

**SUPERIOR COURT
(COLLECTIVE ACTION)**

**CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

No.: 500-06-001018-197

TRACEY ARIAL

-and-

CLAIRE O'BRIEN;

-and-

ERIKA PATTON

-and-

ZOE PATTON

-and-

ALEX TASCIYAN

-and-

MATTHEW NUCCIARONI

-and-

VITO DICICCO

Applicants

vs.

APPLE CANADA INC.

-and-

SAMSUNG ELECTRONICS CANADA

Defendants

**MODIFIED APPLICATION BY DEFENDANT APPLE CANADA INC.
FOR LEAVE TO ADDUCE EVIDENCE
(Article 574(3) CCP)**

**TO THE HONOURABLE JUSTICE PIERRE-C. GAGNON OF THE SUPERIOR COURT
OF QUEBEC, THE DEFENDANT, APPLE CANADA INC., RESPECTFULLY SUBMITS
THE FOLLOWING:**

I. Introduction

1. The Defendant, Apple Canada Inc. ("**Apple**"), seeks leave to file relevant and limited documentary evidence into the Court record.

2. Through this Application, Apple seeks to streamline the hearing on authorization, obtain focus and clarity on the issues of fact and law alleged by the Applicants, correct certain misinformation alleged by the Applicants and ensure an appropriate examination of the criteria for authorization.

II. Brief Description of the Proposed Class Action

3. On September 4, 2019, Applicants filed the *Motion for Authorization to Institute a Collective Action and to Obtain the Status of Representative*.
4. On December 15, 2019, Applicants filed the *Amended Motion for Authorization to Institute a Collective Action and to Obtain the Status of Representative* (the “**Amended Motion for Authorization**”).
5. Through the Amended Motion for Authorization, Applicants seek authorization from this Court to institute a class action on behalf of the following class:

“All persons in the Province of Quebec who purchased, leased and/or used the Phones, namely, iPhone 5s, iPhone 5C, iPhone 6, iPhone 6s, iPhone 6s Plus, iPhone SE, iPhone 7, iPhone 7 plus, iPhone 8, iPhone 8 Plus, iPhone X, iPhone XR, iPhone XS, iPhone XS Max, iPhone 11, iPhone 11 Pro, iPhone 11 Pro Max, Samsung Galaxy S7, Samsung Galaxy S8, Samsung Galaxy S9, Samsung Galaxy J3, Moto e5 Play, Moto g6Play, Vivo 5 Mini and all additional Samsung models sold from 2013 forward, and any other phones sold or marketed by Defendants from 2013 forward.”
6. Applicants essentially appear to allege that certain smartphone models emit radiofrequency (“**RF**”) radiation that exceeds safety standards set by the Federal Communications Commission (“**FCC**”).
7. More specifically, Applicants allege that Apple failed to take steps to prevent excessive RF radiation exposure, failed to warn of the dangers associated with using its products, and negligently advertised its products as being safe to use in close proximity to the human body.
8. Applicants also allege that RF radiation emitted by the “affected” iPhones constitutes an abnormal annoyance and thus an abuse of right and nuisance.
9. Applicants further contend that Apple failed to exercise reasonable care in selling smartphones that emit RF radiation at levels that exceed the FCC’s safety standards, and that Apple benefitted from its unlawful acts by receiving payments for the sale of the “affected” iPhones.
10. As such, Applicants claim damages as a result of being exposed to allegedly harmful levels of RF radiation.
11. Apple rejects the allegations made against it.

III. Application for Leave to File Relevant Evidence

12. Applicants appear to have filed the proposed class action following a report published by the Chicago Tribune in August 2019. This report allegedly suggests that certain smartphone models emit RF radiation that exceeds safety standards set by the FCC.
13. As appears from par. 51 to 68 of the Amended Motion for Authorization, Applicants rely heavily on the results indicated in the Chicago Tribune report, file a copy of this report at Exhibit P-3A, and even reproduce the test results in their claim.
14. However, the Chicago Tribune report paints a partial and inaccurate picture of the situation.
15. In reaction to the release of the report by the Chicago Tribune, the FCC conducted new testing on iPhones and concluded that they comply with the FCC RF radiation exposure limits and that iPhones do not produce evidence of violations of any FCC rules regarding maximum RF exposure levels.
16. Apple therefore seeks leave to file a copy of the FCC's "Results of Tests on Cell Phone RF Exposure Compliance" dated December 10, 2019 as **Exhibit APL-1**.
- 16.1. In a similar class action case filed in the United States, Northern District of California, against Apple Inc. and Samsung Electronics America Inc. (*Cohen v. Apple, Inc.*, File No. 3:19-cv-5322-WHA), the FCC recently filed a Statement of Interest, dated April 13, 2020. The Statement of Interest filed was in response to an invitation from the Court to "participate as an amicus curiae to better inform the Court on the proper application of its regulation and guidance' concerning radiofrequency emissions from cell phones".
- 16.2. In this Statement of Interest, the FCC summarizes and explains its findings reported in the document "Results of Tests on Cell Phone RF Exposure Compliance" (proposed Exhibit APL1) and reiterates its conclusion that RF emissions from FCC-certified cell phones pose no health risks, that all iPhones are FCC-certified and that the cell phone models mentioned in the report indeed comply with the FCC's RF standards.
- 16.3. Apple submits that this Court would benefit from the Statement of Interest dated April 13, 2020 filed by the FCC in the *Cohen v. Apple, Inc.* case and therefore seeks leave to file a copy of it as **Exhibit APL-9**.

- 16.4. For completeness and out of transparency, Apple also seeks leave to file a copy of the *Cohen v. Apple, Inc.* First Amended and Consolidated Class Action Complaint referred to above, as **Exhibit APL-10**, as well as a copy of the Court's Request for Federal Communications Commission to Appear as an Amicus Curiae in that case, as **Exhibit APL-11**.
17. At Exhibit P-3F, Applicants file an expert report by Magda Havas, in which Ms. Havas criticizes the RF limits currently in place in the United States and Canada and argues that they are not sufficient to protect the public. She also goes on to contend that RF radiation can cause cancer and a number of other adverse health effects.
18. However, the FCC itself has recently reviewed its RF safety standards and has recently issued a formal order in which it maintains its current RF exposure safety standards.
19. Excerpts from this formal order indicate the following:

“Moreover as noted by the FDA, there is no evidence to support that adverse health effects in humans are caused by exposures at, under, or even in some cases above, the current RF limits. Indeed, no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses.” (par. 12)

[...]

“Thus, even if certified or otherwise authorized devices produce RF exposure levels in excess of Commission limits under normal use, such exposure would still be well below levels considered to be dangerous, and therefore phones legally sold in the United States pose no health risks.” (par. 14)
20. Apple therefore seeks leave to file the FCC's “Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order” issued on December 4, 2019 as **Exhibit APL-2**.
21. In addition, the United States' Food and Drug Administration (“**FDA**”) recently issued a report and completed an updated RF exposure risk analysis based on relevant peer-reviewed studies published between 2008 and 2018. This report concludes the following:

“Based on the studies that are described in detail in this report, there is insufficient evidence to support a causal association between RFR exposure and tumorigenesis. There is a lack of clear dose response relationship, a lack of consistent findings or specificity, and a lack of biological mechanistic plausibility.” (p. 6)

22. To the extent that Applicants allege that RF exposure causes adverse health effects, Apple submits that the Court should be aware of this analysis recently conducted by the FDA.
23. Apple therefore seeks leave to file the FDA's "Review of Published Literature between 2008 and 2018 of Relevance to Radiofrequency Radiation and Cancer" published in February 2020 as **Exhibit APL-3**.
24. At par. 47 and 48 of the Amended Motion for Authorization, Applicants refer to and quote the "Legal" section of Apple's website with regard to RF exposure information for the iPhone 5 and file a copy of this page at Exhibit P-16.
25. To provide the Court with a complete picture of Apple's representations concerning RF exposure information, Apple seeks leave to file the RF exposure information it provides on its website for each device included in the proposed class, which are the following: iPhone 5s, iPhone 5C, iPhone 6, iPhone 6s, iPhone 6s Plus, iPhone SE, iPhone 7, iPhone 7 plus, iPhone 8, iPhone 8 Plus, iPhone X, iPhone XR, iPhone XS, iPhone XS Max, iPhone 11, iPhone 11 Pro and iPhone 11 Pro Max. (This information is also accessible on every individual iPhone through the settings application, as well as noted in literature that comes with iPhones.)
26. Apple therefore seeks leave to file copies of these pages from its website, as **Exhibit APL-4, en liasse**.
27. In addition, the specific absorption rate ("**SAR**") value of a specific cell phone model can be obtained directly from Industry Canada using the Industry Canada (IC) Certification Number for that model.
28. Apple seeks leave to file excerpts generated from Industry Canada's public website, showing the SAR values of the impugned Apple devices, as **Exhibit APL-5, en liasse**.
29. Further, throughout their Amended Motion for Authorization, Applicants refer to the RF exposure limits set by the FCC in the United States, but they fail to mention the standard in place in Canada.
30. The safety limits for human exposure to RF radiation in Canada are set by Safety Code 6.
31. In order to better assist the Court in understanding the RF safety exposure limits in place by Safety Code 6, Apple seeks leave to file both a copy of Safety Code 6 itself (in English and French) as **Exhibit APL-6** and the following publicly available documents from the government of Canada's website as **Exhibit APL-7, en liasse**: "Fact Sheet – What is Safety Code 6?" and "Understanding Safety Code 6".

32. Finally, it is worth noting that Class counsel had previously filed a proposed class action against 49 defendants, including Apple, claiming damages for the cumulative effects of electromagnetic field (“**EMF**”) radiation from various types of electronic products, which was dismissed at authorization by Justice Morrison in *Durand v. Attorney General of Quebec*, 2018 QCCS 2817.
33. In order to provide the Court with a more complete picture of this similar proposed class action that was filed by Class counsel, Apple seeks leave to file a copy of the *Re-Re-Re-Re-Amended Motion for Authorization to Institute a Collective Action and to Obtain the Status of Representative* in the Durand case as **Exhibit APL-8**.

IV. Conclusion

34. Allowing this documentary evidence to be adduced will streamline the hearing on authorization, obtain focus and clarity on the issues of fact and law alleged by the Applicants, correct certain misinformation alleged and ensure an appropriate examination of the criteria for authorization.
35. Apple’s request to file evidence is necessary for this Court to fully understand the nature of this class action, and for Apple to mount a serious and informed contestation to the Applicants’ allegations of fact and law.
36. The permission sought here to file evidence meets the criterion of proportionality.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Application;

AUTHORIZE Apple to file Exhibit APL-1, Exhibit APL-2, Exhibit APL-3, Exhibit APL-4, Exhibit APL-5, Exhibit APL-6, Exhibit APL-7, [...] Exhibit APL-8, Exhibit APL-9 and Exhibit APL-10 as described above;

ALL OF WHICH IS SOUGHT without costs, unless the present Application is contested.

MONTREAL, April 27, 2020

McCarthy Tétrault S.E.N.C.R.L., s.r.l.

MCCARTHY TÉTRAULT LLP

Lawyers for Apple Canada Inc.