SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-06-000602-124

DATE: November 24, 2014

IN THE PRESENCE OF: THE HONOURABLE SYLVIE DEVITO, J.S.C.

JONATHAN NOVA
Petitioner
v.
APPLE INC.
and
APPLE CANADA INC.
Respondents

JUDGMENT

INTRODUCTION

[1] By his re-amended motion for authorization[1] ("RAMA"), Petitioner, Jonathan Nova, seeks to obtain authorization from the Court to institute a class action on behalf of the following national class of which he is a member:

> "All persons in Canada who purchased and/or otherwise became the owner of an iPhone 4S mobile telephone or any other group to be determined by the Court".

1 *Re-amended motion to authorize the bringing of a class action and to ascribe the status of representative*, dated April 3, 2014; initial motion dated March 20, 2012.

[2] In December 2011, through Telus, his mobile service provider and Apple retailer, he bought an Apple iPhone 4S, the "S" denoting the new Siri feature.

[3] He alleges that at the time of purchase, he was well aware of advertising regarding this new feature which he describes as follows. At paragraph 9 of his RAMA, he refers to an excerpt of Apple Inc.'s webpage concerning Siri[2]:

> [9] The Siri feature is a voice recognition application that allows the smart phone's user to issue voice commands to the mobile telephone, which will in turn execute certain tasks in response. This application is described as follows by Respondents:
>
> > Siri on iPhone 4S lets you use your voice to send messages, schedule meetings, place phone calls, and more. Ask Siri to do things just by talking the way you talk. Siri understands what you say, knows what you mean, and even talks back. Siri is so easy to use and does so much, you'll keep finding more and more ways to use it.

[4] He states that the feature did not perform in the manner described according to Respondents' representations. He basically submits that he was deceived by their misrepresentations which he claims caused him to purchase this phone, at a price premium.

[5] He mentions the following:

> [19] Respondents knew or should have known that the iPhone 4S does not perform in accordance with the advertisements and marketing materials they disseminated, yet failed to warn its customers of the problem;
>
> [20] To ordinary and prudent owners and consumers, the above-mentioned advertisement and implied functionality were likely to induce them into purchasing an iPhone 4S, constituted a violation of the common law principles of negligent misrepresentation and latent defects, and constituted a violation of the following civil law/consumer protection/sales of goods statutes throughout the country: [...]

[6] He then lists provisions of said statutes, for each province[3].

[7] As a consequence, he seeks the following conclusions[4]:

(1) a price reduction on the purchase price paid for the iPhone 4S;
(2) compensatory damages "stemming from the iPhone 4S Siri application's failures";
(3) additional moral, punitive and/or exemplary damages.

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[2] Exhibit R-2.
[3] Par. 20 and 26 of the RAMA.
[4] Par. 36 of the RAMA.

[8] He describes the action he wishes to institute for the benefit of the members of the class as an action in damages for product liability[5].

[9] However, in stating such, he refers to both paragraphs 20 (cited above) and 26 of his RAMA. The latter reads as follows:

> 26. Accordingly, the Group members are entitled to a price reduction of the purchase price of the iPhone 4S and compensation for any other expenses incurred or other damages suffered stemming from the iPhone 4S's Siri application failure, as per the following civil law/consumer protection legislation/sales of goods legislation throughout the country: [...]

[10] In this last paragraph, he identifies provisions of Consumer Protection Acts and other legislation pertaining to sale of goods in all Canadian provinces which he claims would allow compensation.

[11] These provisions, together with those mentioned in paragraph 20 of the RAMA, were filed *en liasse* together with Petitioner's authorities.

[12] He identifies the identical, similar or related questions of fact or law as being the following[6]:

a. Does the Respondents' iPhone 4S Siri application function properly?

a.1 Were the representations made by the Respondents with respect to the iPhone 4S Siri application false or misleading?

b. Are the Respondents responsible to pay compensatory damages to Group Members stemming from the iPhone 4S's Siri application's failures, and if so in what amount?

c. Are the Respondents responsible to pay any other compensatory, moral, punitive and/or exemplary damages to Group Members, and if so in what amount?

[13] Respondents contest the RAMA. Essentially, they plead that it contains virtually no allegations of ascertainable fact. That in any event, the allegations of misrepresentation and latent defect are without foundation, constituting bare assertions which are insufficient to warrant authorization of a class action and which are basically contradicted by Petitioner's own adduced evidence. They further contest the request to authorize a national class.

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5 Par. 35 of the RAMA.

6 Par. 33 of the RAMA.

EVIDENCE ADDUCED AT THIS STAGE

[14] In addition to Petitioner's allegations, the Court was provided with the following evidence[7] adduced in the Record by the parties pursuant to a prior Order of this Court dated December 21, 2012, authorizing the filing of such[8]:

- Exhibit R-1: Extract from the Québec Registry of Enterprises: Apple Canada Inc.;
- Exhibit R-2: Copy of Apple Inc.'s webpage concerning Siri;
- Exhibit R-3: Copy of Respondents' YouTube Channel advertisement;
- Exhibit R-4: Order of the United States District Court for the Northern District of California, In re iPhone 4S Consumer Litigation, No. C 12-1127 CW, docket No. 32, granting a motion to dismiss an Amended Class Action complaint (ACAC), February 14, 2014;
- Exhibit I-1: French and English copy of the Frequently Asked Questions (FAQ) regarding the iPhone 4S available on the Telus website;
- Exhibit I-2: French and English copy of the smartphone return policy of Telus;
- Exhibit I-3: French and English copy of the iOS preview on Apple's website;
- Exhibit I-4: French and English copies of the iPhone User Guide.

[15] Pursuant to the same Order which further authorized Respondents to examine Petitioner, the transcript of his examination held on February 11, 2013 was also filed.

ADDITIONAL FACTUAL CONTEXT

[16] While Petitioner's initial motion in the present file is dated March 20, 2012, it should be noted that in parallel to his RAMA, Merchant Law Group (counsel of record for the Petitioner in this case) also filed a Statement of claim under *The Class Actions Act* of Saskatchewan (*Hendriks and Apple Canada Inc., and Apple Inc.*, Q.B. No. 569 of 2012) on April 2, 2012[9].

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7 Exhibits R-1 to R-4 by Petitioner; Exhibits I-1 to I-4 by Respondents.

8 Further to Respondents' *Motion for particulars, for leave to conduct a preliminary examination of petitioner and to file relevant evidence*, dated December 11, 2012.

9 Tab 13 of the Book of proceedings filed by Respondents.

[17] The allegations made in the Saskatchewan proceedings are substantially similar to those of the RAMA. The plaintiff in those proceedings, as Petitioner does here, also asks to represent a Canada-wide class of consumers:

> 6. The Plaintiff brings this action on behalf of himself and all persons in Canada who purchased, for use and not resale, an Apple iPhone 4S (the "Class").

[18] At the time of hearing before this Court, in April 2014, no case management or certification hearings had yet been held with respect to the Saskatchewan class action. The Court has not since been apprised of such.

[19] Also contemporaneously, two class action complaints dated respectively March 6 and 20, 2012, which are materially similar to the one filed by the Petitioner, were consolidated before the United States District Court for the Northern District of California on March 29, 2012 (*In Re Apple iPhone 4S Consumer Litigation*, Case No. C 12-1127 CW).

[20] A motion to dismiss this proceeding was brought by Apple and granted in part by Wilken J. on July 23, 2013, with leave to amend. Following an amended consolidated complaint, a new motion to dismiss was subsequently filed by Apple.

[21] It was granted, with prejudice, on February 14, 2014[10]. Among other things, the Court found that "*Plaintiffs do not allege any specific statement by Apple that expressly indicates that Siri would be able to answer every question, or do so consistently*"[11]. The Court went on to state[12]:

> Apple made no promise Siri would operate without fail. A reasonable consumer would understand that commercials depicting the products they are intended to promote would be unlikely to depict failed attempts. Absent a representation that a product feature would perform at a certain level, a reasonable consumer is unlikely to be deceived by advertising that merely demonstrates a product has such a feature.

[22] This ruling has since been appealed.

PETITIONER

[23] Petitioner is domiciled in Montréal.

[24] He states that he was induced to purchase the phone due to the Siri feature on the iPhone 4S as he planned to use it as a time management and planning device[13].

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[10] Exhibit R-4.
[11] *Id.*, page 14.
[12] *Id.*, page 17.
[13] Par. 22 of the RAMA.

[25] He alleges that although he made several attempts to use this feature, he noticed that it did not operate properly and that he could not rely on it[14].

[26] Although he no longer used the Siri feature, except to verify on occasion if the feature worked, he kept and used his iPhone 4S for a little over one year[15].

THE LAW

[27] Articles 1002 and 1003 C.C.P. provide as follows:

> **1002.** A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.
>
> The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act. It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action; the motion may only be contested orally and the judge may allow relevant evidence to be submitted.
>
> **1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of 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 or 67 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.

[28] In addition to satisfying the requirements imposed by article 1002 C.C.P., Petitioner must demonstrate that all four conditions provided in article 1003 C.C.P. are met.

[29] Respondents indicate at the outset that they will offer no argument as concerns article 1003 (c). However, they contest Petitioner's submissions as pertains to paragraphs (a), (b) and (d) of said article 1003.

[30] Lacoursière J. recently summarized the general guidelines to apply when the Court is seized with a motion for authorization to introduce a class action[16]:

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[14] Par. 23 of the RAMA.

[15] Par. 24 of the RAMA; examination of Petitioner, pages 28 and 29.

[16] *Charest* c. *Dessau Inc.*, 2014 QCCS 1891 (inscription in appeal 2014-06-05, 500-09-024488-140).

a) le juge doit simplement s'assurer que le requérant satisfait aux critères de l'article 1003 C.p.c. sans oublier le seuil de preuve peu élevé prescrit par cette disposition;

b) le juge jouit d'une discrétion dans l'appréciation des quatre critères de l'article 1003 C.p.c. Cependant, une fois ces quatre critères jugés satisfaits, il est dépouillé de tout pouvoir additionnel et il doit autoriser le recours;

c) l'analyse des critères d'autorisation doit bénéficier d'une approche généreuse plutôt que restrictive. Ainsi, le doute doit jouer en faveur des requérants, c'est-à-dire en faveur de l'autorisation du recours collectif;

d) la règle de la proportionnalité de l'article 4.2 C.p.c. doit être considérée dans l'appréciation de chacun des critères de l'article 1003 C.p.c. mais ne constitue pas un cinquième critère indépendant;

e) le défaut de satisfaire un seul des quatre critères de l'article 1003 C.p.c. devrait entraîner le rejet de la requête;

f) le juge doit exclure de son examen les éléments de la requête qui relèvent de l'opinion, de l'argumentation juridique, des inférences, des hypothèses ou de la spéculation. Le requérant doit alléguer des faits suffisants pour que soit autorisé le recours;

g) enfin, le Tribunal doit s'assurer que les parties ne soient pas inutilement assujetties à des litiges dans lesquels elles doivent se défendre contre des demandes insoutenables. Le fardeau imposé au requérant consiste à établir une cause défendable.

(references omitted)

[31] Additionally, to paraphrase Perrault J.'s summary in *Wilkinson* c. *Coca-Cola Limited*[17], the allegations are assumed to be true and the Court must take into account the exhibits and/or the depositions filed in the record[18]. However, accepting allegations as true only applies to allegations of fact. Opinions, arguments, inferences or unsupported hypotheses, or allegations that have been disproven by the evidence in the record, are open to challenge and cannot be taken as averred[19]. Furthermore, allegations are no longer accepted as true if they are improbable or implausible[20].

[32] Even if Petitioner's burden is one of demonstration and not of proof at the authorization stage, he must still demonstrate that the allegations and the adduced evi-

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17 2014 QCCS 2631; inscription in appeal, July 11, 2014, (C.A.), 500-09-024570-145.
18 *Union des consommateurs* v. *Bell Canada*, 2012 QCCA 1287.
19 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201.
20 *Marandola* v. *Fédération des caisses Desjardins du Québec*, 2007 QCCS 356 (appeal dismissed 2007 QCCA 1039).

dence support the facts that will justify the conclusions sought. A mere affirmation that is vague, general or imprecise does not meet that burden[21].

ANALYSIS

1. A *prima facie* demonstration that the alleged facts seem to justify the conclusions sought as not been made (article 1003 (b) C.C.P.)

[33] The facts alleged by Petitioner in his RAMA are as follows:

> [...]
>
> 10. This new feature *(Siri)* was extensively advertised, as can be seen, among other things, on Respondents' Youtube Channel [...];
>
> 11. Respondents's (*sic*) advertising and marketing campaign is designed to cause consumers to purchase the iPhone 4S over other smart phones because of its Siri feature;
>
> 12. Respondents' advertisements regarding the Siri feature are fundamentally and designedly false and misleading. Although the iPhone 4S is markedly more expensive than the iPhone 4, the iPhone 4S's Siri feature does not perform as advertised and implied by Apple, rendering the iPhone 4S largely a more expensive version of the iPhone 4;
>
> 13. Indeed, the iPhone 4S advertised priced by Apple for consumer purchase is $649, while an iPhone 4 (without Siri) can be purchased for $549;
>
> 14. Apple had actual or constructive knowledge of the iPhone 4S's shortcomings prior to its distribution. The Siri Application often fails to understand the commands of its user, or simply provides a wrong answer to the command. Indeed, buried in Apple's current website is the amorphous sentence: "Siri is currently in beta and we'll continue to improve it over time." However, Respondents' media marketing, ads, and advertising campaign, including but not limited to the abovementioned Youtube channel, fail to mention the word "beta", and the fact that Siri is, at best, a work-in-progress;
>
> 15. Similarly, Respondents never disclosed that the Siri transactions depicted in its advertisements are fiction and that actual consumers using actual iPhone 4Ss cannot reasonable expect Siri to perform the tasks performed in these advertisements;
>
> 16. The information withheld from Petitioner and the other Group members is material and would have been considered by a reasonable person, as are the misrepresentations regarding Siri [...];

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[21] *Infineon Technologies AG* v. *Option consommateurs,* 2013 SCC 59; *Harmegnies* v. *Toyota Canada*, 2008 QCCA 380.

> 17. Respondents' misrepresentations concerning the Siri feature of the IPhone 4S are misleading, false, and reasonably likely to deceive and have deceived Petitioner and members of the Group;

[34] Petitioner alleges that his recourse is one of product liability claim[22]. However, Respondents rightly point to the fact that there are no allegations that the Siri application caused any damage to himself or to anyone. They suggest that by Petitioner's own assertions found in paragraphs 20 and 26 of his RAMA, the Court must conclude that his action is rather one based on latent defect or misrepresentation. The Court agrees.

[35] Therefore, to establish such, Petitioner must *prima facie* demonstrate that the iPhone 4S:

- was not fit for the purposes for which goods of that kind are ordinarily used (sections 37, 42 and 219 of the Québec Consumer Protection Act ("CPA"); or
- was unfit for the use for which it was intended, or so diminished for its intended use that the buyer would not have bought it or paid so high a price if he had been aware of the defect (articles 1726 and 1458 C.C.Q.).

[36] In other words, Petitioner must demonstrate that Respondents failed to meet the expectations of average consumers, and in a way to affect their willingness to buy the product or to pay such a price for it.

[37] By definition, a latent defect must be unknown or hidden from the purchaser or consumer.

[38] The basis of Petitioner's class action is that Siri did not perform in the manner described by Respondents in their representations. To substantiate his claim, Petitioner files Exhibits R-2 (copy of Apple Inc.'s webpage concerning Siri) and R-3 (copy of Respondents' YouTube Channel advertisement).

[39] The latter refers to advertisement videos whose content was not made available nor was viewed at the hearing. Only the page listing them was filed. This page mentions several videos, only eight of which refer to the iPhone 4S, and only two specifically to the Siri feature. They are all in English.

[40] As introduced, this Exhibit R-3 is basically useless at this stage and does not allow the Court to assess, *prima facie*, if these were instrumental in any way, shape or form, to, as asserts Petitioner, induce consumers to buy the iPhone 4S because of its Siri feature.

[41] However, in his examination, when questioned about the videos filed as Exhibit R-3, Petitioner cannot recollect exactly which ones he saw, nor if and when in fact he saw them. He mentions that he may have seen them only after his purchase or even

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[22] Par. 35 of his RAMA.

after the introduction of the motion. He states that he saw 30 seconds videos or TV adds of the Siri feature on YouTube before his purchase, but cannot identify them, and cannot confirm if they were in fact those filed as Exhibit R-3.

[42] As concerns Exhibit R-2 (copy of Apple Inc.'s webpage concerning Siri), it clearly states the following qualifications as pertains to the product:

1) to the bolded word "Siri" on the very first page, there is an orange-coloured icon which clearly reads "Beta";

2) it also refers the customer to "Siri Frequently Asked Questions" (p. 3), specifies that "Siri is available in Beta only on iPhone 4S" (p. 6) and adds that "Siri may not be available in all languages or in all areas, and features may vary by area" (p. 6). It further invites potential customers to contact Apple prior to buying an iPhone 4S (p. 7):

> "Call Apple get answers before you buy Call 1-800-MY-APPLE to talk with a knowledgeable Specialist"

[43] Further to the exhibits filed by Petitioner, Respondents filed Exhibit I-1, being the Frequently Asked Questions (FAQ) regarding the iPhone 4S available on the Telus website, Petitioner's iPhone carrier, at the time of purchase. Petitioner did consult his carrier Telus at the time of purchase.

[44] Exhibit I-1 clearly states the following (in both French and English versions), which was made known to customers by Telus:

Q. Is Siri available in Canada at time of launch?

A. Full functionality of Siri is not available in Canada at launch. Siri can be activated via the general setting on an iPhone 4S, however **does not currently have Canadian content** (directions, restaurant find etc.) **and is not available in French Canadian**. Time of availability will be determined by Apple.

(our underlining and added bold characters)

[45] Respondents also filed the iPhone User Guide (Exhibit I-4) which specifies that Siri may not be available in every language or area, performs less well in certain environments, takes longer to adapt to an accent, and is a learning, evolving technology:

> **Note:** Siri is available only on iPhone 4S, and it requires Internet access via cellular or Wi-Fi connection. Siri may not be available in all languages or in all areas, and features may vary by area. Cellular data charges may apply. (p. 39);
>
> [...]

> **If Siri is having trouble**
>
> Siri may sometimes have trouble understanding you. Noisy environments, for example, can make it difficult for Siri to hear what you're saying. If you speak with an accent, it can take Siri some time to get used to your voice. If Siri doesn't hear you exactly right, you can make corrections. (p. 43; *our emphasis*)
>
> [...]
>
> **How Siri learns**
>
> Siri works right from the start without setup, and gets better over time. Siri learns about your accent and other characteristics of your voice, and categorizes your voice into one of the dialects or accents it understands. As more people use Siri and as it's exposed to more language variations, recognition will improve and Siri will work even better. (p. 43)

(our underlining and added bold characters)

[46] Petitioner admits to having consulted the User Guide as he states in his examination that he tried everything to make Siri work, "including with the book".

[47] Respondents then filed Exhibit I-3 (copy of the iOS 6 preview – Siri, on Apple's website), demonstrating that Siri only became available in English and French Canada following an update (iOS 6) released by Apple subsequently to Petitioner's filing of his initial motion, in March 2012:

> **Siri**
>
> Sports. Restaurants. Movies. Now ask even more of Siri.
>
> Ask Siri about sports scores and stats, where to eat, what movies to see – even ask to make Facebook posts. Siri understands more languages and works in more countries. So you can get more things done in more places around the world. And most exciting of all, with Siri on the new iPad, on more devices, too. (p. 1);
>
> [...]
>
> More languages. More countries.
>
> Siri now understands more languages and is optimized for more countries and regions around the world. [...]
>
> **English and Canadian French** [...] (p. 4)

(our underlining and added bold characters)

[48] Moreover, Petitioner's examination reveals that:

- he recognizes that although the advertisements he files as Exhibit R-2 and R-3 did not appear in French, that he saw none in this language, but that he nevertheless relied on them;
- he cannot say whether they were American or Canadian, nor if they were destined to American or Canadian customers;
- he cannot say whether he saw Exhibit R-2 before buying his iPhone but mentions he may have seen something similar;
- he does not remember seeing the indication "Beta" in said Exhibit although he recognizes that it is there and that customers had been informed of this;
- he does not remember reading the "Siri frequently asked questions" on Exhibit R-2 although he recognizes that these exist;
- he does not remember seeing the invitation to contact a specialist before buying although he recognizes that it exists; in any event, he did not contact such;
- although he also understands English well, his mother tongue is French but he admits to speaking with an accent (Latino);
- he had the opportunity to return his device for a full refund, declined this option and as he needed a phone, used his iPhone 4S for a year after purchase.

[49] On the issue of Siri still being in Beta technology, contrary to his allegation made in paragraph 14 of his RAMA, it appears from his own evidence (Exhibit R-2) that this fact was not "buried" or underplayed, but was rather prominently featured in the advertising. Exhibit R-2 states that Siri is in Beta mode, explains that Siri works better in certain environments, takes longer to adapt to accents and is a technology that gets better with time.

[50] Therefore, it appears that, contrary to Petitioner's allegations, consumers like him were in fact put on notice that Siri would not work perfectly from the outset and were advised that various factors would influence its functionality.

[51] In paragraph 14 of his RAMA, Petitioner brings attention to the phrase included in said Exhibit R-2 which states that "*Siri is currently in Beta and we'll continue to improve it over time*", qualifying it as "amorphous". He states that it is not indicative that Siri is still a "work in progress".

[52] Given the rest of the evidence, the Court finds that this assertion is not plausible.

[53] As mentioned earlier, in order to succeed, Petitioner must *prima facie* demonstrate that the latency of the defect was hidden or misrepresented. Considering the evidence adduced at this time, including that of Petitioner which contradicts and disproves his own allegations, the Court is able to conclude, even at this preliminary stage, that

the issues with Siri raised by Petitioner were apparently addressed squarely, directly and openly by Respondents.

[54] Indeed, notwithstanding Petitioner's allegation, the Court finds that the evidence on record rather shows that both Respondents and Petitioner's carrier Telus advised consumers, therefore Petitioner, that Siri was not yet available in Canada and that, in any event, it was a developmental and evolving technology with certain identified limitations.

[55] As concerns compensatory damages, Petitioner alleges that Respondents charged a premium of $100 for the Siri feature only. As Respondents argue, this constitutes at best an unsubstantiated hypothesis by which Petitoner assumes that the price difference cannot be attributable to any other feature, improvement or update having nothing to do with Siri.

[56] Pertaining to the conclusion for additional moral, punitive and/or exemplary damages, the Court finds that Petitioner has not alleged what damages he has suffered as a result of purchasing the iPhone. His claim for these damages is not supported by allegations of fact in the RAMA, nor in the evidence he adduces.

[57] In light of the foregoing, even if Petitioner had fulfilled his burden and demonstrated that Respondents had committed a civil fault, he has failed to *prima facie* demonstrate that he has suffered any prejudice as a result thereof.

[58] Consequently, it is the Court's opinion that Petitioner has failed do demonstrate, on a *prima facie* basis, that Respondents have made representations that are false, inaccurate and committed a behaviour that could constitute a civil fault under the invoked regimes. In other words, the Court finds that Petitioner's proposed syllogism is flawed and that he has failed to demonstrate that he has an arguable case.

[59] Given that the Court finds that the condition of article 1003 (b) has not been met, the motion for authorization should be dismissed.

[60] However, the Court will nevertheless analyse Petitioner's motion in view of the other conditions provided in article 1003 C.C.P.[23]

2A- There are insufficient identical, similar or related questions of law or fact (article 1003 (a) C.C.P.) as the proposed class is overbroad

[61] As already mentioned, Petitioner states that the identical, similar or related questions of fact or law are the following[24]:

a. Does the Respondents' iPhone 4S Siri application function properly?

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[23] *Fortier* v. *Meubles Léon ltée*, 2014 QCCA 195.
[24] Par. 33 of the RAMA.

a.1 Were the representations made by the Respondents with respect to the iPhone 4S Siri application false or misleading?

b. Are the Respondents responsible to pay compensatory damages to Group Members stemming from the iPhone 4S's Siri application's failures, and if so in what amount?

c. Are the Respondents responsible to pay any other compensatory, moral, punitive and/or exemplary damages to Group Members, and if so in what amount?

[62] Petitioner submits that the facts relating to Respondents' advertising and marketing campaign, their knowledge of the feature's shortcomings, their failure to warn customers and the defectiveness of the feature constitute questions which are common to all members of the proposed class. This could seem to be an appropriate statement at first glance.

[63] To paraphrase LeBel and Wagner JJ. in *Vivendi Canada Inc.* c. *Dell'Aniello*[25], common questions do not have to lead to common answers. At the authorization stage, the approach concerning the commonality requirement should be a flexible one. Therefore, this requirement may be met even if the common questions raised by the class action entail nuanced answers for the various members of the group.

[64] In certain circumstances, a single common question can be enough to satisfy the condition of article 1003 (a) C.C.P.[26]

[65] The Court must satisfy itself that "*the applicant has established the existence of a common question that would serve to advance the resolution of the litigation with respect to all the members of the group, and that would not play an insignificant role in the outcome of the case*."[27]. However, the resolution of that question must provide a meaningful benefit to *all class members* consistent with the principle of proportionality [28].

[66] Respondents submit that the question "*Does the Respondents' iPhone 4S Siri application function* <u>*properly*</u>*?*" necessarily brings an infinite and variable range of expectations, subjective perceptions and levels of satisfaction on the part of each purchaser of the device, as to how well Siri would work for each of them every time they chose to use it.

[67] They also submit that:

- leaving aside the issues of Siri being in Beta mode or that it is not available in French-Canadian or even in English with full functionality in Can-

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25 2014 SCC 1, par. [59].
26 *Id.*, par. [58].
27 *Supra,* note 18, par. [60].
28 *Lorrain v. Petro-Canada*, 2013 QCCA 332 (CanLII) at par. [90] and [91].

ada during the relevant period, the evidence adduced at this stage demonstrates that at the very least, Siri gets better with time, adapts to the user's voice and has trouble with accents;

- given these elements, this would mean that to establish whether this feature on a person's iPhone 4S does not function "properly" or as advertised, the Court would have to determine, among other things:
  - how long a person had been using Siri;
  - whether this person was the only one using the feature on the device and, if so, whether this person spoke to Siri consistently in the same language;
  - the nature of the questions asked of Siri and the commands given to it;
  - whether or not the user has an accent, difficulty articulating words and/or a speech impediment.
- authorizing a class comprised of <u>all</u> iPhone 4S owners, without any distinction, time-frame or other reference, as suggested by Petitioner, would be overbroad since such a class would necessarily include consumers:
  - who acquired their devices in full knowledge that Siri was not available in French-Canadian or with full functionality in Canadian English;
  - who never saw or sought advertisements nor were affected by marketing efforts;
  - whose problems are due not to something inherent in their iPhone 4S, but rather to their improper use of Siri or to their individual pattern of speech, accent or mumbling;
  - who have no complaint with Siri;
  - who bought the iPhone 4S with no concern or care whatsoever for the availability of Siri;
  - who returned their iPhone 4S for a full refund (for whatever reason) and who are therefore uninjured and have no possible cause of action.

[68] In analyzing the condition provided in article 1003 (a), the Court must also be mindful of the following:

- the possibility of uninjured class members being included in a class description should be avoided[29];
- a class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings[30];

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[29] *Bou Malhab v. Diffusion Métromédia CMR inc.*, [2011] 1 S.C.R. 214.
[30] *Id*, note 29;

- common questions should not be drowned in a sea of individuality[31].

[69] The Court finds that Respondents' arguments, given the questions put by Petitioner, tend to demonstrate the overreach resulting from the proposed overbroad class definition. They also illustrate that here, variability takes over commonality. The questions identified by Petitioner would in fact be "drowned in a sea of individuality", notably in the analysis of fault, causation and the existence of damages.

[70] Defining the class is key:

> [38] [...] First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: [...][32]

[71] For Petitioner to propose such an overbroad class entails the risk of failing to meet article 1003 (a) by undermining the issue of commonality. In *Lallier c. Volkswagen Canada inc.*[33], the Court of Appeal (Pelletier J.) expressed the following which he later reiterated in *Citoyens pour une qualité de vie/Citizens for a Quality of Life* c. *Aéroports de Montréal*[34]:

> [18] Pendant longtemps, la jurisprudence a insisté sur le pouvoir du juge d'autorisation de modifier la composition du groupe proposé par le requérant en recours collectif. Sans minimiser l'importance de ce pouvoir, je note que cette insistance a pu avoir l'effet pervers d'inciter certains requérants à proposer des définitions fort larges. Se fiant sur cette faculté du juge de remodeler le groupe dans des proportions logiques et raisonnables, <u>ces requérants sous-estiment le risque qu'ils encourent de voir leur requête rejetée pour défaut de conformité avec l'exigence du paragraphe a) de l'article 1003 C.p.c. Il faut garder en mémoire que la personne la mieux placée pour définir adéquatement le groupe de réclamants demeure celle qui a fait enquête avant d'introduire la demande d'autorisation, en l'occurrence celle qui postule le statut de représentant. Sans doute le juge peut-il, après audition, intervenir pour ciseler la définition sous quelque rapport, mais il ne lui revient pas au premier chef de la créer.</u>
>
> [...]

(our underlining)

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31 *Citoyens pour une qualité de vie/Citizens for a Quality of Life* c. *Aéroports de Montréal,* 2007 QCCA (motion for leave to appeal before the Supreme Court of Canada refused in 2008).

32 *Western Canadian Shopping Centres inc.* c. *Dutton*, [2001] 2 R.C.S. 534.

33 EYB 2007-121289 (C.A.).

34 *Supra*, note 31.

[73] Even if the Court has the power and discretion to tailor an overbroad proposed class definition, there are limits to what it can accomplish[35]:

> [21] Lorsqu'il constate que le groupe proposé n'est pas suffisamment homogène de sorte que l'usage du véhicule procédural du recours collectif devient inapproprié en raison de l'importance prépondérante de questions individuelles, le juge a le choix de rejeter la requête ou de tenter de remodeler la composition du groupe. Il n'a pas l'obligation stricte d'opter pour la seconde branche de l'alternative, notamment s'il estime ne pas avoir en main les éléments lui permettant d'imposer au requérant une définition que celui-ci, au départ, n'a pas jugé opportun de retenir ou s'il estime que, tout compte fait, la redéfinition n'assurera pas la conduite d'un procès conciliant efficacité et équité, pour paraphraser les termes utilisés par le juge en chef McLachlin dans *Western Canadian Shopping Centres*.

[74] In view of the above, the Court concludes that the proposed class is so overbroad and overreaching that the importance of the individual questions becomes preponderantly apparent. Given what is available, the Court cannot foresee a tailoring exercise or creating groups which would ensure, in all proportionality, the conduct of a trial where efficiency and fairness could all at once prevail.

[75] Therefore, the Court finds that it cannot conclude that the condition set out in article 1003 (a) C.C.P. is met.

2B- Petitioner's request for a national class should be dismissed

[76] Is Petitioner's request for a national class warranted in the present case? Does this Court have jurisdiction over non residents of Québec?

[77] According to article 3148 C.C.Q., a Québec court can hear a class action provided that one or more of the conditions stipulated in that provision are met:

> **Art. 3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where:
>
> (1) the defendant has his domicile or his residence in Québec;
>
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
>
> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;

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[35] *Supra*, note 31; *Contat* c. *General Motors du Canada Ltée,* 2009 QCCA 1699, par. 42-44.

> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
>
> (5) the defendant submits to its jurisdiction.
>
> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

[78] In his RAMA, Petitioner states that Respondent Apple Inc.'s headquarters (or head office) are located in Cupertino, California, U.S.A.

[79] He further alleges in his RAMA that Respondent Apple Inc. does business in Canada and Québec through Respondent Apple Canada Inc. and refers to a principal place of business located in Montréal.

[80] To sustain these allegations, he files Exhibit R-1, which is a copy of the Québec "Régistraire des Entreprises".

[81] However, this Exhibit R-1 rather indicates that Apple Canada Inc. is headquartered in Markham, Ontario, and confirms that it has a principal place of business in Montréal, Québec.

[82] Strangely enough, Petitioner in the Saskatchewan class action claim mentioned earlier, Ms Hendriks, also represented by Petitioner Nova's attorneys, Merchant Law Group L.L.P., alleges in her statement of claim that Apple Canada Inc. is headquartered in Montréal and carries on business in that province and all over Canada.

[83] Added to the contradictions highlighted previously, these additional ones again invite the Court to question the seriousness of Petitioner's and his counsel's action and motivations, seeing that in principle, courts of different jurisdiction owe one another judicial deference.

[84] Returning to the legal theory behind Petitioner's allegations, it is principally based on the application of statutory consumer law in Québec and civil liability arising from the *Civil Code of Québec* with regards to latent defect and misrepresentations.

[85] In this context, given the terms of article 3148 C.C.Q., this Court would clearly have jurisdiction over Respondents and over Petitioner and class members who bought their iPhone 4S in this province.

[86] However, there is no clear statutory or other rationale for the Court to extend its jurisdiction to non-resident class members who purchased their devices or saw the alleged advertisements elsewhere, especially since Apple is not headquartered in Qué-

bec and there is no apparent real and substantial connection between non-resident class members and the courts of Québec.

[87] To paraphrase Nollet J. in *Albilia* c. *Apple*[36], the fact that Respondents have a principal place of business in Québec does not automatically create a real and substantial connection. A principal establishment should not be confused with a head office. By Petitioner's own evidence, there exist other principal establishments elsewhere in Canada, unlike in the *Brito*[37] case cited by Petitioner.

[88] Moreover, to further paraphrase Nollet J., Petitioner has not demonstrated that the legal systems in the twelve and more different jurisdictions that he wishes to apply to this case rely on similar laws and concepts. He has proposed no legal syllogism based on these provisions to disclose a serious colour of right or arguable case.

[89] The Court deems that Petitioner has failed to establish that a national class is justified.

3. Article 1003 (c): the composition of the group makes the application of article 59 or 67 difficult or impracticable

[90] Respondents did not offer arguments regarding this condition. Had there been a Class for Québec members, the Court would have concluded that article 1003 (c) is met.

4. Article 1003 (d) is not met as concerns adequate representation of members

[91] In his RAMA[38], Petitioner states that he will fairly and adequately represent the interests of the members of the group because:

- he purchased an iPhone 4S mobile telephone with a faulty Siri application;
- he understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the members of the group;
- he is available to dedicate the time necessary for the present action before the courts of Quebec and to collaborate with group attorneys in this regard;
- he is ready and available to manage and direct the present action in the interest of the group members that the petitioners wishes to represent, and is determined to lead the present file until resolution of the matter, the whole for the benefit of the group;

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36 2013 QCCS 2805.
37 *Brito* v. *Pfizer Canada inc.*, 2008 QCCS 2231.
38 Par. 38.

- he has given mandate to his attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;
- with the assistance of his attorneys, he is ready and available to dedicate the time necessary for this action and to collaborate with other members of the group and to keep them informed.

[92] For the Court to determine if Petitioner can adequately represent members, it must consider three factors: (1) petitioner's interest in the suit; (2) his competence and (3) an absence of conflict of interest between him and the group members. These factors should be interpreted liberally and a proposed representative should not be excluded unless his interest or competence is such that the case could not possibly proceed fairly[39].

[93] However, this Court agrees with the reasoning of Yergeau J. in *Sibiga* c. *Fido Solutions inc.*[40] when he mentions that a representative has a more significant role than one of a mere bystander or "figurant".

[94] The various flaws present in Petitioner's RAMA raise reasonable doubt as to his capacity to lead this class action. Considering his failure to demonstrate, individually, an arguable case, his flawed allegations of fact outlined in above paragraphs [48] and [78] to [83], his apparent lack of knowledge and comprehension of the facts that his own exhibits contradict, together with the broadness of the proposed class, the Court finds that the criteria of competence and interest provided in article 1003 (d) are not met.

FOR THESE REASONS, THE COURT:

[95] **DISMISSES** Petitioner's *Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative*;

[96] **THE WHOLE** with costs.

SYLVIE DEVITO, J.S.C.

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39 *Infineon*, *supra,* note 21, par. [149].
40 2014 QCCS 3235, par. [140] onwards. Appeal filed August 1, 2014.

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Date of hearing: April 3, 2014