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CANADA

COURT OF APPEAL

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

C.A.:
S.C.M: 500-06-000602-124

500-09-024969-156

JONATHAN NOVA, domiciled and residing at 1270, 5th avenue, city of Montreal, judicial district of Montreal, province of Québec, H1E 1R2

APPELLANT - Petitioner

-vs-

APPLE INC., a legal person duly constituted according to the law, having its principal place of business at Infinite Loop, city of Cupertino, State of California, 95014, United States of America;

and

APPLE CANADA INC., a legal person duly constituted according to the law, having a place of business at 555, Dr. Frédérik-Phillips, suite 210, city of Saint-Laurent, Province of Quebec, H4M 2X4

RESPONDENTS - Respondents

INSCRIPTION IN APPEAL

1. The Appellant-Petitioner inscribes the present matter in appeal before the Court of Appeal, sitting in Montreal;

2. The Judgment of the Superior Court was rendered on November 24th, 2014 by the Honourable Justice Sylvie Devito, J.C.S., sitting in the judicial district of Montreal;

3. The Judgment denied Appellant Jonathan Nova's *Re-amended motion to authorize the bringing of a class action and to ascribe the status of representative*, dated April 3rd, 2014 ("**RAMA**");

4. The hearing in first instance lasted less than a day, on April 3rd, 2014;

5. The Appellant-Petitioner asks that the Judgment of the Superior Court be revised and that the RAMA be granted, the whole with costs in both Courts;

A. Summary of the Litigation History

6. On or about March 20th, 2012, the Appellant instituted the present proceedings and filed his original *Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative*, on behalf of the following proposed Group, 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

7. In essence, the present Court file relates to a proposed class action in relation to latent defects in, and misrepresentations by the Respondents as to the capabilities and reliability of, the "Siri" feature of the iPhone 4S;

8. The coordinating Judge for the Class Actions Division of the Superior Court of Quebec assigned the present matter to the Honourable Justice Sylvie Devito, J.C.S. for case management and hearing purposes;

9. On or about December 11, 2012, Respondents filed a "Motion for Particulars, Motion for leave to conduct a preliminary examination of Petitioner on his motion for Authorization, Motion for Leave to file Relevant Evidence Prior to the Hearing on Authorization", which was granted by the Superior Court of Quebec on December 21, 2012;

10. On or about December 17, 2012, the Appellant filed a Motion for Permission to Amend the Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (adducing further particulars stating the legal basis of the Petitioner's claim, which was granted (on consent) by the Superior Court of Quebec on December 21, 2012;

11. The Appellant proposed a further amendment (in the form of the RAMA) at authorization, adding proposed common issue "a.1", which formed the basis of the decision of Devito J.C.S.'s judgment;

12. On November 24th, 2014, the Honourable Justice Sylvie Devito, J.C.S. denied the Appellant's RAMA as follows:

> **FOR THESE REASONS, THE COURT:**

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

THE WHOLE with costs.

B. Summary of the Relevant Facts

13. In September, 2011, Apple announced that it would be introducing a new product on the market. In October, 2011, after significant efforts on the part of Apple to create hype around this new product launch, Apple introduced the iPhone 4S, with the S denoting the new Siri application, which had been added by Apple to the previous iPhone 4 model;

14. 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. Theoretically, Siri allowed a user to send messages, schedule meetings, place phone calls, get directions, "and more";

15. The Siri feature was extensively advertised by the Respondents;

16. The iPhone 4S' Siri feature did not perform as advertised and implied by Apple, a fact which the Respondents had actual or constructive knowledge of prior to the iPhone 4S' debut and distribution;

17. The Respondents asserted that the advertisements, product literature, and communications from the Respondents and from third-party wireless carriers sufficiently warned consumers that their actual results of using Siri might vary; that Siri was a "Beta" product; and that the Appellant-Petitioner in particular had sufficient notice of its potential shortcomings that neither he nor any other member of the proposed Group could have been taken by surprise as to Siri's actual performance;

C. Grounds of Appeal

18. The Honourable Judge in the first instance committed manifest errors in fact and in law in rendering the Judgment under Appeal for the reasons set forth below;

(1) The proposed group was not inappropriately "overbroad" and similar or related questions of law or fact existed that were amenable to group-wide resolution

19. The Appellant-Petitioner respectfully submits that the Honourable Justice Devito correctly identified the applicable legal principles to apply to the

assessment of the art. 1003(a) criterion at paras. 63-65, but erred in concluding at paras. 69-74 that the individual issues outweighed the common questions;

20. Preliminarily, the first common issue proposed by the Appellant-Petitioner – "Does the Respondents' iPhone 4S Siri application function properly?" must be read in context alongside the second common issue, which questions the appropriateness of the Respondents' representations about Siri. Taken together, the meaning of the word "properly" is unambiguous: the question is whether the Siri application functions in accordance with the representations made by the Respondents;

21. The suggestion by the Respondents, which the Court accepted, that even *that* would be insufficient because of differing expectations and experiences across users is without merit. An objective assessment as to whether the Siri application performs in accordance with the Respondents' representations thereabout is attainable and that objective standard may be applied to all members of the propose group equally;

22. The Honourable Justice Devito relied heavily on the assertions of the Supreme Court of Canada in *Bou Malhab v Diffusion Métromédia CMR Inc.*, 2011 SCC 9 for the proposition that the presence of "uninjured class members" must not be a part of the defined group and that "a class action can succeed only if each claim it covers, taken individually, could serve as a basis of court proceedings";

23. Deschamps J., writing for the court, noted that:

> [22] ... The plaintiff is entitled to compensation if fault, injury and a causal connection are all present. Fault is determined by looking at the defendant's conduct, while injury is assessed by looking at the impact of that conduct on the victim, and a causal link is established where the decision maker finds that a connection exists between the fault and the injury. ...
>
> [45] The requirement of proving the existence of a personal interest is not dispensed with in the context of a class action ...

24. That being said, respectfully, *Bou Malhab* is a special circumstance in that it dealt with claims for defamation. The law of defamation (including the scheme and regime provided for under the *Quebec Charter*) absolutely requires **proof** of personal injury;

25. The Honourable Justice Devito accepted the Respondents' arguments that the common questions, as framed, "necessarily brings an infinite and variable range of expectations, subjective perceptions and levels of satisfaction on the part of each purchaser." These individual perceptions are not, however, conclusive. Article 253 of Quebec's *Consumer Protection Act* creates a

presumption that "had the consumer been aware of [the misrepresentations], he would not have agreed to the contract or would not have paid such a high price";

26. Assuming that the Petitioner could succeed at trial in proving that the Siri feature and its capabilities was misrepresented *to the Group as a whole*, it would not ultimately be necessary to prove individual reliance in order to sustain a claim;

27. Moreover, if this presumption applies to one consumer then it applies to all consumers, and therefore to all members of the proposed group. All members of the proposed group would therefore, by definition, be entitled to compensation;

28. Taken to a logical conclusion, if the presumption is that all members of the proposed group "would not have paid such a high price", the only question that will remain for determination would be the extent of the overcharge.

29. In circumstances where a presumption of wrongdoing is afforded by legislation without the need for individual assessments, a similar presumption as to the extent of the overcharge without the need for individual assessments ought also to follow, and the collective recovery mechanisms at art. 1028 CCP and 1034 CCP may be appropriately applied;

30. Finally, while the definition of the Group should be as inclusive as possible without being unacceptably overbroad, the mere fact that some members of the Group may have lesser damages, or no damages, is not determinative. Drug-related class actions are regularly certified on the basis of such classes as, "all persons who ingested Vioxx"[1] or "all persons in Canada who were prescribed and ingested Meridia"[2].

31. Clearly in those cases, not *every single person* who is a member of the class will recover. Indeed, even the Supreme Court of Canada (in *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 at para. 57) acknowledges that one purpose of the definition of the class is in part to "identify those persons who have a **potential claim** for relief against the defendants";

32. For these reasons, the Appellant-Petitioner asserts that the Honourable Justice Devito erred in concluding that the proposed group definition was inappropriately overbroad and, on that basis, concluding that the individual issues outweighed the common issues proposed;

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[1] *Tiboni v Merck Frosst Canada Ltd.* (2008), 295 DLR (4th) 32

[2] *Charlton v Abbott Laboratories, Ltd.*, 2013 BCSC 1712

(2) <u>The alleged facts were sufficient to justify the conclusions sought</u>

33. Whether framed as a product liability claim, a claim regarding a latent defect, or a claim based on misrepresentation, the facts alleged by the Appellant-Petitioner (summarized at para. 33 of the decision and more generally *supra*) are sufficient to justify the conclusions being sought;

34. The Honourable Justice Devito, J.C.S. erred by finding *as fact* that "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";

35. First, even if *certain* limitations of the Siri application were disclosed in certain of the Respondents' marketing materials, which the Petitioner may or may not have seen, and which members of the Group may or may not have seen, which is not in any event admitted, at issue are the fundamental, core capabilities of the Siri application, and the "general impression" that the Respondents' representations would leave;

36. As observed in *Richard v Time Inc.*, 2012 SCC 8 at paras. 66-71, the "general impression" that is at issue here is the "general impression" that would be left on "hurried ordinary purchasers' who 'take no more than 'ordinary care to observe that which is staring them in the face'". The standard is not that of "a reasonably prudent and diligent person, let alone a well-informed person", but rather, that of "someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations." Nevertheless, consumers are presumed to be able to understand "the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible" (para. 72);

37. At paras. 51-54 of the decision, the Honourable Justice Devito, J.C.S. dismisses the Appellant-Petitioner's assertion that the following statement, included in the Respondents' promotional materials, is insufficient to convey Siri's state of readiness and capabilities: *Siri is currently in Beta and we'll continue to improve it over time*;

38. This finding was an error in law because:

    a) it amounted to a weighing of the evidence presented by the Appellant-Petitioner against the evidence presented by the Respondents that ought to have properly been the subject of a trial and a full factual record;

    b) it amounted to finding as *fact* the phrase, 'Siri is currently in Beta' would in and of itself sufficiently convey the extent and nature of the limitations

of the Siri application to 'hurried ordinary purchasers' without further reference by such persons to additional materials which presumes that such 'hurried ordinary purchasers' would understand the meaning of the word 'Beta' as it is used in this context; and,

c) it amounted to finding *as fact* the phrase, "we'll continue to improve it over time" would in and of itself sufficiently convey the extent and nature of the limitations of the Siri application to 'hurried ordinary purchasers', when in fact it suggests nothing about the then-current state of the application;

39. Second, the Honourable Justice Devito, J.C.S. erred at law at paras. 55-57 by concluding that the fact that the Appellant-Petitioner has not proven the amount of his damages was fatal to the RAMA. As discussed in *Bou Malhab* at para. 55, even at trial, the initial step for the Appellant-Petitioner will be proving that injuries *occurred* (at the hands of the Respondents), and only *then* will the *extent* of that injury become an issue for resolution by the Court:

> It is not until the existence of personal injury sustained by each member of the group has been proved that the judge will focus on assessing the *extent* of the injury and choosing the appropriate recovery method, whether individual or collective. If personal injury is not proved, the class action must be dismissed. Thus, contrary to what is argued by the appellant, the possibility of ordering individual recovery of damages does not relieve the plaintiff of the burden of first proving that each member of the group sustained personal injury. In other words, the recovery method cannot make up for the absence of personal injury

40. To effectively dismiss the action on the basis that the *amount claimed* is subject to dispute (without concluding in the same breath that *there are no damages to be disputed in the first place*) is in err;

41. In this case, damages may well arise on a group-wide basis as a result of the loss of value for these devices due to the misrepresentations of the Respondents and the latent defects inherent to the iPhone 4S. It can hardly be necessary *at the authorization stage* for the Appellant-Petitioner to *prove* the precise amount of the damage claimed;

42. Finally, at para. 31, the Honourable Justice Devito, J.C.S. erred by stating (citations omitted):

> Additionally, to paraphrase paraphrase Perrault J.'s summary in *Wilkinson c. Coca-Cola Limited*, the allegations are assumed to be true and the Court must take into account the exhibits and/or the depositions filed in the record.. **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. Furthermore, allegations are no longer accepted as true if they are improbable or implausible.

43. Respectfully, authorization is not the time in which findings of fact and determinations as to which facts have or have not been "disproven by the evidence in the record." The Appellant-Petitioner has no obligation to *prove* the facts, but only to demonstrate that there are facts which could go to proving his or her case.

44. As a consequence the evidence and material that the Appellant-Petitioner puts forward (and indeed any petitioner seeking to authorize a class action) is limited to that evidence which is necessary to satisfy the authorization conditions, and is not necessarily the evidence that is sufficient or necessary to succeed in a trial circumstance;

45. The fact that the Respondents have put into dispute these facts and submitted evidence contrary to the facts alleged provides all the more reason to authorize and allow the matter to proceed to trial where a full and complete factual record will be before the Court;

46. Imposing upon the Appellant-Petitioner a positive obligation to *prove* his allegations (and overcome any evidence the Respondent might put forward) on the basis of the limited evidentiary record normally permitted at authorization is an erroneous and wrong direction for the law;

47. For these reasons, it is respectfully submitted that the Honourable Justice Devito, J.C.S. erred at law by not accepting the facts in the RAMA as being true, and instead engaging in a weighing of the evidence to determine (to the level of "proof") which version of events (as offered by the Appellant-Petitioner and as offered by the Respondents) was more accurate and acceptable to the Court. These are functions of the Court at trial, not at authorization;

(3) <u>The capacity and ability of the representative ought not to be informed by the Court's assessment of the other authorization criteria.</u>

48. The Honourable Justice Devito, J.C.S. concluded at para. 94 that "the various flaws in the Petitioner's RAMA raise reasonable doubt as to his capacity to lead this class action", with such "various flaws" including his allegedly flawed allegations of fact and the broadness of the proposed class;

49. The Appellant-Petitioner respectfully submits that while the Honourable Judge in the Court below identified the correct *test* for assessing the appropriateness of the representative at para. 92 of the decision, she incorrectly attributed her findings relating to the other criterion to the representative's "competency";

50. In assessing "competency," it is sufficient that the Appellant-Petitioner has taken steps to investigate and participate in the process.

51. Whether or not the Court ultimately agrees with the propositions tendered in the RAMA (such as the definition of the group) is not a determinant of competency of the representative;

52. The representative need not have significantly greater knowledge or understanding of the law than any other litigant represented by competent and experienced counsel might have;

53. To conflate the competency of the representative with the representative's success, through counsel, in achieving authorization of a given action distorts the process and is inconsistent with decisions where authorization or certification has been denied notwithstanding the availability of a suitable representative;

THE APPELLANT-PETITIONER WILL THEREFORE RESPECTFULLY REQUEST THAT THE COURT OF APPEAL:

GRANT the appeal and reverse the judgment of the Superior Court dated November 24th, 2014;

GRANT the Appellant-Plaintiff's RAMA, subject to such amendments or modifications as counsel may suggest and this Court may accept;

THE WHOLE with costs, in both Courts.

NOTICE of the present inscription is given to **Mtres Simon V. Potter, Kristian Brabander**, and **Shaun Finn** of **McCarthy Tetrault**, attorneys for the Respondents.

MONTRÉAL, December 23rd, 2014

(s) Merchant Law Group LLP

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Attorneys for the APPELLANT-Petitioner

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Attorneys for the APPELLANT-Petitioner

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DISTRICT OF MONTRÉAL

JONATHAN NOVA

APPELLANT - *Petitioner*

- vs -

APPLE, INC.

And

APPLE CANADA INC.

RESPONDENTS - *Respondents*

INSCRIPTION IN APPEAL

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