description) resulting from the Class Modification did not benefit from such suspension of prescription. As such, their claims for any alleged unilateral increase of their subscription fees between September 1, 2013 and July 19, 2014, are prescribed.

III. MR. MENDELSON IS NOT A CONSUMER UNDER THE CPA

95. Mr. Mendelsohn's subscription to the Defendant's services was made to fulfill the commercial purposes of a corporation, NewIntelligence Inc. ("NewIntelligence"). Indeed, the satellite radio receivers associated with the accounts in dispute have been embedded in vehicles belonging to NewIntelligence. Moreover, Mr. Mendelsohn used NewIntelligence's business address in his dealings with the Defendant.
96. In addition, on October 17, 2011, Mr. Mendelsohn sent an email to the Defendant requesting an official invoice with GST/QST numbers to process the subscription fees within his business, as appears from a copy of said email communicated as **Exhibit D-7**.
97. As a result, Mr. Mendelsohn and other class members who were reimbursed for, or who otherwise deducted their subscription fees as a business expense, are not "consumers" and therefore have no claim against the Defendant under the CPA.

IV. COLLECTIVE RECOVERY

98. As explained, an individual inquiry will be needed to determine if a subscriber gave his or her consent to the applicable subscription fees, and this throughout the class period.
99. A detailed member-by-member, year-by-year analysis may therefore be necessary to establish the existence of an alleged violation of Section 11.2 CPA and, as the case may be, the actual quantum of damages suffered.

100. Collective recovery of the potential members' claims is therefore clearly not appropriate in the present instance, as this would likely artificially inflate the number of members forming part of the class as well as the quantum of their claims, resulting in an unjust enrichment at the expense of the Defendant.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

DISMISS the Plaintiff's *Originating Application of a Class Action Lawsuit*;

THE WHOLE with costs.

MONTREAL, June 14, 2019



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SIRIUS XM CANADA INC.

**SUPERIOR COURT
(Class Action)**

No.: 500-06-000806-162

**PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

UNION DES CONSOMMATEURS

Plaintiff

-and-

COREY MENDELSON

Designated Person

- v. -

SIRIUS XM CANADA INC.

Defendant

-and-

ATTORNEY GENERAL OF QUEBEC

Impleaded Party

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