SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-06-000714-143

DATE: February 20, 2018

PRESIDING THE HONOURABLE THOMAS M. DAVIS, J.S.C.

STEVE MARTINEAU
Plaintiff
v.
BAYER CROPSCIENCE INC.
and
BAYER INC.
and
BAYER CROPSCIENCE AG
and
SYNGENTA CANADA INC.
and
SYNGENTA INTERNATIONAL AG
Defendants

JUDGMENT
ON THE MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION
AND TO OBTAIN THE STATUS OF REPRESENTATIVE

JD2836

1. OVERVIEW

[1] Bees play an important role in agriculture. So do pesticides when they are properly applied.

[2] In this matter Plaintiff Steve Martineau who is a Queen Bee breeder asks the Court to authorize a class action, which has as its premise that Defendants Bayer CropScience Inc., Bayer Inc. and Bayer CropScience AG ("**Bayer**"), and Syngenta Canada Inc. and Syngenta International Inc. ("**Syngenta**") have been negligent in the manufacture and sale of neonicotinoid pesticides in Québec and are responsible for the damages that he and other class members have suffered under article 1457 C.C.Q. as a result of their conduct.

[3] The re-re amended Application[1] defines neonicotinoids as follows at paragraph 2 (m):

> (m) "**Neonicotinoids**" means imidacloprid, clothianidin and thiamethoxam, which are the members of the neonicotinoid class of broad-spectrum **Insecticides** or pest control products, that are researched, designed, manufactured, distributed, marketed and/or sold by the **Defendants**;

[4] For the purposes of the present judgment the three will often be referred to collectively as "neonicotinoids".

[5] Mr. Martineau alleges significant losses in his bee population beginning in 2006. The most significant losses would occur in the June sowing period. He also observed an unusual mortality or atrophy of the Queen Bees and larvae, and that eggs were affected by dehydration.

[6] Alarmed by this, Mr. Martineau had samples of water and dead bees analyzed and found that they contained neonicotinoids as set out in paragraph 16 of the Application:

> 16. The Plaintiff had samples of water and dead Bees analyzed and found that they contained "neonicotinoid", a systemic Insecticide, the whole as appears from the analysis report of the Ministry of Agriculture, Fisheries and Food of Québec, a copy of which is produced herewith as **Exhibit P-55**, from the interpretation of the results of the Ministry of Agriculture, Fisheries and Food of Québec, a copy of which is produced herewith as **Exhibit P-56** and from the various reports of the Ministry of Agriculture, Fisheries and Food of Québec, copies of which are produced *en liasse* herewith as **Exhibit P-57**.

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[1] For ease of reference, the Court will use the term "**Application**" to refer to the most recent Re-re Amended Application for Authorization to Institute a Class Action and to Obtain the Status of Representative, dated September 26, 2017.

[7] Mr. Martineau estimates that he has suffered losses of up to $20,000 in all or some years from 2006 to the present.

[8] His position is summarized in the Application as follows:

> 52. The Plaintiff and Class Members have suffered, and continue to suffer harm caused by Neonicotinoids designed, manufactured, marketed, distributed and sold by the Defendants in Québec. The three types of Neonicotinoids (imidacloprid, clothianidin and thiamethoxam) are used interchangeably; their impact on Bees is the same.

2. BAYER'S REQUEST TO ADDUCE ADDITIONAL EVIDENCE

[9] Following the closure of the authorization hearing, Bayer asked the Court for permission to adduce additional evidence, stating:

> On December 19, 2017, the PMRA released (i) a Proposed Re-evaluation Decision regarding the Pollinator Re-evaluation and (ii) a Proposed Registration Decision with respect to Bayer's Clothianidin conversion application. Both the underlying proceedings and of the possibility that these decisions might be rendered were referenced at some length in the Parsons affidavit and during the course of our submissions during the recent authorization hearing in this matter.[2]

[10] It is true that the role of the Pest Management Regulatory Agency ("PMRA") and the possibility of the decisions referred to being rendered by the PMRA were referenced in the Parsons affidavit. However, the Court will not allow the introduction of this new evidence at this juncture. This is not to discount the importance, either of the role of the PMRA, or of the collaboration of Defendants with the PMRA. However, Mr. Martineau's allegations of fault go well beyond whether or not Defendants complied with the PMRA. Witness the following paragraphs of the Application:

> 96. The Defendants committed a fault in their research, design, development, manufacture, marketing, distribution and sale of Neonicotinoids.
>
> 97. The Defendants committed a fault in failing and continuing to fail to warn the Plaintiff and Class Members about the risks to Bees associated with exposure to Neonicotinoids.
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> 98. The Defendants committed a fault in making misstatements with respect to the risks to Bees associated with exposure to Neonicotinoids.
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> 99. The fault of the Defendants has caused damage to the Plaintiff and Class Members.

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[2] E-mail from Bayer Counsel Me William McNamara, dated December 21, 2017.

[11] At the authorization stage the Court is of the view that this new evidence will not be probative and therefore will not assist it in evaluating whether the criteria necessary for the authorization of a class action are satisfied. That being said, it is clear that if the matter goes forward, the interactions between Defendants and the PMRA, and the decisions of the PMRA will constitute evidence relevant to the analysis of whether Defendants' committed a fault.

3. THE PROPOSED CLASS AND CLASS PERIOD

[12] The Application describes the proposed class as follows:

> "**Class**" or "**Class Members**" means all persons in Quebec who own or owned **Bees** in the **Affected Area** during the **Class Period**;[3]

[13] The Class Period is defined as follows:

> "**Class Period**" means the period between January 1, 2006 and the date on which this action is authorized as a class proceeding;[4]

4. MR. MARTINEAU'S ALLEGATIONS

[14] Mr. Martineau poses the following questions in his Application:

a. Can Neonicotinoids researched, designed, developed, manufactured, marketed, distributed and/or sold by the Defendants, or any one of them, cause damage to the Class?

b. Did the Defendants, or any one of them, commit a fault in violation of section 1457 of the *Civil Code of Québec* in the research, design, development, manufacture, marketing, distribution and/or sale of Neonicotinoids?

c. Did the Defendants, or any one of them, commit a fault in violation of section 1457 of the *Civil Code of Québec* by failing to warn the Class about the risks to Bees associated with Neonicotinoids?

d. Did the Defendants, or any one of them, commit a fault in violation of section 1457 of the *Civil Code of Québec* by making misstatements with respect to the risks to Bees associated with Neonicotinoids?

e. If the above questions are answered in the affirmative, did the Plaintiff and the Class suffer damages as a result of the conduct of the Defendants?

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3 Application, para. 2.
4 *Id.*

f. Are the Defendants jointly, or severally, liable for past, present and future pecuniary losses and damages suffered by the Class?

g. Are the Defendants jointly, or severally, liable for punitive damages?[5]

5. BAYER'S POSITION

[15] Bayer posits that Mr. Martineau's Application does not meet the criteria of either article 575(2) or article 575(4) C.C.P.

[16] It takes the position that the facts alleged do not justify the conclusions sought and that Mr. Martineau cannot adequately represent the class members.

[17] Bayer adds that the conclusions sought by Mr. Martineau regarding collective recovery and punitive damages are also improper and should not be authorized because:

i) collective recovery is not possible because liability cannot be established at the common questions trial. Individual trials would be required to establish specific causation. Furthermore, the total amount of the claims of individual Class members cannot be assessed with sufficient certainty; and

ii) there is no legal basis for the punitive damages claim. Even if there was, it cannot be ordered on a solidary basis.[6]

[18] Finally, Bayer takes the position that in the event the Court authorizes the action, the questions must be restated.

6. SYNGENTA'S POSITION

[19] For Syngenta, neither the criteria of article 575(1) nor 575(2) C.C.P. are met in the Application. In addition, like Bayer, it believes that in the event the action is authorized, the common questions require restatement.

[20] It points out that the liability of the different Defendants must be dealt with separately, as Defendants do not produce the same Neonicotinoid-based products, nor do they produce all the Neonicotinoid-based products used in Québec. Therefore, Bayer's liability does not equate to Syngenta's liability, and vice versa.[7]

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5 Application, para. 124.

6 Plan of argument of the Defendants Bayer CropScience Inc., Bayer Inc. and Bayer CropScience AG, dated November 8, 2017 ("**Bayer's argument**"), para. 4 b).

7 Defendant Syngenta's argument outline at authorization, dated November 8, 2017 ("**Syngenta's argument**"), para. 17.

7. ANALYSIS

7.1 Article 575(1) C.C.P.

[21] Neither Defendant seriously questions that Mr. Martineau's action meets the test of article 575(1). The Court agrees.

[22] Considering the criteria outlined in *Vivendi Canada Inc. v. Dell'Aniello*,[8] the Court considers that there is sufficient commonality in the potential claims of all class members. The legal issue of whether the fault of Defendants, or of one of them,[9] caused damages to beekeepers is one that is common. The same can be said for the question of whether the failure of Defendants to warn the class members of the risks of neonicotinoids constitutes a fault under article 1457 C.C.Q.

7.2 Article 575(2) C.C.P.

[23] This article gives the Court reason for pause. There are two concerns, the first being the one raised by Syngenta that the Application lumps the fault of each Defendant into one. The second is more fundamental: are Mr. Martineau's allegations, taken as true, sufficient to justify Mr. Martineau's affirmation that Defendants have committed a fault vis-à-vis him and the other class members?

[24] Where there is not a concern, at this juncture, is that neonicotinoids may be toxic to bees. This can be seen at this stage from a review of many of the exhibits produced by Plaintiff.

[25] To refer to but some of them, Exhibit P-2 is a document "How Neonicotinoids Can Kill Bees", which sets out the risks that occur during seed planting. Exhibit P-5: "Where Have All the Bees Gone? - BC Farms & Food" confirms that neonicotinoids can be toxic to bees. Exhibit P-6: "BACKGROUNDER: Neonics, Honey Bees, and Food Security" confirms increased bee losses in areas close to where corn and other coated seeds are sown during the spring planting season.

[26] The potential risk to pollinators has been acknowledged by the PMRA (Exhibit P-25).

[27] Exhibit P-42, a PMRA report, speaks of bee mortality in Coteau-du-Lac in 2010 and of the dead bees containing residues of clothianidin and thiamethoxam. The PMRA concluded that exposure to these chemicals was the probable cause of death of the bees, although it could not explain how the exposure occurred.

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8 [2014] 1 S.C.R. 3, 2014 SCC 1.

9 The Court will consider whether the precise questions posed by Mr. Martineau are appropriate in a separate section.

[28] Exhibit P-43 refers to a similar incident in St. Dominique in 2010, where residues of clothianidin were found in the dead bees.

[29] Exhibit P-44 discusses honey bee mortality in corn growing regions of Québec and Ontario in spring 2012. Residues of clothianidin and thiamethoxam were found in the dead bees. The PMRA concluded that the exposure was likely from contaminated dust blowing from fields being seeded with coated seed.

[30] Exhibit P-46, a 2013 PMRA document, called for a change in the practices for the seeding of neonicotinoid treated seeds, as the current practice was not sustainable.

[31] It appears that Mr. Martineau's bees were not immune to the effects of neonicotinoids.

[32] Exhibits P-55 and P-56 are samples of the presence of pesticides in Mr. Martineau's bees taken in 2016. Both reports show the presence of clothianidin and thiamethoxam. A 2014 analysis, found in Exhibit P-57, is to the same effect.

[33] There is really no need to exhaustively consider the other documents produced by Mr. Martineau as they relate to the issue of the risk posed to honey bees from exposure to neonicotinoids. It is evident and is not denied by Defendants.

[34] The documents, however, do not clearly resolve the issue of whether the neonicotinoids that caused the damage to Mr. Martineau's bees were manufactured by Defendants and certainly not the issue of which Defendant manufactured the pesticides that Mr. Martineau alleges harmed his bees.

7.2.1 The Defendants' Fault

[35] Bayer raises concerns about the somewhat vague nature of Mr. Martineau's allegations, particularly in relation to where the offending seeds were used in relation to his hives and what or whose product coated the offending seeds. The Court agrees that they are somewhat imprecise; it disagrees that they are purely speculative.

[36] The Application seems to be based on the assumption that the neonicotinoids that caused the damages suffered by Mr. Martineau were indeed manufactured by Defendants, Mr. Martineau even stating in his oral argument that Defendants were the principal or perhaps the only manufacturers of neonicotinoids sold in Québec. Do the allegations of the Application allow for this conclusion?

[37] To pose the question differently, are the allegations set out at paragraphs 16 and 52 sufficient to meet the test of article 575(2), as there are no other allegations that the damage was caused by a product manufactured by either Defendant?

[38] Exhibit P-26 is important in this regard. It sets out new registrations during 2016 and many of the newly registered products contain imidacloprid, clothianidin or

thiamethoxam. However, one cannot determine from this document who the manufacturers of these new products are.

[39] Exhibit P-34, a Western Producer article of January 31, 2014, is somewhat helpful in this respect. It refers to imidacloprid and clothianidin as being Bayer products and thiamethoxam as being a Syngenta product.

[40] Exhibit P-63 indicates that Bayer and Syngenta are the only members of a Québec committee on neonicotinoids in Québec.

[41] Exhibits P-39 and P-40 show Bayer as the registrant for clothianidin in the United States.

[42] Finally, the Application clearly alleges that neonicotinoids manufactured by Defendants were sold in Québec, which has not been denied in any event.

[43] While the analysis of these allegations and the evidence requires a degree of reading between the lines, the Court concludes that, at this juncture, there is a reasonable demonstration that residues of products manufactured by either Bayer or Syngenta (or perhaps both) were found in the dead bees belonging to Mr. Martineau. The process the Court must engage in was recently explained by the Court of Appeal in *Asselin c. Desjardins Cabinet de services financiers inc.*:

> [33] D'une part, s'il est vrai que l'on ne doit pas se satisfaire du vague, du général et de l'imprécis, l'on ne peut pour autant fermer les yeux devant des allégations qui ne sont peut-être pas parfaites, mais dont le sens véritable ressort néanmoins clairement. Il faut donc savoir lire entre les lignes. Agir autrement serait faire montre d'un rigorisme ou d'un littéralisme injustifié et donner aux propos de la Cour suprême en la matière une acception qu'ils n'ont pas.
>
> [34] D'autre part, on doit comprendre que des allégations génériques ne suffiront pas, les faits soulevés devant, au regard du droit applicable, être suffisamment spécifiques pour qu'on puisse saisir les grandes lignes du narratif proposé et vérifier sur cette base que sont remplies les conditions de l'art 575 *C.p.c.*, c'est-à-dire que le syllogisme juridique est plaidable et que les questions de fait et de droit qui le sous-tendent sont suffisamment communes pour que leur résolution fasse avancer le débat au bénéfice de chacun des membres d'un groupe par ailleurs convenable, dont les intérêts seront assurés par une personne capable d'une représentation adéquate, conditions qui doivent être interprétées et appliquées en vue de « faciliter l'exercice des recours collectifs ». Il ne s'agit donc pas d'exiger de celui qui demande l'autorisation d'intenter une action collective le menu détail de tout ce qu'il allègue ni celui de la preuve qu'il entend présenter au soutien de ces allégations dans le cadre du procès sur le fond, approche que la Cour suprême a rejetée dans l'arrêt *Infineon* en rappelant que « la norme applicable est celle de la démonstration d'une cause

> défendable et non celle de la présentation d'une preuve selon la prépondérance des probabilités, plus exigeante ».[10]
>
> [The Court's underlining. References omitted]

[44] The evidence submitted allows for a reasonable narrative that Bayer and Syngenta were the principle manufacturers of seed coated with clothianidin, imidacloprid, or thiamethoxam sold in Québec during the Class Period.

[45] The next question is whether the manufacture and sale of these products by Defendants, given the authorizations of the PMRA, can be viewed as a fault.

[46] The Court concludes that at the authorization stage the allegations of fault are sufficient. Mere authorization by the PMRA is not sufficient to prevent the matter from moving forward.

[47] Mr. Martineau summarizes his position as to fault in his written arguments:

> 48. The Applicant alleges that the Defendants were at fault and negligent in the research, design, development, distribution, marketing and sale of Neonicotinoids.
>
> 49. The Applicant further alleges that the Defendants knew or ought to have known that:
>
> (a) Neonicotinoids are harmful to Bees;
>
> (b) the use of Neonicotinoids as directed would result in Neonicotinoids being ingested by the Bees and brought back to the Beehive, causing contamination of the Beehive; and
>
> (c) the impact of Neonicotinoids on Bee Colonies would be devastating and cause material damage to the members of the Class.
>
> 50. The risks to the Applicant and Class Members ought to have been known by the Defendants before they began marketing Neonicotinoids in Canada.
>
> [...]
>
> 51. The Applicant alleges that the Defendants are at fault for breaching, and continuing to breach, their duties to the Applicant and Class Members by:
>
> (a) designing and manufacturing Neonicotinoids in a way that, when used as directed, is contrary to the principles of sustainable pest management and rendered it inevitable that Bees would come in contact with Neonicotinoids;

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[10] 2017 QCCA 1673.

(b) failing to adequately research, test and study the impact of Neonicotinoids on Bees and failing to keep current on the status of research regarding the impact of Neonicotinoids on Bees;

(c) negligently designing, manufacturing and marketing products that were likely to, and did, cause foreseeable damage to the Plaintiff and Class Members;

(d) manufacturing, distributing, marketing and selling products that contain dangerous defects and are unreasonably hazardous to the property of the Plaintiff and Class Members;

(e) failing to warn the Plaintiff and Class Members of the real and substantial risks of danger associated with Neonicotinoids;

(f) making false, misleading and deceptive statements about the risks of Neonicotinoids to Bees and the state of research regarding same;

(g) after becoming aware of the impacts of Neonicotinoids on Bees and the Class, failing to warn of the harm, cease or limit manufacturing and distribution, and institute an effective products recall;

(h) to otherwise take reasonable steps to avoid harm and/or damage to the Plaintiff and the other Class Members; and

(i) failing to act in good faith toward the Plaintiff and Class Members. [11]

[48] Bayer's argument can be summarized from the following paragraphs of its written argument:

86. For these reasons, the legal syllogism proposed by Plaintiff rests on foundations of sand:

a) Neonicotinoid pesticides are known to have potentially toxic effects to bees and other insects;

b) When used responsibly and in accordance with usage recommendations, neonicotinoids do not represent an unacceptable risk to pollinators;

c) Neonicotinoid pesticides have been approved for sale and use in Canada on this basis by the relevant regulatory authority;

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[11] Plan of argument of the Plaintiff relating to the re-re-amended application for authorization to institute a class action and to obtain the status of representative, dated November 8, 2017 ("**Plaintiff's argument**").

d) Since granting the relevant marketing authorizations, in 1993 and 2003, respectively, the PMRA has continued its close monitoring of the potential impacts of neonicotinoid pesticides on honey-bees in particular, through numerous requests for additional safety studies, with which Bayer has complied, as the PMRA has acknowledged;

e) Furthermore, Plaintiff has no knowledge regarding which neonicotinoid-treated seeds have been used in his area, if any, nor who used the seeds or whether they were used in accordance with the instructions given; and

f) Finally, Plaintiff freely acknowledges that "*tout le monde*" wants to use these seeds, to the point where they are the only seeds available on the market.

87. There is no evidence that Bayer failed to disclose relevant safety information which might have led to the rejection of its registration applications for imidacloprid and clothianidin by the PMRA. At most, there are only bald assertions to this effect, and these assertions are insufficient as a matter of law.[12]

[49] The role of the Court in determining whether the criteria of article 575 C.C.P. have been satisfied is well set out by Justice Hamilton in *Zuckerman c. Target Corporation*:

> [57] The recent jurisprudence of the Supreme Court of Canada and the Court of Appeal makes it very clear that the role of the Court at the authorization stage with respect to the merits of the proposed class action is very limited: the Court is acting as a filter and should refuse authorization only where the proposed class action is frivolous and has no chance of success. In that analysis, the burden on the petitioner is to demonstrate a *prima facie* or arguable case in light of the facts and the applicable law. This means that the petitioner must allege, with sufficient precision and with some supporting evidence, all of the elements of a valid cause of action. The Court is to assume that the petitioner will be able to prove the allegations at trial, unless they are too vague, general or imprecise to amount to anything more than speculation or hypotheses on the petitioner's part or they are clearly contradicted by uncontroverted evidence. The Court must then assess whether the allegations are sufficient for a valid cause of action.
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> [58] The Court will therefore find that the petitioner has not met the condition in Article 575(2) in the following circumstances:
>
> - The petitioner fails to allege an essential element of the recourse that he or she seeks to institute;

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[12] Defendant Bayer's argument.

- The allegations are too vague to amount to anything more than supposition on the petitioner's part;
- Allegations which are essential to the recourse are clearly contradicted by uncontroverted evidence; or
- The recourse that the petitioner seeks to institute is not valid as a matter of law.[13]

[References omitted]

[50] The Court might also look to the words of the Court of Appeal in *Charles c. Boiron Canada inc.*:

> [43] En somme, cette condition sera remplie lorsque le demandeur est en mesure de démontrer que les faits allégués dans sa demande justifient, *prima facie*, les conclusions recherchées et qu'ainsi, il a une cause défendable. Toutefois, des allégations vagues, générales ou imprécises ne suffisent pas pour satisfaire ce fardeau. En d'autres mots, de simples affirmations sans assise factuelle sont insuffisantes pour établir une cause défendable. Il en sera de même pour les allégations hypothétiques et purement spéculatives. Selon l'auteur Shaun Finn, en cas de doute, les tribunaux penchent en faveur du demandeur sauf si, par exemple, les allégations sont manifestement contredites par la preuve versée au dossier.[14]
>
> [References omitted]

[51] The principle concerns for the Court are the somewhat vague nature of some of the allegations and the fact that certain allegations do not appear to be true.

[52] Firstly, the harmful nature of neonicotinoids has never been hidden by Defendants. Several of the exhibits produced by Mr. Martineau demonstrate this.

[53] Exhibit P-11 is a September 7, 2001 document where the PMRA acknowledges the toxicity of imidacloprid to bees.

[54] In Exhibit P-65, Bayer specifically admits that neonicotinoids are harmful to bees.

[55] However, even acknowledging that Defendants did not hide the potential toxicity, did they do everything required to eliminate or reduce its effects? Only a trial on the merits will allow the answer to the question.

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13 2017 QCCS 110.
14 2016 QCCA 1716.

[56] The allegations of negligent research and manufacture, and that even when used as directed the use of neonicotinoids is contrary to sustainable pest management, also lack precision. However, in the Court's view, at this juncture there is a sufficiently defendable case that Defendants may have been negligent. In particular, the Court notes that the appropriate method of using neonicotinoids seems to have evolved over the class period.

[57] Exhibits P-42, 43 and 44 relate problems caused to bees in 2010 and 2012 and linked to the use of neonicotinoids. Then in Exhibit P-46 the PMRA itself questioned the sustainability of the continued use of neonicotinoids, such that the practices for their application were changed for the 2013 growing season. These elements of the file leave unanswered questions that can only be properly answered at a full trial. Firstly, what role, if any did Defendants play in the recommendations to the PMRA in respect of the appropriate application of neonicotinoids, both before the changes in 2013 and after. What research did they do on the optimal application or seeding of coated seeds to prevent damage to pollinators? Without answering the question at this juncture, the Court can see a potential issue in this area, particularly given that the recommended application methods changed during the class period.

[58] Another one of Bayer's arguments that fails at this juncture is that "when used responsibly and in accordance with usage recommendations, neonicotinoids do not represent an unacceptable risk to pollinators."[15] Firstly what constitutes an unacceptable risk is not a determination that Bayer can make itself. Only scientific proof will allow the Court to decide whether the risk is acceptable. Moreover, as the Court has said, the recommendations on usage have evolved, which also supports the conclusion that more evidence is likely required.

[59] In saying this, the Court does not discount the role of the PMRA. Nor does it ignore Bayer's affirmation that it has fully complied with the PMRA's requirements. However, in the Court's view neither the fact that the neonicotinoid products are sold in a controlled environment, nor the fact that Defendants may have fully complied with the PMRA, eliminates the possibility that Mr. Martineau may be able to demonstrate that Defendants were at fault in the manufacture and sale of the products.[16]

[60] There may also be an issue of whether the farmers using coated seeds followed the proper methods of application. Even assuming that they did not, this would not eliminate a potential finding of fault against Defendants. Perhaps they were at fault in the establishment of the seed application criteria.

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15 Defendant Bayer's argument, para. 11.

16 Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, "La classification des fautes" in *La responsabilité civile, Volume I – Principes généraux*, 8th ed., Éditions Yvon Blais, 2014, EYB2014RES19; *Bélanger c. Fédération, compagnie d'assurance du Canada*, REJB 1998-09965 (C.A.), 1998 CanLII 12569 (QC CA).

[61] In any event the contributory fault of another party is not a reason to refuse to authorize a class action. This was discussed by Justice Lalonde in *Thibault c. St. Jude Medical Inc.*:

> [68] Mais la preuve que suggère la requérante n'est pas impossible à faire, d'autant plus qu'elle soutient que la valve Silzone peut avoir contribué à sa condition de santé actuelle. La causalité sera établie si la requérante prouve, selon la norme applicable en matière civile, que St. Jude Medical, par sa faute, a causé ou contribué au préjudice allégué. La responsabilité du fabricant ne sera pas écartée du seul fait que d'autres facteurs qui ne lui sont pas imputables ont contribué au préjudice. Il suffit que la négligence du fabricant soit une cause contributive au préjudice allégué.[17]

[62] In the Court's view, at the filtering stage, the requirements of article 575(2) are satisfied.

7.3 Article 575 (3)

[63] Justice Nollet considers the appropriate analysis of the 575(3) criteria in *Brière c. Rogers Communications*:

> [71] Dans son livre *Le recours collectif,* Yves Lauzon énumère les divers facteurs retenus par les tribunaux dans l'analyse de la causalité entre « *composition du groupe* » et le fait qu'il est difficile ou peu pratique d'appliquer les articles 59 et 67 *C.p.c.*
>
> [72] Les éléments suivants s'appliquent : le nombre probable des membres; la situation géographique des membres; les coûts impliqués; et les contraintes pratiques et juridiques inhérentes à l'utilisation du mandat et de la jonction des parties en comparaison avec le recours collectif.
>
> [73] Dans Morin c. Bell Canada, la Juge Savard rappelle que les requérants n'ont pas à démontrer que l'application des articles 59 et 67 *C.p.c.* est impossible; ils doivent plutôt démontrer que l'application de ces articles est difficile ou peu pratique.[18]
>
> [References omitted]

[64] The information provided to the Court is that there are 300 members of the Québec Federation of Beekeepers operating six or more beehives. One might take the view that these 300 members are identifiable relatively easily. However, they are no doubt located in a rather wide geographical area in which coated seeds are used by farmers. In and of itself, the dispersion of the class members will make the application of the rules for mandates to take part in judicial proceedings impractical. Moreover, there may well be beekeepers with fewer than six hives who are also part of the class and very hard to identify.

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17 2004 CanLII 21608 (QC CS).
18 2012 QCCS 2733.

[65] Finally, the likely cost of this suit and the required expert evidence will make it difficult for most or many class members to assert their claims on an individual basis.

[66] In the circumstances, the Court considers that the conditions of article 575(3) are satisfied.

7.4 Article 575 (4)

[67] In *Infineon Technologies AG v. Option consommateurs*[19], the Supreme Court of Canada decided the following with respect to the ability of a plaintiff to represent the class:

> [149] Article 1003*(d)* of the *C.C.P.* provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [translation] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003*(d)*, the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.

[68] No conflict between Mr. Martineau and the other members of the class has been demonstrated.

[69] Clearly Mr. Martineau has an interest in the suit. He is a breeder of bees and alleges that he has suffered losses as a result of the Defendants' conduct. Defendant Bayer argues that other than his legal interest, through his conduct, Mr. Martineau has not demonstrated sufficient interest to adequately represent the members of the class.

[70] Bayer also relies on the question of competence to disqualify Mr. Martineau. Bayer alleges that Mr. Martineau has not made sufficient efforts to contact and identify other potential members of the class.

[71] With respect, the Court does not agree. Although the efforts of Mr. Martineau to contact class members have been minimal, there have been some. In addition, given that there is a federation of beekeepers, the ultimate identification of the potential class members should be fairly straight forward.

[72] Mr. Martineau also understands the beekeeping industry, having been involved for many years. He is one of the larger breeders and clearly has collaborated with the class lawyers to explain the science of bee breeding and the apparent effect of the neonicotinoids on bees.

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[19] [2013] 3 S.C.R. 600, 2013 SCC 59.

[73] He has also attended certain of the hearings before the Court and has submitted himself to cross-examination.

[74] The analysis of a plaintiff's ability to adequately represent the class was considered by the Court of Appeal in *Sibiga c. Fido Solutions inc.*:

> [108] [...] As one author observed, Quebec rules are less strict in this regard that certain other jurisdictions: not only does the petitioner not have to be typical of other class members, but courts have held that he or she "need not be perfect, ideal or even particularly assiduous". A representative need not single-handedly master the finery of the proceedings and exhibits filed in support of a class action. When considered in light of recent Supreme Court decisions where issues were equally if not more complicated, this is undoubtedly correct: in *Infineon*, for example, the consumer was considered a competent representative to understand the basis of a claim for indirect harm caused down the chain of acquisition for the sale of computer memory hotly debated by the economists; in *Vivendi*, the issue turned on the unilateral change by the insurer of in calculations of health insurance benefits to retirees and their surviving spouses; in *Marcotte*, the debate centered on currency conversion charges imposed by credit card issuers. It would be unrealistic to require that the representative have a perfect understanding of such issues when he or she is assisted, perforce, by counsel and, generally speaking, expert reports will eventually be in the record to substantiate calculations of what constitutes exploitative roaming fees.[20]
>
> [Reference omitted]

[75] Mr. Martineau may not be a perfect class representative, but he is clearly an adequate one.

7.5 The Common Questions

[76] The common questions are set out above.[21]

[77] In the conclusions of the application, Mr. Martineau also seeks an order for the collective recovery of damages awarded to the Class members as well as an order awarding punitive damages.

[78] Both Defendants take the position that the proposed common questions are not appropriate.

[79] Starting with the first question Bayer frames its opposition this way:

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20 2016 QCCA 1299.

21 *Supra*, para.14.

> 112. The relevant general question is therefore whether the ordinary use of neonicotinoids – use in accordance with their label and instructions and the standard of care of an ordinarily skilled farmer – can harm honeybee colonies to such an extent that commercial beekeepers suffer an economic loss.[22]

[80] Both Defendants also point out that they do not manufacture the same product. Bayer manufactures neonicotinoids containing clothianidin and imidacloprid, whereas Syngenta manufactures products containing thiamethoxam.

[81] The Court agrees with Defendants that the question must be reformulated to adequately reflect the differences in the manufactured products. However, it does not agree that liability can only be present in the situation of "use in accordance with their label and instructions and the standard of care of an ordinarily skilled farmer".[23] Perhaps the appropriate application methods were not properly researched by Defendants. Perhaps the labelling is deficient. These are matters that are properly dealt with on the merits of the application. The appropriate common questions around this issue would therefore be:

a) Can any neonicotinoid based pest control products researched, designed, developed, manufactured, marketed, distributed and sold by Bayer CropScience AG and/or BayerCrop Science Inc. and/or Bayer Inc. in Québec during the class period (i.e. imidacloprid, clothianidin and their related end-use products approved for agricultural use) cause honeybee colony loss resulting in financial damages or losses to commercial beekeepers?

b) Can any neonicotinoid based pest control product researched, designed, developed, manufactured, marketed, distributed and sold by Syngenta International AG and/or Syngenta Canada Inc. in Québec during the class period (i.e. thiamethoxam and its related end-use products approved for agricultural use) cause honeybee colony loss resulting in financial damages or losses to commercial beekeepers?

[82] In the Court's view, questions b), c) and d) proposed by Mr. Martineau, do not require restatement, other than to pose the questions separately for each Defendant.

[83] Question e) proposed by Mr. Martineau is more problematic. As set out by Bayer, this is not a case where collective recovery is likely. Although ultimately this will be a matter for the trial judge to decide,[24] each member of the class is very unlikely to have suffered the same level of damages if either Defendant is found to be at fault. This reality is explained by Bayer as follows and the Court agrees:

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22 Bayer's argument.

23 *Id.*

24 *Vermette v. General Motors du Canada ltée*, 2008 QCCA 1793.

> 130. If individual causation is established, such damages (if any) would necessarily vary from Class member to Class member: there is no alleged common injury in the present case and it is not possible to reasonably determine the total amount of the damages claimed without proof by individual Class members of their respective losses. For example, while Plaintiff's business focusses on queen bee rearing, the businesses of some Class members may focus on the sale of hive products (*e.g.*, honey, wax), and others may focus on providing pollination services. Those that provide multiple services may do so to varying degrees: *e.g.*, one Class member may derive 80% of her income from pollination services, 10% from rearing queens, and 10% from the sale of hive products while another may derive 50% of his income from pollination services, 50% from the sale of hive products, and nothing from queen rearing.[25]

[84] Another issue that the trial judge will have to consider is that agricultural conditions vary from one place to another. Even if the fault of Defendants, or of either of them, is established other factors may explain bee losses and those may be different between Mr. Martineau and other Class members.

[85] However, in the Court's view, the question posed by Mr. Martineau remains appropriate, as it is broad enough to allow for individual recovery if the trial judge decides that collective recovery is not possible.[26] It must, however be asked for each Defendant.

[86] The final questions relate to the solidarity of Defendants for damages, both punitive and compensatory.

[87] Mr. Martineau acknowledged at the hearing that there could be no joint and several liability for punitive damages. As to the possibility that punitive damages be awarded against either Defendant, it is covered in the third question on damages proposed by Bayer, which reads:

> 3. What is the nature and amount of the damages each member of the Class is entitled to?[27]

[88] Finally, the possibility of a solidary condemnation in compensatory damages. While the Court considers it unlikely that the elements required by article 1480 C.C.Q. will be satisfied, this cannot be ruled out at this stage. What if, for example in a particular corn growing area, the proof allows a conclusion that seeds using both the Syngenta product and the Bayer products have been planted? Determining individual liability may be impossible and the Court may need to have recourse to article 1480 C.C.Q.

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25 Bayer's argument.
26 *Vermette*, *supra* note 24, para. 63.
27 Bayer's argument, para. 134.

[89] An appropriate question would be: Are the Defendants jointly, or severally, liable for compensatory damages suffered by the Class?

FOR THESE REASONS, THE COURT:

[90] **GRANTS** Plaintiff's Application;

[91] **AUTHORIZES** the bringing of a class action generally described as follows:

A civil liability action for damages;

[92] **GRANTS** Plaintiff the status of representative for bringing the said class action for the benefit of the Class described as follows, namely:

All persons in Quebec who own or owned Bees in the Affected Area during the Class Period;

[93] **DECLARES** that the principal questions of fact and law be dealt with collectively and be identified as follows:

a) Can any neonicotinoid based pest control products researched, designed, developed, manufactured, marketed, distributed and sold by Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc. in Québec during the class period (i.e. imidacloprid, clothianidin and their related end-use products approved for agricultural use) cause honeybee colony loss resulting in financial damages or losses to beekeepers?

b) Can any neonicotinoid based pest control product researched, designed, developed, manufactured, marketed, distributed and sold by Syngenta International AG and/or Syngenta Canada Inc. in Québec during the class period (i.e. thiamethoxam and its related end-use products approved for agricultural use) cause honeybee colony loss resulting in financial damages or losses to beekeepers?

c) Did Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc. commit a fault in violation of section 1457 C.C.Q. in the research, design, development, manufacture, marketing, distribution and/or sale of neonicotinoids?

d) Did Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc. commit a fault in violation of section 1457 C.C.Q. by failing to warn the Class about the risks to Bees associated with neonicotinoids?

e) Did Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc. commit a fault in violation of section 1457 C.C.Q. by making misstatements with respect to the risks to Bees associated with neonicotinoids?

f) If the above questions are answered in the affirmative, did the Plaintiff and the Class suffer damages as a result of the conduct of Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc.?

g) Did Syngenta International AG and/or Syngenta Canada Inc. commit a fault in violation of section 1457 C.C.Q. in the research, design, development, manufacture, marketing, distribution and/or sale of neonicotinoids?

h) Did Syngenta International AG and/or Syngenta Canada Inc. commit a fault in violation of section 1457 C.C.Q. by failing to warn the Class about the risks to Bees associated with neonicotinoids?

i) Did Syngenta International AG and/or Syngenta Canada Inc. commit a fault in violation of section 1457 C.C.Q. by making misstatements with respect to the risks to Bees associated with neonicotinoids?

j) If the above questions are answered in the affirmative, did the Plaintiff and the Class suffer damages as a result of the conduct of Syngenta International AG and/or Syngenta Canada Inc.?

k) What is the nature and amount of the damages each member of the Class is entitled to?

l) Are the Defendants jointly, or severally, liable for compensatory damages suffered by the Class?

[94] **IDENTIFIES** the principal conclusions sought by the class action to be instituted as being the following:

GRANTS Plaintiff's action;

CONDEMNS Defendants Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc. to pay Plaintiff and the Class Members an amount to be determined as compensatory damages, the whole with interest and additional indemnity pursuant to section 1619 C.C.Q. from the date of service of the Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative;

CONDEMNS Defendants Bayer CropScience AG and/or Bayer CropScience Inc. and/or Bayer Inc. to pay Plaintiff and the Class Members an amount to be determined as punitive damages and/or grants Plaintiff and the Class Members such further relief as appropriate;

CONDEMNS Defendants Syngenta International AG and/or Syngenta Canada Inc. to pay Plaintiff and the Class Members an amount to be determined as compensatory damages, the whole with interest and additional indemnity pursuant to section 1619 C.C.Q. from the date of service of the Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative;

CONDEMNS Defendants Syngenta International AG and/or Syngenta Canada Inc. to pay Plaintiff and the Class Members an amount to be determined as punitive damages and/or grants Plaintiff and the Class Members such further relief as appropriate;

THE WHOLE with costs, including the costs of all exhibits, experts, expertise and publication notices.

[95] **CONVENES** the parties to a further hearing to hear representations on the content of the notice required under article 579 C.C.P., the appropriate communication or publication of the said notice and the appropriate delay for a Class Member to request exclusion from the Class, such hearing to take place within 60 days of the present judgment, on a date to be determined between the parties and the Court;

[96] **DECLARES** that any Class Member who has not requested exclusion from the Class shall be bound by any judgment to be rendered on the class action in accordance with the Code of Civil Procedure;

[97] **THE WHOLE**, with judicial costs, including the costs of the notices.

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Hearing dates: November 13 and 14, 2017