

CANADA

COUR SUPÉRIEURE
(Chambre des actions collectives)

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

UNION DES CONSOMMATEURS

N°. : 500-06-000806-162

Demanderesse

-et-

COREY MENDELSON

Personne désignée

-c.-

SIRIUS XM CANADA INC.

Défenderesse

-et-

PROCUREUR GÉNÉRAL DU QUÉBEC

Mise en cause

DEMANDE DE LA DÉFENDERESSE EN PRÉCISIONS
(ARTICLES 169 et 584 C.p.c.)

À L'HONORABLE JUGE SYLVAIN LUSSIER DE LA COUR SUPÉRIEURE, LA DÉFENDERESSE SIRIUS XM CANADA INC. EXPOSE RESPECTUEUSEMENT CE QUI SUIT:

I. LE CONTEXTE PROCÉDURAL

1. Le 1^{er} septembre 2016, Corey Mendelsohn a déposé une *Demande pour autorisation d'exercer une action collective et pour attribution d'un statut de représentant* dans laquelle un manquement à l'article 11.2 L.p.c. est allégué, laquelle fut subséquemment modifiée à deux reprises.
2. Le 23 février 2018, l'honorable Stéphane Sansfaçon, alors à la Cour supérieure, a accueilli en partie ladite demande pour autorisation, permettant à la demanderesse et à Corey Mendelsohn d'intenter une action collective contre la défenderesse SiriusXM Canada inc. pour le compte du groupe suivant :

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.

3. Le 12 juillet 2018, la demanderesse a fait signifier à la défenderesse une *Demande introductive d'instance en action collective* (la « **Demande** »).
4. Dans sa *Demande*, aux paragraphes 43 à 45, la demanderesse allègue ce qui suit à l'égard de la modification par la défenderesse de ses *Terms & Conditions* (pièce P-14) en janvier 2018 :

43. The Plaintiff has further learned that in January 2018 - more than a full year after the present proceedings were instituted - SiriusXM substantially modified its Terms and Conditions, the whole as appears from the "Terms and Conditions" effective as of January 5, 2018, a copy of which is produced herewith as Exhibit P-14 (the "Modified Terms and Conditions");

44. The Modified Terms and Conditions stipulate that the terms set forth in the original Terms and Conditions in respect of the automatic renewal of a subscription and SiriusXM's right to amend subscription fees, are not applicable to Quebec residents. This represents an admission by SiriusXM that the Terms and Conditions applicable during the Class period were unlawful in Quebec, and should never have been applied to the Class members;

45. Furthermore, the Modified Terms and Conditions now provide the express requirements set forth in Section 11.2 CPA in order for SiriusXM to lawfully increase subscription fees (if notices complying with Section 11.2 of the CPA are in fact sent), thereby constituting a further admission that the Terms and Conditions applicable during the Class period did not comply with Section 11.2 of the CPA; [notre emphase]

5. Selon la demanderesse, cette modification constituerait en quelque sorte une admission par la défenderesse à l'effet que la version antérieure de ses *Terms & Conditions* (pièce P-2) n'est pas conforme à l'article 11.2 L.p.c., ce qui est bien entendu nié par la défenderesse.
6. Le 20 décembre 2018, lors de l'interrogatoire de la personne désignée Corey Mendelsohn, les procureurs de la défenderesse lui ont posé la question suivante concernant les paragraphes 43 à 45 précités de la *Demande* :

302 Q. I will draw your attention, sir, to page 13 of your proceedings. I'm looking at paragraph 43 referring to modified terms and conditions filed as Exhibit P-13; have you seen those?

Me ROBERT KUGLER: P-14.

BY Me FRÉDÉRIC PARÉ: Q. P-14, have you seen those revised terms and conditions before?

A. It has come to my attention that there has been changes in regards to the terms and conditions.

Me FRÉDÉRIC PARÉ: So maybe that is not a question to the witness but rather to a representative of the OPC, and I'm also inviting you to the discussion, colleague, but my following questions are meant at seeing whether or not there is a dispute, as far as the current proceedings are concerned, with respect to the revised terms and conditions and the recent notice that you gave us as an example in support of your letter of 16 December of this year, whether or not you are satisfied with that regardless obviously of our respective positions with respect to the current proceedings.

Me ROBERT KUGLER: I will get back to you. [notre emphase]

tel qu'il appert de l'extrait pertinent des notes sténographiques de l'interrogatoire de M. Mendelsohn, communiqué au soutien des présentes comme **pièce R-1**.

7. Le 19 mars 2019, dans une lettre des procureurs de la défenderesse, ceux-ci indiquent qu'ils sont d'avis que la défenderesse aurait enfreint l'article 11.2 L.p.c. lors de sa modification en janvier 2018 de ses *Terms & Conditions* (pièce P-14) et que ses avis subséquents de hausse du prix d'abonnement à ses services seraient eux aussi non-conformes à l'article 11.2 L.p.c. Ladite lettre est communiquée au soutien des présentes comme **pièce R-2**.
8. Or, la Demande ne contient aucune telle allégation.
9. Au contraire, les paragraphes 43 à 45 de la Demande suggèrent plutôt que les *Terms & Conditions* (Pièce P-14) et les avis subséquents de hausse du prix d'abonnement aux services de la défenderesse sont conformes à la L.p.c.
10. Afin d'éviter toute forme de surprise à un stade ultérieur et de permettre à la défenderesse de se défendre en pleine connaissance de cause, la défenderesse est en droit d'exiger que la demanderesse précise sa Demande à l'égard d'une quelconque illégalité de la version modifiée des *Terms & Conditions* (pièce P-14) et des avis subséquents.
11. À cet égard et tel qu'annoncé aux procureurs de la demanderesse, notamment lors de l'interrogatoire de la Personne désignée Corey Mendelsohn, la défenderesse se réserve le droit de procéder à un court interrogatoire d'un représentant de la demanderesse Union des consommateurs, lorsque ces précisions auront été fournies dans le cadre de la Demande.

PAR CES MOTIFS, LA DÉFENDERESSE DEMANDE AU TRIBUNAL:

ACCUEILLIR la présente demande de précisions;

ORDONNER à la demanderesse de préciser dans sa *Demande introductive d'instance en action collective* en quoi la version modifiée des *Terms & Conditions* (pièce P-14) de la défenderesse et ses avis subséquents aux membres contreviendraient à la L.p.c., le tout dans un délai de 10 jours du jugement à intervenir;

LE TOUT sans frais, sauf en cas de contestation.

MONTREAL, le 27 mars 2019



STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.

Avocats de la défenderesse

Code d'impliqué: BS0350

SIRIUS XM CANADA INC.

M^e Frédéric Paré

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Notre référence : 113737-1037

AVIS DE PRÉSENTATION

À : M^e Robert Kugler
M^e Pierre Boivin
M^e William Colish
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Montréal, Québec H3B 2A7

Téléphone : 514 878 2861
rkugler@kklex.com
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wcolish@kklex.com

Avocats de la demanderesse

PRENEZ AVIS que la présente *Demande de la défenderesse en précisions* sera présentée pour adjudication devant l'Honorable Juge Sylvain Lussier de la Cour supérieure, au Palais de justice de Montréal, situé au 1, rue Notre-Dame Est, à Montréal, Québec, H2Y 1B6, le 1^{er} avril 2019, à 9h30, dans une salle à être déterminée par ce dernier.

MONTRÉAL, le 27 mars 2019



STIKEMAN ELLIOTT S.E.N.C.R.L., s.r.l.

Avocats de la défenderesse

Code d'impliqué: BS0350

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COREY MENDELSON/DECEMBER 20, 2018

Sheet 1 Page 1

COREY MENDELSON/DECEMBER 20, 2018 - 1

1 Court File No. 500-06-000806-162

2 C A N A D A

3 PROVINCE OF QUEBEC

4 DISTRICT OF MONTREAL

5 S U P E R I O R C O U R T

6

7 UNION DES CONSOMMATEURS,

8 Plaintiff,

9 and

10 COREY MENDELSON,

11 Designated Person,

12 - vs. -

13

14 SIRIUS XM CANADA INC.,

15 Defendant.

16

17 Pre-trial Examination of COREY MENDELSON, taken on

18 DECEMBER 20, 2018.

19

20 APPEARANCES:

21 Me ROBERT KUGLER/Me WILLIAM COLISH For the Plaintiff

22 Me FRÉDÉRIC PARÉ/Me PATRICK DESALLIERS For the Defendant

23 Me CHARLES GRAVEL For Procureur Général du Québec

24

25 Elizabeth Robinson, Official Court Reporter

COREY MENDELSON/DECEMBER 20, 2018

Sheet 29 Page 110 COREY MENDELSON/DECEMBER 20, 2018 - 110	Page 111 COREY MENDELSON/DECEMBER 20, 2018 - 111
<p>1 Me ROBERT KUGLER: 2 Objection. 3 4 OBJECTION NO. 19: Isn't it a fact, sir, that 5 you actually processed directly the expenses 6 through your corporations at any point in time? 7 8 Me FRÉDÉRIC PARÉ: 9 300 Q. Has there been any different use of your 10 Sirius XM account during the relevant Class period 11 versus before? 12 Me ROBERT KUGLER: 13 What use did you make of your Sirius XM? 14 15 BY Me FRÉDÉRIC PARÉ: 16 301 Q. Has there been any difference? 17 A. No. I listen to music, I listen to the NHL 18 network, I listen to Howard Stern for my personal 19 enjoyment. 20 302 Q. I will draw your attention, sir, to page 13 21 of your proceedings. I'm looking at paragraph 43 22 referring to modified terms and conditions filed as 23 Exhibit P-13; have you seen those? 24 Me ROBERT KUGLER: 25 P-14.</p>	<p>1 BY Me FRÉDÉRIC PARÉ: 2 303 Q. P-14, have you seen those revised terms and 3 conditions before? 4 A. It has come to my attention that there has 5 been changes in regards to the terms and conditions. 6 Me FRÉDÉRIC PARÉ: 7 So maybe that is not a question to the witness 8 but rather to a representative of the OPC, and 9 I'm also inviting you to the discussion, 10 colleague, but my following questions are meant 11 at seeing whether or not there is a dispute, as 12 far as the current proceedings are concerned, 13 with respect to the revised terms and 14 conditions and the recent notice that you gave 15 us as an example in support of your letter of 16 December 13 of this year, whether or not you 17 are satisfied with that regardless obviously of 18 our respective positions with respect to the 19 current proceedings. 20 Me ROBERT KUGLER: 21 I will get back to you. 22 Me FRÉDÉRIC PARÉ: 23 Okay. If you allow us five minutes to review 24 my notes. 25</p>
Page 112 COREY MENDELSON/DECEMBER 20, 2018 - 112	Page 113 COREY MENDELSON/DECEMBER 20, 2018 - 113
<p>1 Me ROBERT KUGLER: 2 Take your time. 3 4 --- upon recessing and resuming --- 5 6 BY Me FRÉDÉRIC PARÉ: 7 304 Q. So only two follow-up questions, sir. I 8 asked you, as an undertaking, to provide me with the 9 kilometer records that you may have had; to the 10 extent it is presented in another format, such as in 11 a way of a percentage, for instance, like I'm using 12 my car for 75% or 25% for my business, that type of 13 information that would have been provided to your 14 professional for your tax income purposes, I would 15 like to get a copy of that. 16 Me ROBERT KUGLER: 17 Objection. 18 19 UNDERTAKING NO. 8: To provide a copy of the 20 kilometer records to the extent it is presented 21 in another format such as a percentage for 22 personal/business that would have been provided 23 to the accountant for income tax purposes. 24 (under objection) 25</p>	<p>1 OBJECTION NO. 20: To undertaking 8. 2 3 Me FRÉDÉRIC PARÉ: 4 305 Q. And also I would like to see the underlying 5 documents that would show me how the fees that were 6 paid to Sirius, both during the relevant Class but 7 also before, that would have been treated by your 8 company from a tax standpoint. 9 Me ROBERT KUGLER: 10 Objection, 11 Me FRÉDÉRIC PARÉ: 12 And I understand, colleague, your objection is 13 only limited to what is outside of the Class. 14 Me ROBERT KUGLER: 15 No. 16 Me FRÉDÉRIC PARÉ: 17 No? 18 Me ROBERT KUGLER: 19 What his company does has nothing to do with 20 this case, 21 Me FRÉDÉRIC PARÉ: 22 Okay. 23 24 UNDERTAKING NO. 9: To provide a copy of the 25 underlying documents showing the fees that were</p>

Robert Kugler
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Assistant: Olga Colque
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March 19, 2019

By E-mail

Without Prejudice

Me Frédéric Paré
Me Patrick Desalliers
STIKEMAN ELLIOTT
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Montreal, Quebec
H3B 3V2

Re : Union des Consommateurs et al.
v. Sirius XM Canada Inc.
S.C.M.: 500-06-000806-162
Our file: 6150-001

Dear Colleagues,

The following are the answers to the undertakings that you requested during Mr. Mendelsohn's examination:

1. Mr. Mendelsohn's cars were changed in or about May 2013 and September 2016;
2. The complaint is set out in the Originating Application of a Class Action Lawsuit, which contends that the increases in subscription fees imposed by SiriusXM are not opposable to consumers. It is also a fact that until shortly before the hearing of the Application for Authorization to institute a class action, in both the English and the French versions of the Terms and Conditions (Exhibit P-2), the hyperlink (on page 11) purporting to direct consumers to the subscription fees in effect at the time, did not work; that being said, we have nothing further to add at this time to our Originating Application;
3. Prior to Mr. Mendelsohn's examination, we provided you with all of the exchanges with SiriusXM in issue in the class action authorized by the Court, for the Class Period set forth in the Authorization Judgment. Exchanges outside the Class Period or unrelated to the determination of the collective questions authorized by the Court are under objection;
4. See our reply to undertaking 3;

5. To the best of Mr. Mendelsohn's knowledge, the email was delivered on October 3, 2016;
6. Mr. Mendelsohn does not know the precise date that SiriusXM changed his billing address from his home in Côte-St. Luc to his former business address, however this change was noticed in or about the middle of June 2017, shortly before the hearing of the Application for Authorization to Institute a Class Action was scheduled to take place;
7. This undertaking is under objection, however Mr. Mendelsohn does not have a log for the two Audis setting out business versus personal kilometer or percentage kilometer usage;
8. See our reply to undertaking 7;
9. This undertaking is under objection, however Mr. Mendelsohn does not have any such document;
10. Although there are only 9 undertakings included in the list of undertakings in the transcript, you also asked us to provide our position with respect to the revised Terms and Conditions (Exhibit P-14), and the most recent notice sent to Mr. Mendelsohn further imposing an increase in his subscription fees, and we indicated that we would let you know (page 111 of the transcript). Below is our position:
 - a. The revised Terms and Conditions (Exhibit P-14) appear to rectify what we contend was unlawful in the Terms and Conditions applicable beforehand (Exhibit P-2) regarding the right to unilaterally modify consumers' subscription fees, provided SiriusXM sends written notices which contain the public order requirements set forth in Section 11.2 of the CPA;
 - b. However, we are not aware of SiriusXM having sent an exclusive notice to consumers setting out the current terms and conditions (those set forth in Exhibit P-2), and the terms and conditions that SiriusXM proposed to unilaterally modify (Exhibit P-14), or informing consumers of their right to refuse the modified terms and cancel the contract without penalty. As Section 11.2 of the CPA requires such an exclusive notice in order for a unilateral amendment to be opposable to consumers, in the absence of such a notice, the recent unilateral increases in subscription fees are not opposable to consumers;
 - c. Furthermore, although the most recent notice informing of a further increase in subscription fees stipulates the fees charged prior to the proposed increase, such prior subscription fees were introduced further to unlawful

unilateral amendments and were accordingly not opposable to consumers. As such, the notices did not properly set out the *valid* current subscription fees in effect, and accordingly ran afoul of the public order requirements of Section 11.2 of the CPA.

We ask that you kindly indicate to us when you will provide us with your written defence, as well as several dates when the CEO of your client is available to be examined.

Yours truly,

KUGLER KANDESTIN LLP



Per: Robert Kugler

RK/oc

c.c. Me Charles Gravel, Attorney General of Quebec
Me Pierre Boivin and Me William Colish, Kugler Kandestin

COUR SUPÉRIEURE
(Chambre des actions collectives)

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Mise en cause

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Notre référence: 113737-1037

DEMANDE DE LA DÉFENDERESSE EN PRÉCISIONS
(ARTICLES 169 et 584 C.p.c.)
et AVIS DE PRÉSENTATION
et PIÈCES R-1 et R-2

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