C A N A D A

(class action)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
C.S. **500-06-000636-130**
C.A. **500-09-**

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

INGA SIBIGA, domiciled and resident at 4824 Avenue du Parc, Montreal, Quebec, H2V 4E6

APPELLANT (Petitioner)

v.

FIDO SOLUTIONS INC., a legal person duly constituted and having a place of business at 4000-800 rue De La Gauchetière Ouest, Montréal, Québec, H5A 1K3
- and -
ROGERS COMMUNICATIONS PARTNERSHIP, a legal person duly constituted and having a place of business at 4000-800 rue De La Gauchetière Ouest, Montréal, Québec, H5A 1K3
- and -
BELL MOBILITY INC., a legal person duly constituted and having a place of business at Tour A-7, 1 Carrefour Alexander-Graham-Bell, Verdun, Québec, H3E 3B3
- and -
TELUS COMMUNICATIONS COMPANY, a legal person duly constituted and having a place of business at 630, boulevard René-Lévesque Ouest, Montréal, Québec, H3B 3C1

RESPONDENTS (Respondents)

INSCRIPTION IN APPEAL
(C.C.P. Articles 495 and 496)

1. On January 8, 2013, the Appellant filed a motion to authorize a class action on behalf of persons forming part of the following class:

> All consumers residing in Quebec who were charged international mobile data roaming fees by the Respondents at a rate higher than $ 5.00 per megabyte after January 8, 2010;

2. The class action seeks a reduction of the Respondents' international data roaming fees as damages to compensate class members as well as punitive damages under articles 8 and 272 of the Quebec *Consumer Protection Act*[1] ("***CPA***"). It also seeks the reduction of these fees as damages to compensate class members under *CCQ* article 1437;

3. The Appellant appeals the Superior Court's decision rendered on July 2, 2014 by the Honourable Mr. Justice Michel Yergeau, sitting in the district of Montreal. After a two and a half day hearing, the motion judge dismissed the Appellant's authorization motion because it did not meet the requirements of *CCP* article 1003 (a), (b), or (d);

4. The Appellant filed 19 exhibits with her authorization motion. The parties together provided the motion judge with a technical introduction and glossary of technical terms regarding international data roaming. The Respondents filed two affidavits, eight exhibits, and their November 15, 2013 out of court examination of the Appellant. Neither party examined witnesses at the authorization hearing;

5. The Appellant inscribes the present decision in appeal because the motion judge made several errors in fact and law, particularly in his interpretation of *CCP* article 1003's authorization criteria, that are significant to the point of invalidating the judgment in first instance;

Errors Determinative of the Authorization of the Class Action

6. The motion judge made significant, manifest errors of law and fact when he held that the motion did not satisfy *CCP* article 1003 (b) because the Appellant did not produce any independent, tangible, objective, concrete, and palpable facts to support her allegations[2];

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1 CQLR c P-40.1 (Tab 32).
2 Decision appealed from at paras 120-122 (**Annex 1**).

7. The motion judge made significant, manifest errors of law and fact when he held that the Appellant did not satisfy *CCP* article 1003 (d) for all three Respondents because she could not understand the class action and control her lawyers[3];

8. The motion judge made significant, manifest errors of law and fact when he held that the Appellant did not satisfy *CCP* article 1003 (d) because as a Fido client, she did not have the legal interest required to represent Bell and Telus members[4];

9. The motion judge made significant, manifest errors of law and fact when he opined *in obiter* that the proposed objective lesion class action did not satisfy *CCP* article 1003 (a) because it necessitated an individual analysis of each member's rights and obligations under her contract with the Respondents[5];

General Context

10. The proposed class action challenges the legality of the Respondents' international data roaming fees under *CPA* articles 8 and *CCQ* article 1437. It seeks the collective recovery of compensatory and punitive damages for Quebec consumers in relation to the amounts of money that the Respondents have overcharged them for using wireless internet services outside of Canada. Due to these rates, consumers like the Appellant have received bills for hundreds or thousands of dollars in international data roaming fees for using small amounts of wireless data;

11. The Respondent wireless services providers ("**WSPs**") have entered contracts with hundreds of thousands, if not millions, of Quebec consumers to provide them access to wireless voice, text, and/or data services on their mobile devices. Data

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3 *Ibid.* at paras 152-158.
4 *Ibid.* at paras 130-138.
5 *Ibid.* at paras 130-137.

services generally include but are not limited to email, web browsing, application usage, instant messaging, picture and video messaging, and video calling[6];

12. The Respondents offer consumers international roaming services so that they can continue to use wireless services on another WSP's network while they travel outside of Canada. In order to do so, the Respondents enter international roaming agreements with domestic or foreign WSPs;

13. The Respondents charge class members international data roaming fees when they use their mobile device to download or upload data on a foreign network. They set standard rates per kilobyte ("**KB**") or megabyte ("**MB**")[7] used in a given foreign country or a member of a group of foreign countries organized into a zone.[8] The Respondents also allow their consumers to purchase prepaid international data roaming plans or add-ons ("**travel plan**") that enable use of a specified amount of data at a lower effective pay-per-use rate;

14. After entering a contract with the Appellant in 2006, the Respondent Fido charged her the following amounts for her use of international data roaming services:

Dates	Country	Data Used	Amount Due	Rate per MB	Rate per GB
July 2010[9]	USA	474 KB	$14.22	$30.72	$31 457.28
August 2011[10]	USA	22.53 MB	$230.78	$10.24	$10 489.07
September 2012[11]	USA	40.82 MB	$250.81	$6.14	$6 291.76

6 See Glossaire français et anglais pour l'usage de la cour at "mobile data".
7 The Respondents each equate 1 MB of data with 1024 KB of data, and 1 gigabyte (GB) of data with 1024 MB of data (*Ibid.*).
8 P-5.
9 Respondent Fido, *Requête pour permission de produire une preuve appropriée*, at Exhibit 2, Affidavit of François Deschamps, Annex B at Inga Sibiga Fido Account Summary, July 18, 2010 at 5.
10 *Ibid* at Inga Sibiga Fido Account Summary, August 18, 2011 at 5.
11 P-18 at 3. See Authorization Motion at paras 2.71 to 2.74 (**Annex 2**).

15. When the authorization motion was filed in January 2013, the Respondents charged consumers roaming outside of Canada anywhere from $5 to $31.2 per MB, or between $5 120 and $31 948.80 per GB:

Respondents' 2012 Retail International Data Roaming Rates per MB[12]				
Country	**Rogers & Fido**	**Chatr**	**Bell, Solo & Virgin Mobile**	**Telus & Koodo**
USA	10.24[13]	6	6	5
France	31.2	30	8	5

16. The Respondents set even higher rates at earlier points in the class period. In September 2010, Rogers and Bell, the two largest Canadian WSPs at the time, charged an average rate of $30.24 for a MB while roaming in OECD members states.[14] Rogers and Bell further set an average rate of $12.32 per MB for their least expensive OECD country, which is and has always been the USA.[15] Until June 11, 2011, Telus charged $25 per MB in every country other than the USA[16];

17. To justify her conclusions, the Appellant alleged that the Respondents' rates are disproportionate to not only prices available on the market for international data roaming services, but also the likely true cost of offering such services.[17] To support these allegations, the Appellant notably filed the following evidence with her motion:

> **i. P-9.** The OECD report's conclusions that in September 2010, Canadian WSPs charged their consumers the highest average rate for a single MB for roaming in the OECD, and that prices surveyed across the OECD indicated

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12 P-5 (Solo does not offer roaming services in France. Rogers and Fido charged their subscribers a fee per KB of data used. In every country other than the USA, Rogers and Fido generally imposed a minimum data volume of 20 KB with data increments of 20 KB. Thus, a consumer who used one MB or 1024 KB would be charged for using 1040 KB of data).

13 Both Rogers and Fido charged subscribers a standard rate of $0.01 per KB. Rogers and Fido subscribers with a domestic Data Plans paid $0.006 per KB. Rogers subscribers with a Flex Rate domestic data plan paid $0.003 per KB.

14 P-9 at 10-11, 14, 24. See Annex 2 at paras 2.22 to 2.24.

15 P-9 at 14, 24; P-10.

16 P-11. See Annex 2 at para 2.31.

17 The Appellant unsuccessfully attempted to obtain information from the CRTC regarding the cost of providing international data roaming services by means of access to information requests (P-8. See Annex 2 at paras 2.15 to 2.18).

either insufficient retail or wholesale competition in the international data roaming market[18];

ii. P-10 & P-11. A Telus executive's admission reported in a June 8, 2011 Globe and Mail article that Rogers had previously had a monopoly on international roaming and that Telus could cut their current prices by more than 50% and still be profitable. Three days later on June 11, 2011, Telus reduced its roaming rates by 60% from $25 to $10 per MB used outside of North America, and further recognized that the launch of its HSPA+ network in 2009 ended Rogers' monopoly on international roaming[19];

iii. P-12. a UK WSP executive's admission reported in a March 29, 2011 ZDNet UK article that data-roaming retail prices bear no relation to the underlying cost of 1 to 3 UK pence to transport a MB[20];

iv. P-13 & P-14. The EU's enactment of price-caps for data roaming in the EU and European Economic Area after assessing the underlying costs of this service. The wholesale and retail price-caps were 0.25 EUR and 0.70 EUR per MB when the authorization motion was filed in January 2013[21];

v. P-15. In January 2013, the Respondents' standard USA data roaming fees greatly exceeded those charged by their Quebec and Canadian competitors, Videotron, Public Mobile, Mobilicity and Wind Mobile. Roger's standard roaming fee for Western Europe, Turkey, Russia, Mexico, Dominican Republic, Brazil, China, Australia and the UAE greatly exceeded the rates charged by Videotron for those countries[22]; and

vi. P-17. The Respondents' standard international data roaming rates for France are hundreds to thousands times larger than the combined domestic price of two GB – one in Quebec and one in France – and 20% to cover roaming integration and billing[23];

18. At the authorization hearing, the Appellant submitted that the available evidence establishes an arguable case for objective lesion under the *CPA* and *CCQ*. It firstly reveals that the Respondents have charged consumers rates per MB that work out to be thousands of dollars per GB. It secondly demonstrates that the Respondents' rates greatly exceed prices available on both the Canadian and global markets for international data roaming services. It thirdly indicates that the Respondents' fees are

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18 See Annex 2 at paras 2.20 to 2.28.
19 See *ibid.* at paras 2.29 to 2.34.
20 See *ibid.* at paras 2.35 to 2.38.
21 See *ibid.* at paras 2.39 to 2.48.
22 See *ibid.* at paras 2.49 to 2.55; P-15 at 1 (for the complete table of countries).
23 See Annex 2 at paras 2.61 to 2.66.

anti-competitive and thus are not reliable indicators of the value of the service that they offer. It fourthly shows that the Respondents' fees greatly exceed the likely cost of offering international data roaming services;

19. Based on the available evidence, the Appellant submitted that any consumer charged $2 or more per MB would have suffered objective lesion under either *CPA* article 8 or *CCQ* article 1437. However, in order to avoid any doubt as to the exploitative nature of the Respondents' fees, the Appellant used the rate of $5 per MB to define the proposed group;

The Motion Judge's Decision

20. In his July 2, 2014 decision, the motion judge dismissed the Appellant's authorization motion because it did not satisfy *CCP* article 1003 (a), (b), or (d).

21. With respect to *CCP* article 1003 (b), the motion judge primarily held that the motion failed this requirement because the Appellant had not produced any independent, tangible, objective, concrete, and palpable facts to support her allegations.[24] He found that her only positive, neutral fact was the Fido bill where she was charged a rate of $6.14 per MB while roaming in the USA.[25] He further ruled that the Appellant had not satisfied this authorization requirement because she had not produced evidence of the Respondents' domestic contracts and plans with class members – tangible facts that were essential to any consideration of whether the motion's conclusions were justified.[26] He finally posited that the Superior Court did not have the mandate, resources or competence to launch an investigation into international data roaming and should leave such a task to the CRTC or legislature[27];

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[24] Annex 1 at para 120.
[25] *Ibid* at para 116.
[26] *Ibid* at paras 109, 113, 136.
[27] *Ibid.* at para 121.

22. With respect to *CCP* article 1003 (d), the motion judge held that the Appellant lacked the competence required to adequately represent any of the group members. He found that she could not adequately control her lawyers because she had not initiated the class action until after she responded to an email and had no knowledge of the subject matter of the class action other than the usual opinions that consumers have of wireless services contracts.[28] He also posited that she could not understand the class action since she had had difficulty expressing how her counsel reached the rate of $5 per MB to define the group[29];

23. The motions judge further held that the Appellant lacked the legal interest required to represent Bell and Telus members under *CCP* article 1003 (d) because she had a different cause of action against Fido than the other members did against Bell and Telus.[30] He based this ruling on his interpretation that the class action's questions regarding the violation of *CPA* article 8 and *CCQ* article 1437 necessitated an analysis of each member's primary, domestic wireless services contract with the Respondents and thus did not satisfy *CCP* article 1003 (a)[31];

Detailed Grounds of Appeal

A. The motion judge made significant, manifest errors of law and fact when he held that the motion did not satisfy *CCP* article 1003 (b) because the Appellant did not produce any independent, tangible, objective, concrete, and palpable facts to support her allegations;

24. The motion judge misinterpreted the evidentiary requirements under *CCP* article 1003 (b) for an objective lesion class action and made manifest factual errors when he dismissed the class action because the Appellant did not produce any independent,

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28 *Ibid.* at paras 152-154. See also para 125 m).
29 *Ibid.* at paras 155-157.
30 *Ibid.* at paras 130-138.
31 *Ibid.* at paras 130-137.

tangible, objective, concrete, and palpable facts to support her allegations.[32] Rather than assuming the truth of the facts alleged and assessing whether they supported an arguable case for objective lesion, he incorrectly imposed a higher evidentiary burden by engaging with the merits of the evidence on a balance of probabilities.[33] A review of the evidentiary rules for an objective lesion class action at the authorization stage reveals that the motion judge incorrectly dismissed the evidence produced by the Appellant as untenable hypotheses.[34]

25. In affirming the arguable case standard for *CCP* article 1003(b) in *Infineon Technologies AG v. Option consommateurs*, the Supreme Court emphasized that an applicant must not establish the elements of her cause of action on the balance of probabilities at the authorization stage, but rather advance more than bare allegations, that is to say allegations with some evidence to support them.[35] A motion judge must assume that the facts alleged are true unless they are vague, general, or imprecise or have no evidence to support them.[36] The Supreme Court notably affirmed that exhibits attesting to the existence of a price-fixing conspiracy and the international impact of that conspiracy were sufficient to support an inference that group members suffered the alleged injury in Canada[37];

26. The Appellant submitted relevant, probative evidence that is more than sufficient at the authorization stage to establish an arguable case for objective lesion under both *CPA* article 8 and *CCQ* article 1437. Firstly, as outlined above, the Appellant submitted retail prices available on the market for international data roaming to demonstrate that an exploitative disproportion exists between the Respondents' rates and the value of the service.[38] Jurisprudence and doctrine clearly establish that a plaintiff can advance

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32 *Ibid.* at paras 67, 95, 98, 116 and 120-122.
33 See *ibid.* at paras 64-95. For P-9, see paras 69-84. For P-12, see paras 87-89. For P-13 & P-14, see paras 89-91. For P-15, see paras 92-94.
34 Annex 1 at paras 116 and 121.
35 2013 SCC 59 at paras 94, 99, 127 and 134 [*Infineon*].
36 *Ibid.* at para 67.
37 *Ibid.* at para 134.
38 P-9; P-13; P-14 and P-15.

evidence of the prices charged for a similar service to establish the value of that service[39];

27. As indicators of the fair market value of international data roaming in Canada, the EU, and OECD throughout the class period, the motion judge had no valid basis for holding that these retail prices were hypothetical, let alone untenable, evidence of an arguable case for objective lesion. For example, while the EU made the policy choice to adopt a regulatory solution to its roaming problem, its regulations nonetheless provide a relevant, probative assessment of the costs involved in providing international data roaming services for all WSPs and set its price-cap at a level that it deemed reasonable for all WSPs, regardless of whether or not they had access to lower intra-group wholesale roaming rates[40];

28. The motion judge incorrectly dismissed this evidence by finding that the Appellant had played with the evidence by omitting to mention that EU WSPs continue to charge high international data roaming fees outside the EU and European Economic Area.[41] As the Court of Appeal recognized in *Riendeau*, the mere fact that EU WSPs offer a similar service at a similar price to the Respondents does not mean that the Respondents' fees are not exploitative.[42] Moreover, the existence of the EU WSP's higher rates by no means renders the EU's assessment of the cost and fair market value of the service in its roaming regulations hypothetical and untenable;

29. Thus, prior to any discovery and expert evidence, the motion judge improperly engaged in an assessment of the merits of evidence of retail prices in Canada, the EU, and OECD when this evidence clearly indicated that the Respondents may have severely overcharged class members;

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39 Masse, Claude. Loi sur la protection du consommateur: analyse et commentaires (Cowansville, Québec: Yvon Blais, 1999) at 134-135; *Riendeau c. Cie de la Baie d'Hudson* 2000 CanLII 9262 (QC CA) at para 43 [*Riendeau*].

40 Exhibit P-14 at preamble (43), (47), (75). See Annex 2 at paras 2.42 to 2.44.

41 Annex 1 at paras 89-91.

42 2000 CanLII 9262 (QC CA) at para 44.

30. Secondly, as outlined above, the Appellant further provided evidence to establish that the Respondents' international data roaming rates suffered from a lack of competition during the class period and greatly exceeded the likely true cost of the service.[43] In *Riendeau,* the Court of Appeal recognized that the court does not have to limit its analysis to evidence of the market value of the good or service, but can also consider evidence of its true cost[44];

31. As an indicator of the true cost of international data roaming, the motion judge had no valid basis for holding that Telus' admission of Roger's monopoly on international data roaming and the inflated nature of the Respondents' fees in June 2011 was hypothetical, let alone untenable, evidence of an arguable case for objective lesion. Considering the lack of competition recognized by Telus and the OECD, the motion judge also improperly refused to infer that an exploitative disproportion could exist from the EU wholesale price-cap per roaming MB; the UK WSP executive's March 29, 2011 admission of the underlying cost of transporting a MB; and the combination of domestic data rates per GB in Quebec and France;

32. When he dismissed the Appellant's evidence, the motion judge further incorrectly implied that at the authorization stage, the Appellant needed to have definitive proof of the true cost of international data roaming, an expert report or a sophisticated methodology for establishing the value of the service.[45] In so doing, he did not respect *CCP* article 1003 (b)'s lower evidentiary burden, which unlike other Canadian jurisdictions does not require the applicant to firmly support complex allegations with expert evidence or a sophisticated methodology at the authorization stage[46];

33. Rather than demonstrate that the Appellant's allegations are vague, general, or imprecise, the motion judge's criticisms generally reveal unfounded preoccupations with

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43 For evidence relevant to the lack of competition, P-10; P-11; P-9 at 5. For evidence relevant to the likely true cost of the service, P-12; P-13, P-14; P-16 and P-17.
44 *Riendeau* at paras 43-44.
45 Annex 1 at paras 64, 66-67, 115-116 and 120-122.
46 *Infineon* at para 128.

the weight to give to each exhibit and defences that the Respondents can raise to justify their fees. Regardless of their lack of merit, he should not have allowed such preoccupations to defeat the class action at this stage. As the Supreme Court recognized in *Infineon,* the National Assembly intended for a trial judge to address these evidentiary concerns and defences at the merits stage after reviewing all the available evidence produced after discovery;

34. The motion judge also committed an error of mixed law and fact when he dismissed the motion under *CCP* article 1003 (b) because it did not include copies of each Respondent's standard-form contracts.[47] The motion judge has misapprehended the evidentiary requirements of an objective lesion recourse and neglected the nature of the Respondents' international data roaming fees. The proposed class action addresses a pay-per-use service that each Respondent charges on an accessory basis to a primary, pre- or post-paid, wireless service contract. Before they charge the impugned accessory fee, the Respondents receive consideration for the services and benefits that they provide consumers under the primary wireless-services contracts. The court must thus only assess whether the disproportion between the price of the accessory, pay-per-use service and the value of that service is exploitative or abusive.

35. The Appellant's evidence nonetheless establishes an arguable case that a rate of $5 or more per MB is exploitative or abusive in all cases regardless of the nature of the primary contract. Since the Appellant's evidence demonstrated that each Respondent charged class members standard pay-per-use rates over this amount per MB used outside of Canada, the motion judge did not need a copy of the Respondents' plans and standard-form contracts to assess whether the motion satisfied *CCP* article 1003 (b);

36. The decision appealed from further undermines the power of the Superior Court and the intended role of the class action procedure by implying that an issue such as that raised in this case should be best left to the legislature or the CRTC:

> [121] […] Une thèse, sujette à réfutation comme toutes les thèses, ne se mute pas en fait objectif du seul fait qu'elle est alléguée au soutien d'une requête en autorisation d'un recours collectif. Conclure autrement transformerait du même coup cette Cour en commission d'enquête sur autant de sujets qu'il y aura de requérants intéressés à débattre du bien-fondé de l'hypothèse qu'ils auront mis grand soin à bâtir. Si le CRTC estime qu'il y a lieu d'intervenir, à lui de le faire. Si les pouvoirs politiques estiment qu'il y a matière à légiférer, à eux d'en décider à l'instar de l'Union européenne qui s'en explique de façon limpide dans le long préambule de son Règlement 531 du 13 juin 201254. Mais, dans l'intervalle, ce n'est pas à la Cour supérieure, dans le cadre d'un procès, de décider si l'industrie de la téléphonie sans fil impose aux usagers, qui voyagent à l'étranger et qui choisissent de ne pas adhérer à un plan de voyage ou de ne pas acheter de forfait, des frais d'itinérance qui excèdent le juste prix. Faire droit à la requête ne mènerait à rien d'autre qu'à ouvrir une enquête à caractère public sur ce secteur d'activité sans avoir ni le mandat, ni les ressources, ni la compétence spécialisée pour le faire[48];

37. With respect, it is the role of the Superior Court to decide whether the Respondents charged exploitative or abusive international data roaming fees to class members. The National Assembly gave the court such jurisdiction when it enacted *CPA* article 8 and *CCQ* article 1437 to protect consumers from exploitative contractual terms, and class action procedure to enable individuals to collectively assert their rights in a court of law and deter violations of the law;

38. This Court should therefore authorize the Appellant's class action by setting aside the motion judge's significant misapprehension of *CCP* article 1003 (b)'s evidentiary requirements for an objective lesion recourse as well as his manifest errors of fact in dismissing the Appellant's evidence as untenable hypotheses;

39. The Appellant's motion has provided ample evidence to support a sound legal challenge to the Respondents' fees. Authorization of this class action will thus not submit the Respondents to an untenable or frivolous cause of action on the merits. It will rather provide Quebec consumers charged hundreds or thousands of dollars for small amounts of data, with a real opportunity to challenge the Respondents' common practice of charging exploitative international data roaming fees;

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47 Annex 1 at paras 113 and 136. See generally paras 108-113.

48 Annex 1 at para 121. See also para 98 (« On ne lance pas une procédure aussi coûteuse pour le système de justice qu'un recours collectif sur une base aussi ténue »).

B. The motion judge made significant, manifest errors of law and fact when he held that the Appellant did not satisfy *CCP* article 1003 (d) for all three Defendants because she could not understand the class action and control her lawyers;

40. The motion judge misapprehended *CCP* article 1003 (d)'s competence standard and manifestly erred when he found as a fact that the Appellant lacked the competence to understand the class action and control her lawyers;

41. The motion judge first incorrectly based this finding on the fact that the Appellant did not initiate the class action until after she responded to a message that her attorneys sent to members of its other class actions.

> [152] Ici, nous n'avons pas une requérante qui initie une démarche et qui consulte un avocat dans ce cadre. Nous avons une personne qui répond à un courriel d'un cabinet d'avocats spécialisé en recours collectif qui de sa propre initiative a mis en chantier une étude sur les frais d'itinérance internationale et qui, de façon aléatoire, invite ceux et celles qui ont reçu des «factures élevées» à communiquer avec lui. Dix jours plus tard, Mme Sibiga répond à cette invitation pour devenir dans les jours suivants la requérante. Il n'est pas exagéré de conclure qu'ici les avocats ont choisi leur cliente, une cliente qui n'a au départ aucune connaissance du dossier qu'elle pilote de son nom autre que les notions que partagent les usagers de la téléphonie sans fil à travers leur propre histoire de cas (*stories*, dit-elle en interrogatoire).
>
> [153] Le rapport client/avocat implique que le second soit au service du premier qui conserve ainsi le privilège de lui retirer sa confiance. Assurer la représentation des membres implique que le représentant le moment venu soit en mesure de questionner, voire de remettre en question les décisions qui doivent sans cesse être prises par les procureurs au fur et à mesure que progresse le dossier. […]
>
> [154] […] Le Tribunal est à ce chapitre convaincu que la requérante n'exerce aucun contrôle sur les avocats au dossier. Il en découle qu'elle ne serait pas en mesure le moment venu d'assurer la représentation des membres du groupe de façon adéquate.[49]

42. This finding constitutes an unfounded assumption that does not stem from an actual lack of competence, interest, or independence on the part of the Appellant;

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[49] Annex 1 at paras 152-154 (emphasis added and original references omitted).

43. As this Court recognized in *Fortier c. Meubles Léon ltée*, the simple fact that class counsel played a significant role in the initiation of a class action does not mean that a victim of an alleged legal violation lacks the requisite interest and capacity to adequately represent members.[50] In such circumstances, the motion judge must not place a higher burden on an applicant by automatically assuming that she is an agent of her class counsel. The court must rather verify that she has the interest, competence, and independence to fairly carry out the class action for the benefit of all class members;

44. The motion judge further erred in dismissing the class action because the Appellant had difficulty expressing how her counsel reached the rate of $5 per MB to define the group.[51] This simple testimony does not preclude her from acting as a representative. In *Infineon*, the Supreme Court affirmed that a motion judge should only exclude a proposed representative if her interest or competence makes it impossible for the class action to proceed fairly.[52] The competence criterion does not require the applicant to be the ideal member with perfect or encyclopaedic knowledge of the class action[53];

45. The motion judge had no valid basis for finding that the Appellant lacked the interest required to adequately represent the group.[54] She had no prior relation to her counsel other than her membership in another one of their class actions.[55] Like many consumers, she was shocked by the size of her international data roaming bills and does not believe that it actually costs the Respondents that much to offer the service.[56] When contacted by class counsel to share her experience, she welcomed the

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50 2014 QCCA 195 at paras 147-150. See also *Tardif c. Hyundai Motor America*, 2004 CanLII 7992 (QC CS) at paras 88-89 and 91-95.
51 Annex 1 at paras 155-157.
52 *Infineon* at para 149.
53 Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice*, Cowansville, Éditions Yvon Blais, 2006, at 100-101.
54 Annex 1 at para 154.
55 Fido's Examination before Plea of Applicant Inga Sibiga, November 15, 2013, p. 10-12, Qs. 14-19.
56 *Ibid.*

opportunity to speak out on behalf of the many consumers that she felt had been charged exploitative data roaming fees[57];

46. The motion judge also had no valid basis to find that the Appellant lacked the understanding required to supervise her lawyers and report to class members.[58] She knows just as much, if not more, about wireless services and international data roaming services as the average consumer does.[59] She most importantly understands who she represents and the nature of the cause of action that she is bringing on their behalf.[60] She further appreciates that her counsel may have to establish the cost of offering international data roaming services and is determined to carry out the class action to obtain this undisclosed information[61];

47. While she may not have a perfect understanding of all elements of her motion, the Appellant has sincerely and diligently worked to advance the class action to the merits stage. She has reviewed her authorization motion and exhibits with her counsel; met her expert; gone before the *Fonds d'aide aux recours collectif* to obtain financing; submitted herself to examination by the Respondents' attorneys; and attended two days of the authorization hearing;

48. The motion judge has unfairly placed a higher burden on the Appellant than that required by *CCP* article 1003 (d)'s competence requirement. A representative does not have to demonstrate her interest and competence by drafting a legal procedure or leading the factual investigation that supports it. Nor does she have to master the exhibits submitted to support her motion or any methodology used to resolve difficult legal issues. Adopting such requirements would unreasonably burden plaintiffs with relatively small claims and discourage them from stepping forward to assert the rights of class members. The legislature recognized that the complex nature of class actions

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57 *Ibid*. pp. 9-10, Qs. 12-13.
58 Annex 1 at paras 152-157.
59 Fido Examination pp. 74-75, Qs. 201-205; p. 113, Q. 333.
60 *Ibid*. pp. 9-10, Qs. 12-13.
61 *Ibid.* p. 105, Qs. 309-310; p. 110, Qs. 329-330; p. 129-131, Qs. 400-405.

necessitated legal help with precisely such matters when it denied class members the right to bring a class action without a lawyer[62];

49. Without the involvement of someone like the Appellant, the Rogers, Bell and Telus group members would have been deprived of their right to have their legitimate challenge to the Respondents' fees determined by a court. Her behaviour has revealed no basis for excluding her from representing group members. This Court should therefore grant the Appellant the right to do so by setting aside the motion judge's significant misapprehension of *CCP* article 1003 (d)'s competence criterion and manifestly incorrect factual findings regarding her competence;

C. The motion judge made significant, manifest errors of law and fact when he held that the Appellant did not satisfy *CCP* article 1003 (d) because as a Fido client, she did not have the legal interest required to represent Bell and Telus members;

50. The motion judge incorrectly concluded that the Appellant did not satisfy the exception to the general rule set in *Bouchard v. Agropur Coopérative* that requires an applicant to have a cause of action with each defendant[63];

51. As the motion judge recognized, this Court has firmly established that an applicant can bring a class action against multiple Respondents without having a direct contractual link to each of them so long as a single cause of action unites the class members.[64] An applicant does not need to have a direct link to each defendant if all defendants and their class members share a juridical relationship that would render a

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62 *CCP* article 1049.

63 Annex 1 at paras 130-138; 2006 QCCA 1342 at para 110.

64 Annex 1 at paras 44. See *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée) c. Comité provincial des maladies* 2007 QCCA 1068 at paras 27, 31; *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694 at paras 21-22 [*ITL*]; *Banque de Montréal c. Marcotte,* 2012 QCCA 1396 at paras 79 (appeal heard by the Supreme Court on February 13, 2014 and decision pending, SCC no 35009) [*BMO*].

single resolution of the dispute expeditious.[65] In *BMO*, the Court further held that a class action meets this requirement if it challenges a business practice common to each Respondent on the same legal basis[66];

52. The motion judge erred when he concluded that the Bell and Telus members did not share the same cause of action as Rogers members because they had different factual situations.[67] He found that no single contractual model united class members since each Respondent offered different wireless services and benefits, which a consumer selected according to her needs when she entered her contract.[68] He posited that the nature of an objective lesion recourse required the Appellant to advance not only evidence of each Respondent's data roaming fees, but also the range of contractual rights and obligations linking Bell and Telus to their consumers[69];

53. As discussed earlier, this reasoning stems from a misapprehension of the evidentiary requirements of an objective lesion recourse and neglect for the nature of the Respondents' international data roaming fees. To resolve the class members' claims, the trial judge does not have to consider the various permutations of the consumers' primary wireless services contracts. He must only assess whether the disproportion between the price of the accessory, pay-per-use service and the value of that service is exploitative or abusive. The Appellant's evidence establishes an arguable case that a rate of $5 or more per MB is exploitative or abusive in all cases regardless of the nature of the primary contract;

54. The motion judge committed a manifest error when he found that the Rogers, Bell and Telus class member's claims did not share the same factual position. The Appellant submitted evidence to establish that each Respondent charged their class members standard, pay-per-use, international data roaming fees of $5 or more per MB.

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65 *ITL* at paras 21-22.
66 *BMO* at para 79.
67 Annex 1 at paras 130-131 and 134-137.
68 *Ibid.* at paras 130-131 and 134.
69 *Ibid.* at paras 136.

This underlying factual situation does not lose its common character simply because these fees are accessory to the primary wireless service contract that can vary by individual. It is plain and obvious that no significant difference exists between each member's primary contract that could render their factual situations incomparable for the purposes of an objective lesion challenge to the impugned accessory fee. The Appellant's cause of action addresses the Respondent's common practice of charging exploitative or abusive fees and does not rest on the length of each class member's primary contract or whether she subscribes to voice-mail;

55. The Bell and Telus class members have the same cause of action against Bell and Telus under *CPA* article 8 and *CCQ* article 1437, as the Applicant does against Fido. Each class member challenges the same business practice on an identical legal basis. Each class member's claim depends upon a determination of the level at which the Respondents' fees constitute exploitation under *CPA* article 8 or are excessively or unreasonably detrimental under *CCQ* article 1437. Each class member will benefit from the evidence advanced to explain international data roaming, present prices available on the market, and if necessary, establish the true cost of offering this service. If the trial judge determines that the value of this service varies by Respondent, the court can create subgroups to address these nuanced answers to the class action's identical questions, without giving rise to a conflict of interest[70];

56. All parties share an interest in having a single judge hear this class action to avoid contradictory factual and legal determinations regarding the Respondents' common business practice. A single class action will efficiently and consistently resolve the disputes of at least tens of thousands of Quebec consumers. In so doing, it will promote access to justice, address wrongful behaviour, and conserve valuable judicial resources;

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[70] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras 76-78 [*Vivendi*].

57. In contrast, the motion judge's decision undermines these objectives by requiring class members that wish to challenge a common business practice on an identical legal basis to take a separate class action with a different representative for each defendant and each type of monthly plan offered by the Respondents. This Court should thus restore their right to bring this legitimate collective challenge by setting aside the motion judge's significant errors on their interest to sue Bell and Telus;

D. The motion judge made significant, manifest errors of law and fact when he opined *in obiter* that the proposed objective lesion class action did not satisfy *CCP* article 1003 (a) because it necessitated an individual analysis of each member's rights and obligations under her contract with the Respondents;

58. The motion judge incorrectly opined *in obiter* that the motion did not satisfy *CCP* article 1003 (a) because it necessitated an analysis of each member's individual primary contract with the Respondents[71];

59. For the same reasons outlined above, the motion judge first misapprehended the evidentiary requirements of an objective lesion challenge to the Respondents' international data roaming fees. The Appellant's class action does not necessitate an analysis of each class members' individual wireless services contract. The court does not have to consider the global value of all the services and benefits received by each consumer under their primary wireless contracts. The trial judge will only have to compare the Respondents' fees to the value of the international data roaming service that they offer consumers;

60. Regardless of this misapprehension, the proposed class action still satisfies *CCP* article 1003 (a) because it raises identical, similar or related questions that do not play an insignificant role in the resolution of their claims or give rise to a conflict of interest between members.[72] The determination of the fair market value of international data

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[71] Annex 1 at paras 130-137
[72] *Vivendi* at paras 45, 58 and 78.

roaming services, their true cost, and the level at which the disproportion amounts to exploitation or abuse, constitute identical questions that every class member must answer to resolve their claims.[73] As mentioned earlier, if the value of the impugned service varies by Respondent, the trial judge can create subgroups to address these nuanced answers to these identical questions without giving rise to a conflict of interest[74];

61. The motion judge clearly disregarded the requirements of *CCP* article 1003 (a). Having made a manifestly incorrect conclusion that the individual issues predominated common ones, he dismissed a class action that nonetheless raised several identical, similar, or related questions. In *Vivendi*, the Supreme Court recognized that a single common question satisfied *CCP* article 1003 (a) and found that the motion judge made virtually the same mistake as Yergeau J.C.S. did here:

> [60] In light of these principles, we are of the opinion that the motion judge was mistaken in emphasizing the possibility that numerous individual questions would ultimately have to be analyzed. He should instead have inquired into whether the condition provided for in art. 1003(a) was met, that is, whether the applicant had 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[75];

62. This Court should thus intervene to set aside the motion judge's incorrect dismissal of the class action under *CCP* article 1003 (a);

<u>Conclusions Sought by the Appellant</u>

63. For these reasons, may it please the Court to:

ALLOW the applicant's appeal;

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[73] For the motion's identical, similar or related questions of fact and law, see Annex 2 at para 4.
[74] *Ibid*. at paras 76-78.
[75] *Vivendi* at para 60.

SET ASIDE the judgment of the Superior Court rendered by the Honourable Mr. Justice Michel Yergeau on July 2, 2014;

GRANT the Appellant's motion for authorization to institute a class action and obtain the status of representative according to its conclusions;

THE WHOLE, with costs.

Notice of this inscription on appeal is given to :

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