SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL.

No: 500-06-000551-107

DATE: November 11, 2014

BY: **THE HONOURABLE PIERRE NOLLET J.S.C**

GAD ALBILIA
Plaintiff

v.

APPLE., INC. ET AL
Defendants

JUDGMENT

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[1] On June 27, 2013, this Court authorized the bringing of a class action on behalf of:

> all residents in Quebec who have purchased or otherwise acquired an iPhone or iPad ("iDevice") and who have downloaded free Apps from the App Store onto their iDevices since December 1, 2008 through to the present.
>
> and (the Geolocation Class)
>
> all residents in Quebec who have purchased or otherwise acquired an iPhone and turned Location Services off on their iPhones prior to April 27, 2011 and have unwittingly, and without notice or consent transmitted location data to Respondents' servers.
>
> (Authorization Judgment)

JN326

[2] On March 28, 2014, after publication of the usual notices, Plaintiff filed a Motion to Institute Proceedings.

[3] Defendants now seek to strike certain allegations and obtain particulars on this Motion to Institute Proceedings.

[4] In the second paragraph of the Motion to Institute Proceedings, Plaintiff defines iDevices to include a device called iPod touch.

[5] In the Court's opinion, with this addition, Plaintiff seeks to expand the class by adding new individuals or new devices or both.

[6] The Motion for Authorization has a purpose. Plaintiff must make a *prima facie* demonstration of his claim.

[7] Here Plaintiff purports to represent a class which has never gone through the burden of demonstration required at the authorization stage.

[8] While Plaintiff's Argument Plan introduces the possibility for the Court to redefine the Class, Plaintiff did not seek the permission to modify the Authorization Judgment as per section 1022 *C.c.p.* The Argument Plan cannot be viewed as motion to that effect.

[9] Plaintiff is asking the Court to modify the Class without proper evidence, the Argument Plan not being supported by Affidavit. This cannot be done.

[10] Defendants referred to the Court of Appeal's decision in *Société d'électrolyse et de Chimie Alcan ltée c. Comité d'environnement de La Baie inc.*[1], whereby the Court of Appeal held (per Justice Tourigny, J.C.A):

> 16 La radiation de paragraphes, comme s'intitule la requête, bien qu'il s'agisse d'une requête visant à la fois des allégations et des conclusions, doit être considérée dans le cadre précis et exceptionnel d'une déclaration servant de fondement à un recours collectif, préalablement autorisé par une décision judiciaire, comme la loi l'exige.
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> 17 Le législateur a voulu que l'exercice du recours collectif obéisse à certaines règles bien précises (art. 1003). C'est normalement dans le jugement qui fait droit à la requête que doivent être identifiées les principales questions en litige et les conclusions recherchées.
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> 18 Une fois cette procédure complétée, un avis est donné aux membres dans lequel apparaissent, entre autres, les

[1] J.E. 92-596.

> questions en litige et les conclusions recherchées (art. 1006 *C.p.c.*).
>
> 19 Notre cour a qualifié de restrictives les conditions imposées par le législateur dans le cadre de l'art. 1003 *C.p.c.* (Voir à cet effet *Proulx c. Pyser* [1985] R.D.J. 47.)
>
> 20 Le tribunal qui est saisi de la demande d'autorisation doit décider comme condition préalable que "les faits allégués paraissent justifier les conclusions recherchées", se fondant entre autres sur les affidavits soumis au soutien de la requête.
>
> [...]
>
> 22 C'est en prenant ces éléments en compte que l'on doit, à mon avis, analyser les questions soumises.

[11] The definition of iDevices as accepted by the Court in the Judgment of Authorization does not subsume that the iPod Touch is part of the definition.

[12] The addition of new claims in respect of iPod touch devices need, in the Court's view, to go through the authorization process or through a modification of the Authorization Judgment properly introduced and supported.

[13] The Court is in full agreement with Defendant's view that all references to iPod touch devices should, at this stage, be struck from the Motion to Institute Proceedings.

[14] With respect to the Motion for particulars, here is what sections 76 and 77 *C.c.p* say in that respect:

> **76.** In their written pleadings, the parties must state the facts that they intend to invoke and the conclusions that they seek.
>
> Such statement must be frank, precise and brief; it shall be divided into paragraphs numbered consecutively, each paragraph referring so far as possible to one essential fact.
>
> **77.** Every fact of such a nature as to take the opposite party by surprise if not alleged, or to raise an issue not arising from the pleadings already filed, must be expressly pleaded.

[15] In essence, Defendants are entitled to know against what allegations they must defend. The right to a complete and full defence is well-known.

[16] In addition, the legislator has created the notion of a judicial contract between litigating parties, aimed at minimizing the costs of litigation, avoiding litigation by ambush.

[17] At the outset, the request for Plaintiff to clarify the distinction between personal and private information was answered by Plaintiff. The two expressions are interchangeable and should read, all along the Motion to Institute Proceedings as "personal and private information". The subsequent orders made in this judgment, that particulars be provided for one or the other expression, shall encompass both.

[18] As well, at the hearing, the following particulars were provided by Plaintiff and accepted by Defendants:

18.1. paragraph 6: 6th line: "undesirable characteristics"; (see Plaintiff's Argument Plan par 29);

18.2. paragraph 32: 3rd and 5th line: "an example of"; "Similarly, additional...include"; (see Plaintiff's Argument Plan par. 30);

18.3. paragraph 38: 5th line: "and to the App themselves" (see Plaintiff's Argument Plan par. 33 third sentence);

18.4. paragraph 53: 1st line: "some of these Apps" (Plaintiff referred only to the Apps already specifically mentioned in the Motion to Institute Proceedings);

18.5. paragraph 58: "huge amount of information" ..."such items as" (partial response provided referring Defendants to par 4 and 33 of the Motion to Institute Proceedings – see additional order below);

18.6. paragraph 61: 5th line: "such as" (see Plaintiff's Argument Plan par. 36);

18.7. paragraph 70: 3rd line: "For example"..(see Plaintiff's Argument Plan par. 37 for the behaviours complained of, last sentence, starting with "Defendants" removing the words "notorious for");

18.8. paragraph 89: 3rd line: "that the feature would leave their private information vulnerable" (see Plaintiff's Argument Plan par. 39);

18.9. paragraph 106: 5th line: "huge amount of information" (partial response provided referring Defendants to par 4 and 33 of the Motion to Institute Proceedings – see additional order below);

18.10. paragraph 111: 2nd line: " Apple's own iDevice data" (Plaintiff responded that this term refers to the personal and private information of Class Members);

18.11. paragraph 111: starting on 3rd line: (period of time covered by the default of addressing the use of UDID-related data) **Request for particulars withdrawn**);

18.12. paragraph 133; last line: "such as" (Plaintiff provided the following

particular: it strictly aims at the Tracking Companies);

18.13. paragraph 180: 3rd line: "including the" (Plaintiff provided the following particular: the undisclosed costs refer strictly to those specifically alleged in the Motion to Institute Proceedings).

[19] Whenever Plaintiff indicated that he did not have the requested information at this time, the Court will nonetheless pronounce on this part of the motion, as a decision on the motion is required, should a party wish to contest such decision.

[20] Several of the particulars requested arise from the use of broad terms such as "included, but not limited to", "such items", "and more" and others.

[21] For most of these issues, Plaintiff's position is that, as this stage he is not in a position to provide the particulars. His argument is that he is not a technical expert, that while he acquired a certain knowledge through various sources of information, and as his claim shows, is capable of identifying certain offending Apps or practices, the crux of his claim is that the collection and dissemination of iDevices user's information was done surreptitiously, without his knowledge. He is therefore relying on future examination of discoveries to find out more. The Court will not pronounce on this latter issue at this stage.

[22] It is hard to blame Plaintiff for using broad language. Nonetheless, this process contravenes the right to a complete and full defence. It is, in essence, a fishing expedition where the claims made could be taken as encompassing a lot more without being clear about what else.

[23] A decision from thirty years ago[2] determined that the use of terms such as «notamment» were too imprecise and did not meet the requirements of section 77 *C.c.p.*

[24] As Defendants noted this principle was followed in *Béchard* c. *Hudon*[3]. Justice Gendreau held that the terms *entre autres* (i.e."amongst other things") and *tell* (i.e. "such as") were equally non-limitative and, therefore, unacceptable.

[25] When the drafting of allegations gives rise to other possibilities, the defendant is within its rights to know their extent and limit them, so as to not be surprised at trial by unforeseen possibilities[4].

[26] Accordingly, the following paragraphs of the Motion to Institute Proceedings require that particulars be provided in reference to the below mentioned terms or that such broad terms be struck in an eventual amended Motion to Institute Proceedings.

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[2] *Cacici* c.. *New York Life Insurance Co.*, J.E. 84-339.
[3] 2007 QCCS 520.
[4] *Mainville v. Claveau* (150-05-000219-933 (C.S), 19 mai 1993), Justice Banford.

26.1. paragraph 4: 3rd line: "included, but was not limited to"; (specify what personal information is gathered);

26.2. paragraph 4: 9th line: "such as"; (specify which App and App-specific activity is targeted);

26.3. paragraph 5: 3rd line: "and included";(specify what other resources if any);

26.4. paragraph 33: 8th line): "including, but not limited to"; (specify what other personal information is accessed/uploaded if any);

26.5. paragraph 38: 1st line): "including, but not limited to" (specify what other App harvested, uploaded, stole or transmitted personal information if otherwise than as already specifically described in the Motion to Institute Proceedings, in which case the particular should say so);

26.6. paragraph 58: "huge amount of information" ..."such items as" (specify which App other than those specifically mentioned in paragraphs 4 and 33 of the Motions to Institute Proceedings has access to what personal information, if any);

26.7. paragraph 61: 5th line: "such as" (given that the response provided contains another broad term, specify to which other Tracking Companies the Plaintiff is referring to, if any);

26.8. paragraph 87; 3rd line: "and more" (specify what "more" refers to);

26.9. paragraph 92; "other popular Apps, such as" (specify what other Apps may have downloaded users' data without their explicit consent);

26.10. paragraph 106: 4th line: "huge amount of information" (given that the response provided contains another broad term specify what this information about the user of an iDevice is if otherwise than as specified in paragraphs 4 and 33);

26.11. paragraph 123 1st and 3rd lines: included...including (specify what other failure (s) is (are) alleged in respect of Apple's commitments and in the case of capturing information; what else than locations of users who had utilized Apple's prescribed method of disabling Global Positioning is intended to be caught if any).

[27] With respect to the definition of personal and private information requested by Defendants, these terms are either defined by law or to be determined by the Court in the context of hearing.

[28] It is sufficient for now that Defendants be informed that the terms private and personal are interchangeable and, when so ordered hereafter, that further particulars about factual details of personal or private information involved in the claim be provided.

FOR THESE REASONS, THE COURT:

[29] **GRANTS** the motion;

[30] **STRIKES** all references to iPod touch from the Plaintiff's Motion to Institute Proceedings;

[31] **ORDERS** Plaintiff to provide within 30 days of this judgment the following particulars in respect of the paragraphs hereafter mentioned:

31.1. paragraph 4: 3rd line: "included, but was not limited to"; (specify what personal information is gathered);

31.2. paragraph 4: 9th line: "such as"; (specify which App and App-specific activity is targeted);

31.3. paragraph 5: 3rd line: "and included" (specify what other resources if any);

31.4. paragraph 33: 8th line): "including, but not limited to"; (specify what other personal information is accessed/uploaded if any);

31.5. paragraph 38: 1st line): "including, but not limited to" (specify what other App harvested, uploaded, stole or transmitted personal information if otherwise than as already specifically described in the Motion to Institute Proceedings, in which case the particular should say so);

31.6. paragraph 58: "huge amount of information" ..."such items as" (specify which App other than those specifically mentioned in paragraphs 4 and 33 of the Motion to Institute Proceedings has access to what personal information, if any);

31.7. paragraph 61: 5th line: "such as" (specify to which other Tracking Companies the Plaintiff is referring to if any);

31.8. paragraph 87; 3rd line: "and more" (specify what "more" refers to);

31.9. paragraph 92; "other popular Apps, such as" (specify what other Apps may have downloaded users' data without their explicit consent);

31.10. paragraph 106: 4th line: "huge amount of information" (specify what this information about the user of an iDevice is if otherwise than as specified in paragraphs 4 and 33 of the Motion to Institute Proceedings);

31.11. paragraph 123 1st and 3rd lines: included...including (specify what other failure (s) is (are) alleged in respect of Apple's commitments and in the case of capturing information; what else than locations of users who had utilized Apple's prescribed method of disabling Global Positioning is intended to be caught if any).

FAILING which the relevant portion of the paragraph shall be struck from the Motion to Institute Proceedings.

[32] **COSTS** to follow.

Pierre Nollet j.s.c..

Me Jeffrey Orenstein
Me Andrea Grass
Plaintiff's Counsel

Me Kristian Brabander
Me Shaun Finn
Defendants' Counsel

Date of hearing: October 30, 2014