C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF MONTREAL

(Class Action)

SUPERIOR COURT

[…]

No: 500-06-001018-197

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Tracey Arial, 7353 Dunver, Verdun, Qc., H4H 2H6; **Claire O'Brien**, 5975 Cote St Antoine, Apt. 17 Montreal, Qc., H4A 1S6; **Erika and Zoe Patton**, 665 Verdure, Brossard, Qc., J4W 1R5; **Alex Tasciyan**, 616 De Namur, Saint-Lambert, Qc., J4S 1Z4; **Mathew Nucciaroni**, 5552 Snowden Apt. 5, Montreal, Qc., H3X 1Y9 and **Vito DeCicco**, 222 Georges-Vanier Blvd., Montreal, Qc., H3J 2Z1

Plaintiffs/Petitioners

vs.

Apple Canada Inc., 120 Bremner Blvd. #1600, Toronto, Ont., M5J 0A8 and **Samsung Electronics Canada**, 2050 Derry Rd. W. Mississauga, Ont., L5N 0B9

Respondents

AMENDED MOTION FOR AUTHORIZATION TO INSTITUTE A COLLECTIVE ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE

(Articles 571 ff., C.C.P.)

INTRODUCTION

1. If a cellphone is marketed and sold to consumers, the device is never supposed to exceed the maximum allowable limit for radiofrequency ("RF") radiation exposure.

2. Defendants […] sell some of the most popular smartphones in the world, including Apple's iPhones and Samsung's Galaxy phones by marketing them as emitting less RF radiation than that set by standards and as being completely safe to carry and use on or in close proximity to the human body.

3. Hold your smartphone to your ear for a phone call? No problem, say Defendants. Carry your smartphone in your back pocket? Of course, say Defendants. Use your smartphone to conduct a sonogram of your unborn child in utero? That's ok too, according to Samsung.

4. In fact, however, recent testing of Defendants' products shows that the potential exposure for an owner carrying the phone in a pants or shirt pocket was over the exposure limit, sometimes far exceeding it – in some instances by 500 percent.

5. Numerous recent scientific publications, supported by hundreds of scientists worldwide, have shown that RF radiation exposure affects living organisms at levels well below most international and national guidelines. Effects include increased cancer risk, cellular stress, increase in harmful free radicals, genetic damages, structural and functional changes of the reproductive system, learning and memory deficits, neurological disorders, and negative impacts on general well-being in humans. Thus, Defendants' design, manufacture, and sale of smartphones that far exceed […] applicable guidelines exacerbate the health risks to Plaintiffs and the Classes.

6. Plaintiffs thus bring this Complaint for negligence, breach of warranty, consumer fraud and unjust enrichment, seeking material, moral and punitive (treble) damages, the costs of medical monitoring, restitution and injunctive relief.

PARTIES

Plaintiffs

7. Tracey Arial is a […] creative entrepreneur who lives in Verdun, Montreal, Quebec. She purchased a Samsung Galaxy S8 (SM-G950W) in August of 2018, prior to this time she owned and used a Samsung Galaxy S5 (SM-G903W). Arial regularly carries and uses the phone on or near her body. […] Despite having taken precautionary measures to minimize her exposure, including choosing a cell phone model that expressly says it emits lower radiation than standards allow, that publicly presents itself as emitting lower radiation than other brands do, the use of air tube headphones, using speakerphone mode to avoid holding the phone to her head, and carrying the phone in a shielded radiation-reducing pouch when streaming media; Arial would not have purchased the phone and/or would not have paid as much for the phone had she understood the real risk of radiation exposure emitted. As a result of Samsung's actions as alleged herein, Arial has been damaged and is now at risk for problems associated with RF radiation exposure.

8. Claire O'Brien leased a Samsung A-20 in June of 2019. Once she learned of the exposure caused by her phone she decided to take protective measures including never carrying her phone directly against her body, always in a purse or bag. At night she places her phone away from her bed, on the dresser 4 (four) feet away. While talking on her phone she uses the speaker or ear phones. She only turns on her data when necessary. She keeps her location indicator off, wi-fi off and keeps the blue light filter on.

9. Erika Patton, a resident of Brossard, Quebec, previously owned an iPhone 6S plus for 1 year in 2018 and an iPhone 6s for two years in 2016. She then inherited her boyfriend's Samsung Galaxy S8 plus in August 2019, and regularly carries and uses the phone on or near her body. She would not have used the phone and/or would not have paid as much for the phone had she understood the risk of radiation exposure from the phone. She now takes extra precautions to protect herself from the exposure of the phone by using a protective pouch for the phone as well as airtube headphones in order to make calls and listen to music.

10. Alexander Tasciyan, who previously owned Erika Patton's Samsung Galaxy S8 plus since 2016, now owns a Samsung Galaxy S10 plus since August 2019, which he carries on his person for most of the day. He also owned an iPhone 5s for a period of 2 years back in 2014. Had he known in advance about the EMF dangers associated with his device, he wouldn't have purchased a newer version of the phone. Nevertheless, he is now taking extra precaution to protect himself from the device such as using a protective case and airtube headphones.

11. Matthew Nucciaroni purchased a Samsung S7 in 2016.

12. Vito DeCicco bought an iPhone 7 about 3 years ago. Once he learned of the EMF risk of his phone, he decided to use a protective case and air tube headphones.

13. Zoe Patton owned an iPhone 5C in 2017, then owned an iPhone 6S plus for 2 years until she acquired her iPhone 8 plus, which she is currently using.

14. Plaintiffs are collectively referred to as the "Apple Plaintiffs" and the "Samsung Plaintiffs". The Apple Plaintiffs and Samsung Plaintiffs are collectively referred to as "Plaintiffs."

Defendants

15. Apple, Inc. ("Apple") is a California corporation and has an office in Ontario at 120 Bremner Boulevard #1600, Toronto, M5J A08. Apple designs, manufactures and sells various consumer electronics, computer software and online services. Apple's consumer electronics products include the iPhone 8 and iPhone X. Apple transacts substantial business throughout the Province of Quebec, through advertising, marketing and ownership of numerous Apple retail stores throughout Quebec. Apple also transacts business nationwide with 22 Apple stores in Canada, advertising, marketing, distributing and selling its iPhone products nationwide and ownership of Apple retail stores.

16. Samsung Electronics Canada, Inc. ("Samsung") maintains its principal place of business at 2050 Derry Rd. W., Mississauga, Ontario.

17. Samsung transacts substantial business throughout Quebec and also transacts business nationwide, advertising, marketing, distributing and selling its smartphone products nationwide.

SUBSTANTIVE ALLEGATIONS

The Role of Smartphones in North American Culture

18. According to Pew Research Center, 96 percent of Americans own a cellphone of some kind.[1] Of those, 81 percent own smartphones,[2] up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011.[3]

[1] **Exhibit P-1:** https://www.pewinternet.org/fact-sheet/mobile/.
[2] PC Magazine defines the term "smartphone" as "[a] cellphone and handheld computer that created the greatest tech revolution since the Internet. A smartphone can do everything a personal computer can do, and because of its mobility, much more . . . A smartphone combines a cellphone with e-mail and Web, music and movie player, camera, camcorder, GPS navigation, voice recorder, alarm clock, flashlight, photo album, address book and a lot more. It is also a personal assistant that delivers information and answers questions about almost everything …. A lot more personal than a personal computer, a smartphone is generally within reach at all times." See **Exhibit P-2:** http://www.pcmag.com/encyclopedia/term/51537/smartphone
[3] *Id.*

19. Roughly 20 percent of American adults are "smartphone-only" internet users, meaning they own a smartphone but don't otherwise subscribe to internet service.[4]

20. According to the August 22 2019 article in the Chicago Tribune, filed herewith as **Exhibit P-3A**, there are currently an estimated 285 million smartphones in active use in the United States.[5]

21. And, 29 percent of U.S. teens sleep with their cellphones in bed with them, according to a 2019 report by the non-profit organization Common Sense Media.

Defendants Market and Sell Their Smartphones as Being Safe to Use on and Close to the Human Body at All Times

22. Widely recognized as Apple's premier product line, iPhone is a line of industry-leading smartphones that debuted on June 29, 2007.

23. When Steve Jobs introduced the iPhone in 2007, he described it as "the Internet in your pocket for the first time ever." He emphasized that the "iPhone is like having your life in your pocket."[6] And displayed behind Jobs as he launched the iPhone was the following picture:

24. In July of 2016, Apple celebrated the sale of its billionth iPhone.[7] Apple included within the press release announcing that milestone sale the following quote from its CEO Tim Cook: "iPhone has become one of the most important, world-changing and successful products in history. It's become more

[4] *Id.*
[5] **Exhibit P-3A:** https://www.chicagotribune.com/investigations/ct-cell-phone-radiation-testing-20190821-72qgu4nzlfda5kyuhteiieh4da-story.html
[6] **Exhibit P-4:** https://thenextweb.com/apple/2015/09/09/genius-annotated-with-genius/
[7] **Exhibit P-5:** https://www.apple.com/newsroom/2016/07/apple-celebrates-one-billion-iphones.html

than a constant companion. iPhone is truly an essential part of our daily life and enables much of what we do throughout the day." [8]

25. Throughout the years, Apple has continued to expound on the theme of keeping the iPhone in your pocket. In May 2018, Apple released a commercial for iPhone X, touting the phone's camera and portrait lighting capabilities. In the ad, a woman is seen taking the iPhone X out of her pocket. Immediately, lights, umbrellas and all of the other trappings of a professional studio appear around her.[9] The commercial ends with the slogan "Studio in Your Pocket". [10]

26. Apple's commercials also regularly show people listening to music through headphones with their iPhones in their pockets[11] or using the iPhones while holding it in their bare hands.[12]

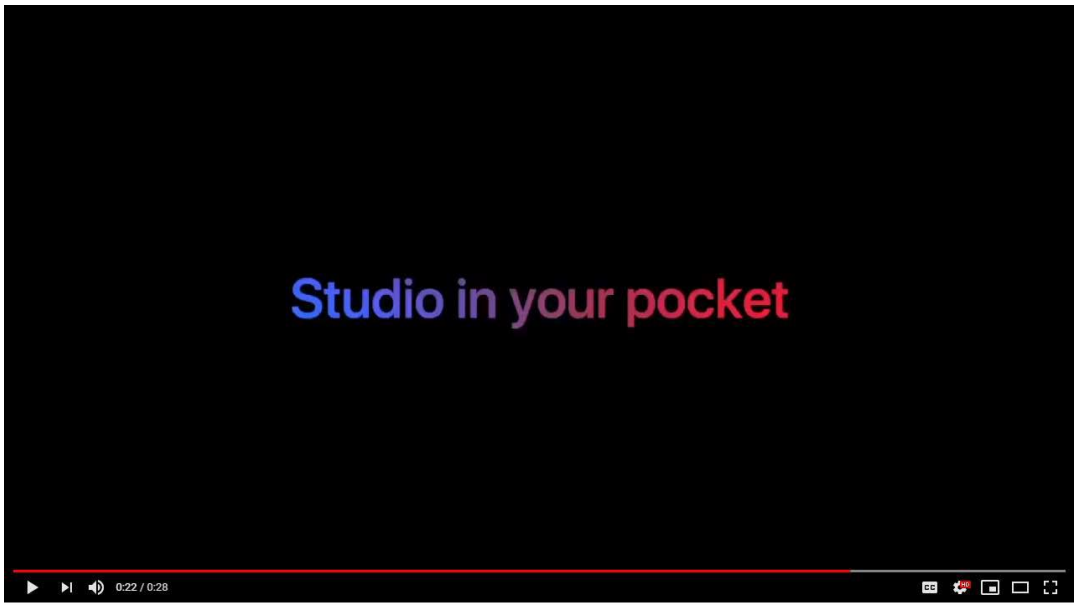
27. Apple's commercials show people using iPhones in their beds,[13] even being held against a person's body as they fall asleep while watching a video. [14]

28. Following Apple's lead, Samsung launched the first android-based smartphone in April 2009. The Galaxy S series of smartphones has made Samsung the biggest seller of smartphones in the world.

29. Like Apple, Samsung advertises people using its smartphones in close proximity to their bodies.

30. For example, one commercial shows a pregnant woman lying in bed and touching the cell phone to her belly to take a sonogram of her child in utero. In the same commercial, a child has his smartphone tucked into his backpack. [15]

[8] *Id.*
[9] **Exhibit P-6:** https://youtu.be/HYO0zkdAqlc
[10] *Id.*
[11] **Exhibit P-7:** https://www.ispot.tv/ad/wC3Y/apple-iphone-x-sway-song-by-sam-smith
[12] **Exhibit P-8:** https://www.ispot.tv/ad/I9eg/apple-iphone-privacy-on-iphone-inside-joke
[13] **Exhibit P-9:** https://www.ispot.tv/ad/IjPm/apple-iphone-xr-and-xs-depth-control-alejandro ; https://www.ispot.tv/ad/I_8y/apple-iphone-private-side
[14] **Exhibit P-10:** https://www.ispot.tv/ad/oVp4/apple-iphone-xr-battery-life-up-late-song-by-julie-andrews
[15] **Exhibit P-11:** https://www.adsoftheworld.com/media/film/samsung_samsung_galaxy_the_future



31. Another commercial shows a hiker taking the Samsung phone out of her back pants' pocket at the summit.[16] Thus, at all relevant times, Defendants have touted the use of their smartphones as being safe and appropriate to use while touching or within close proximity to the human body.

32. Samsung's phones direct users to "Mobile Communications and Health" (https://www.youtube.com/watch?v=OlEZ8Cj3YGk) a nine-year-old video produced by the Mobile & Wireless Forum (The MWF is an international association of companies with an interest in mobile and wireless communications including the evolution to 5G and the Internet of Things).[17] That video shows its actors all holding their phones directly to their heads. The video is painfully misleading and pitches the propaganda that there are no adverse health effects from non-ionizing radiation. It claims there are "wide safety margins" to protect consumers. This propaganda video is patently false and based in false industry-funded science. This intentional misleading of consumers justifies the award of punitive and/or treble damages. *It claims "No scientific or health agency has concluded that there is any risk associate with the electromagnetic fields from wireless devices. This claim is false and intentionally misleading.*

The Dangers of Cellphone Exposure

Radio Frequency (RF) Exposure

33. Cellphones use radio waves to communicate with a vast network of fixed installations called base stations or cell towers. These radio waves are a form of electromagnetic radiation, in the same frequency range used by TVs and microwave ovens.

34. The public relations position from cellphone manufacturers, including Defendants, is that this kind of radiation, also known as radio frequency (RF) exposure, is not the same as ionizing radiation, such as gamma rays and X-rays, which can strip electrons from atoms and cause serious biological harm, including cancer.

[16] **Exhibit P-12:** https://www.bestadsontv.com/ad/107658/Samsung-Do-What-You-Cant
[17] **Exhibit P-3E:** https://www.youtube.com/watch?v=OlEZ8Cj3YGk

35. However, RF exposure, sometimes also called non-ionizing electromagnetic field exposure, at high levels can heat biological tissue and cause harm. Eyes and testes are especially vulnerable because they do not dispel heat rapidly.

36. In fact, in 2015, more than 150 scientists from around the world sent an appeal to the United Nations and World Health Organization, calling for more protective RF exposure guidelines, and education of the public concerning the attendant health risks, particularly to children and fetal development.

37. The appeal, titled "International Appeal: Scientists call for Protection from Non-ionizing Electromagnetic Field Exposure," as of August 25, 2019 has been signed by 250 EMF scientists.[18]

38. In relevant part, the appeal explained the risk of RF exposure:

> Numerous recent scientific publications have shown that EMF affects living organisms at levels well below most international and national guidelines. Effects include increased cancer risk, cellular stress, increase in harmful free radicals, genetic damages, structural and functional changes of the reproductive system, learning and memory deficits, neurological disorders, and negative impacts on general well-being in humans.

39. […] Moreover, […] the largest study to date indicates "clear evidence" of cancerous heart tumors in male rats exposed to cellphone radio-frequency radiation according to work published by the National Toxicology Program ("NTP") research group within the National Institutes of Health, U.S. Department of Health and Human Services in the fall of 2018.

40. The NTP studies were conducted to test the assumption that cell phone radiofrequency radiation could not cause cancers or other adverse health effects (other than by tissue heating) because this type of radiation (non-ionizing) did not have sufficient energy to break chemical bonds. [19]

41. The results of the NTP studies demonstrated that cell phone radiation caused Schwann cell cancers of the heart and brain gliomas in rats, as well as DNA damage in the brain. [20]

42. Consistent with these findings, in May 2011, the International Agency for Research on Cancer (IARC), a part of the World Health Organization, classified radio-frequency radiation from wireless devices as a "possible human carcinogen" based largely on findings of increased risks of gliomas (a malignant type of brain cancer) and Schwann cell tumors in the brain near the ear in humans after long term use of cellphones.[21] Thus, the same tumor types are elevated in both animals and humans exposed to cell phone radiation.

Testing for RF Exposure

43. […] When cellphones hit the market in the 1980s, authorities set exposure limits to address […] heating risks of cellphones and did not consider other ill effects. Limits were based on studies showing adverse effects in animals exposed to enough radiofrequency radiation to raise their body temperature by 1 degree Celsius. Using this finding, authorities built in a 50-fold safety factor to calculate a safety limit for humans.

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[18] **Exhibit P-13:** https://www.emfscientist.org/index.php/emf-scientist-appeal
[19] **Exhibit P-14:** https://thehill.com/opinion/healthcare/416515-theres-a-clear-cell-phone-cancer-link-but-fda-is-downplaying-it
[20] *Id.*
[21] **Exhibit P-15:** https://www.iarc.fr/wp-content/uploads/2018/07/pr208_E.pdf

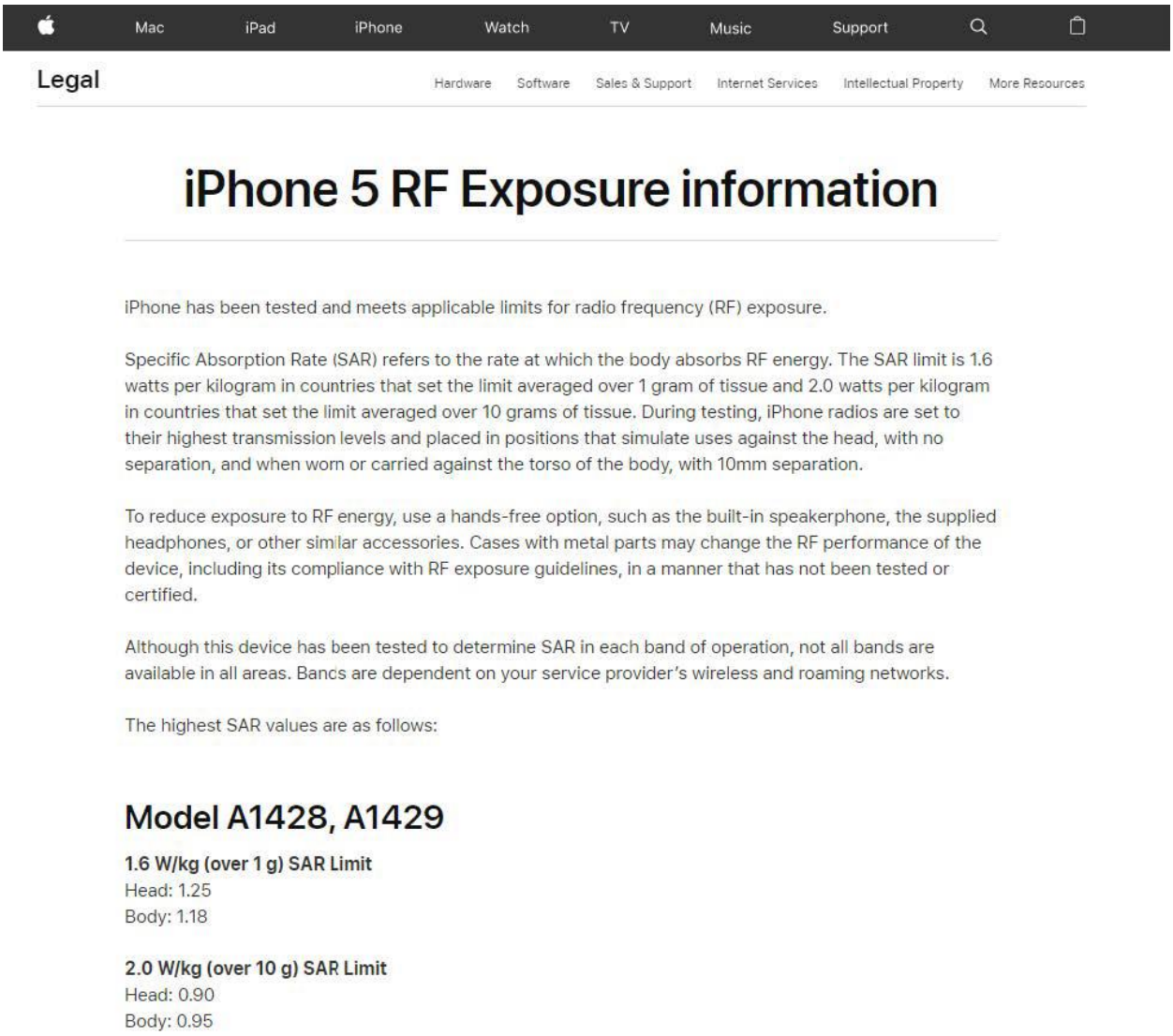
44. The final rule, adopted by the Federal Communications Commission ("FCC") in 1996, stated that cellphone users cannot potentially absorb more than 1.6 watts per kilogram averaged over one gram of tissue. To demonstrate compliance, phone makers were told to conduct two tests: when the devices were held against the head and when held up to an inch from the body.

45. Before a new cellphone model can be brought to market, a sample phone must be tested and comply with an exposure standard for radiofrequency radiation.

46. Companies testing a new phone for compliance with the safety limit are permitted to position the phone up to 25 millimeters away from the body — nearly an inch — depending on how the device is used.

47. Nonetheless, on its website, in the "Legal" section, Apple warrants that it tests the iPhone at the "highest transmission levels and placed in positions that simulate uses against the head, with no separation, and when worn or carried against the torso of the body, with 10mm separation." [22]

[22] **Exhibit P-16:** https://www.apple.com/legal/rfexposure/iphone5,1/en/(emphasis supplied); Apple also warrants that it tests its iPods at 5mm separation.https://www.apple.com/legal/rfexposure/ipod5,1/en/



48. For some past models, Apple's website told users of the iPhone 4 and 4s: "Carry iPhone at least 10mm away from your body to ensure exposure levels remain at or below the as-tested levels." The site says those phones were tested at a distance of 10 millimeters.

49. When Apple submitted its application to the FCC to market the iPhone 7, the company included a similarly worded radiation statement, suggesting users carry the device at least 5 millimeters from the body, records show. But iPhone 7s (and subsequent models) sold to the public did not include that advice.[23]

50. Similarly, […] Samsung provides users the opportunity to check the RF emission levels on its website. Samsung represents not only that its smartphones meet federal requirements, but also that "Body-worn SAR testing has been carried out at a separation distance of 0.0 cm." Samsung thus implies that using,

[23] **Exhibit P-3A** *supra*.

carrying or wearing its smartphones on or in close proximity to the human body is completely safe.

Testing RF Exposure Shows Clear Risk to Plaintiffs and the Class

51. Beginning in or about August 2018, the Chicago Tribune hired RF Exposure Lab in San Marcos, California to measure eleven different cellphone models for radiofrequency radiation.[24]

52. RF Exposure, an accredited testing lab recognized by the FCC, has conducted radiation tests for fifteen years for wireless companies seeking FCC approval for new products.[25]

53. In August and October 2018, twelve phones were tested: three iPhone 7s, an iPhone X, an iPhone 8, an iPhone 8 Plus, a Galaxy S9, a Galaxy S8, a Galaxy J3, a Moto e5 Play, a Moto g6Play and a Vivo 5 Mini (collectively, the "Affected Phones").[26]

54. According to the lab, all of the tests were done in accordance with FCC rules and guidelines.[27]

55. In one phase of the testing, all phones were positioned at the same distance from the simulated body tissue that the manufacturers chose for their own tests — from 5 to 15 millimeters, depending on the model.[28]

56. Prior to each test, the laboratory reviewed the publicly-available testing data that phone manufacturers had submitted to the FCC to demonstrate compliance with radiofrequency radiation limits and gain permission to market the devices.[29]

57. For each phone model, the laboratory determined which licensed band, frequency and channel yielded the highest radiofrequency radiation reading in the manufacturer's own tests, and then replicated this configuration.[30]

58. Plaintiffs expect that the list of smartphones included in this group will expand with discovery and reserve their right to amend accordingly. They currently seek conclusions concerning all phones sold or marketed by Defendants in Quebec or Canada from 2013 forward.

59. To conduct the tests, each phone was placed underneath a tub containing specially formulated liquid intended to simulate the electrical properties of human body tissue.[31]

60. The laboratory used a base station simulator to place a call to the phone and adjusted the base station's settings to replicate the desired configuration, causing the phone to operate at full power.[32]

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[24] **Exhibit P-3A** *supra*
[25] *Id.*
[26] *Id.* Plaintiffs expect that the list of smartphones included in this group will expand with discovery.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

61. A probe attached to a robotic arm then moved in the liquid for eighteen minutes, taking 276 measurements of the radiofrequency radiation absorbed. The results constituted the Specific Absorption Rate, or SAR, which must be under the federal safety limit.[33]

62. Two tests were conducted on each phone. In the first tests, each device was placed the same distance away from the outside of the tub that the manufacturers selected when they tested the phone.[34]

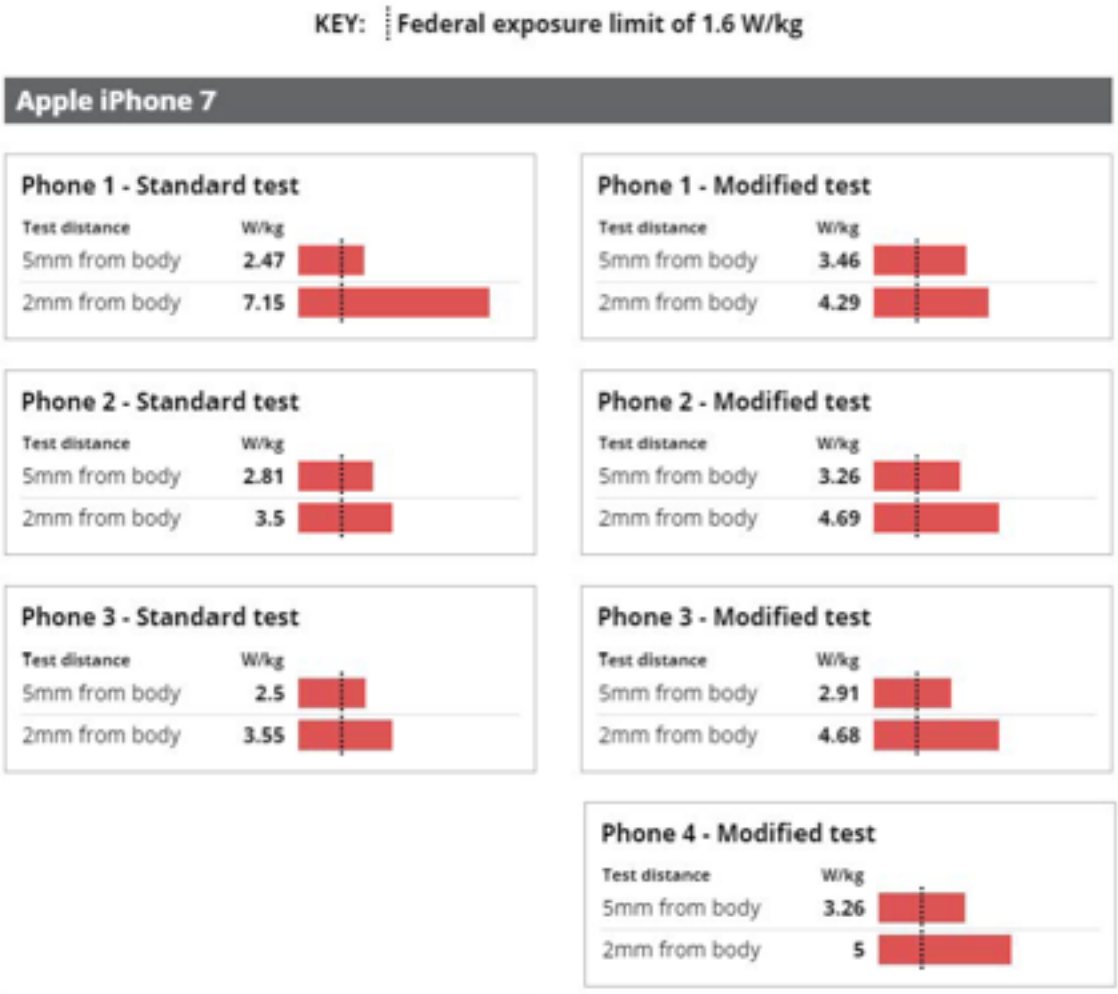
63. In the second test, the phones were placed 2 millimeters from the tub, a smaller distance meant to reflect a phone being carried in a pants or shirt pocket, based on actual measurements of pieces of dress shirts, T-shirts, jeans, track pants and underwear.[35]

64. In a second round of testing in March 2019, a person touched or grasped the originally- tested iPhones, plus one additional one, for the duration of the process. This was action intended to activate sensors designed to reduce the phones' power.[36]

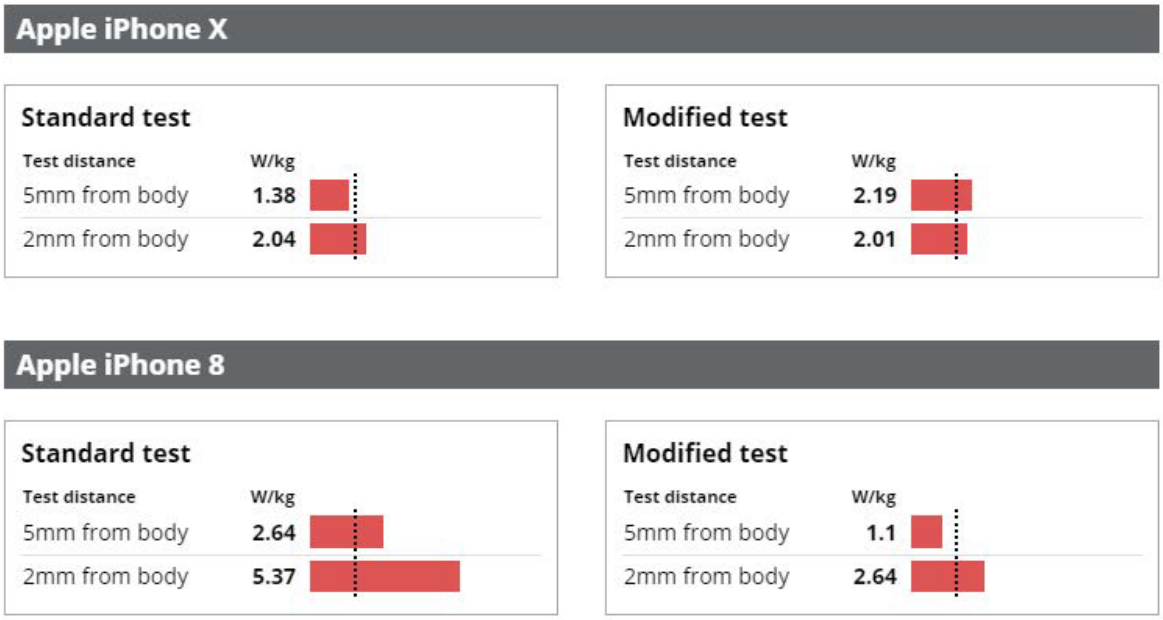
65. The results by model follow.

66. For the iPhone 7 models, in the original or standard test at 5 millimeters, the RF exposure averaged 2.59 W/kg – more than the 1.6 W/kg limit. In the second or modified test at 5 millimeters, the RF exposure averaged 3.225 W/kg – more than twice the federal exposure limit.[37] At 2 millimeters, results from the original and modified tests ranged from 3.5 W/kg to 7.15 W/kg.

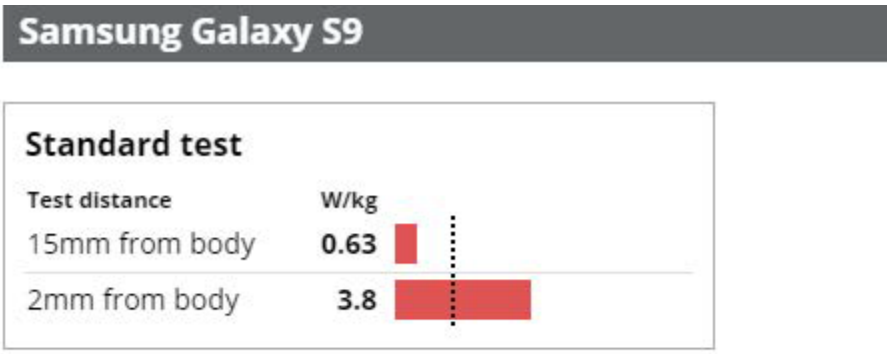
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] **Exhibit P-3A** *supra*

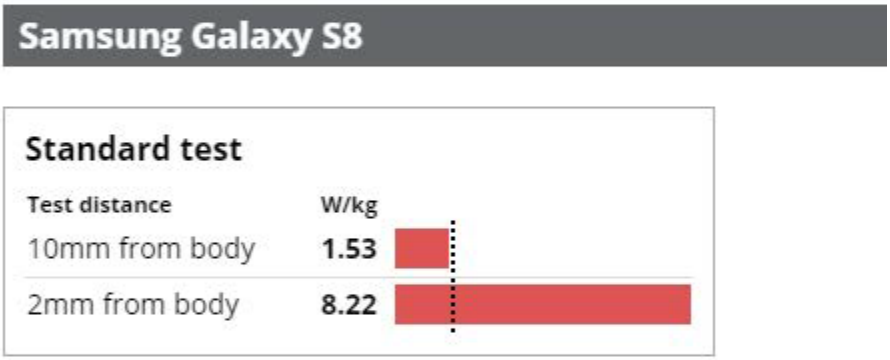


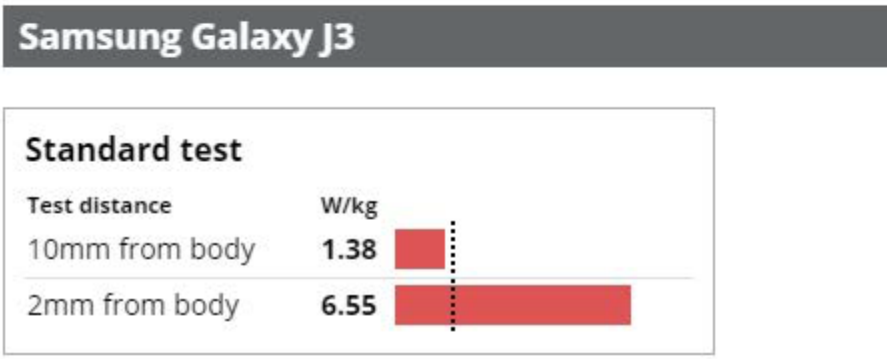
The Apple iPhone X and iPhone 8 each scored three out of four tests above the […] federal limit of 1.6W/kg:



When tested at 2 millimeters, the Samsung Galaxy S8 exceeded the federal limit by more than 500 percent:







67. These results are not an aberration, but instead reflect actual emissions conducted by an FCC-accredited laboratory under the same conditions used by the manufacturers themselves.

68. Notwithstanding these results and the studies reflecting the dangers inherent at these levels, Defendants have failed to take steps to prevent this excessive RF radiation exposure or to warn Plaintiffs and the Class of the dangers associated with using their products.

69. Prior to the Chicago Tribune testing, two other sets of test results indicated similar fraudulent testing by Defendants:

    (a) Worst case adult testing done for reporter Wendy Mesley's March 24 2017 CBC Marketplace, of 3 Smart Phones, including the iPhone 7 and Samsung Galaxy S7, alleging a failure to properly test

and inform consumers of health risks resulting from cell phone radiation levels which cause a higher incidence of brain, breast and other cancers in Canada, filed herewith as **Exhibit P-3B** *en liasse*[38];

(b) The French "Phonegate" testing, made public in 2017, indicated that a number of European Smart Phone models, including the iPhone 5, failed to meet the far more restrictive European standards, as indicated in the studies filed herewith *en liasse* as **Exhibit P-3C**.[39] On October 21, 2019 the French regulator ANSES made public part of its July 2019 study "Mobile phones close to the body and health", filed herewith as **Exhibit P-3D**[40], which called upon public authorities and the cell phone industry to face their health responsibilities and recommends, *inter alia*, software updates and phone recalls, which measures are sought in the present proceedings;

(c) Defendants design and tune their phones to the threshold of FCC to maximize transmission power while still purportedly complying with it. The phone industry's self testing, designed in the 1990's for first generation phones, is so nonrepresentative of today's cell phone use and manipulated, that this testing must be considered negligent and knowingly misleading;

(d) The health effects and levels of exposure are described in the report prepared by Dr. Magda Havas, which, as well as her CV, is produced as **Exhibit P-3F** *en liasse*, and in the report prepared by Mr. Pedro Gregorio, which, as well as his CV, is produced as **Exhibit P-3G** *en liasse*[41].

CLASS ACTION ALLEGATIONS

70. The Apple Plaintiffs bring this action as a class action pursuant to Article 575 of the Quebec *Code of Civil Procedure* on behalf of themselves and all others similarly situated as members of the following "Apple Class": "All persons who purchased, leased or used an iPhone 5, 6, 7, 8, […], X or 11 for personal or household use or any other Apple phone from 2013 forward in the province of Quebec and in Canada."

71. The Samsung Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated as members of the following "Samsung Class": "All persons who purchased, leased or used a Samsung Galaxy S7, S8, S9, Moto e5 Play, Moto g6Play and Vivo 5 Mini or J3 for personal or household use or any other Samsung phone from 2013 forward in the province of Quebec and in Canada.

Common Questions of Law and Fact.

72. Common questions of law and fact applicable to all members of the Class predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

[38] **Exhibit P-3B**: https://www.cbc.ca/marketplace/episodes/2015-2016/the-secret-inside-your-phone
[39] **Exhibit P-3C**: https://data.anfr.fr/explore/dataset/das-telephoniemobile/table/?disjunctive.marque&disjunctive.modele).
[40] **Exhibit P-3D**: https://ese-ara.org/mediatheque/telephones-mobiles-portes-pres-du-corps-et-sante-avis-de-lanses-rapport-dexpertise
[41] **Exhibit** P3-F Havas Expert Testimony Quebec 2019 and P3-G Gregorio Expert Testimony Quebec 2019.

a. Whether Apple and Samsung properly tested their smartphones before selling them to the Plaintiffs and the Class;
b. Whether Apple and Samsung represented and/or warranted that their smartphones were safe for ordinary use;
c. Whether the smartphones were safe for ordinary use;
d. Whether the RF radiation from the smartphones placed Plaintiffs and Class members at risk for cancer and other health problems;
e. Whether Defendants owed a duty to Plaintiffs and Class members to disclose the dangers of their smartphones;
f. Whether Defendants intentionally misrepresented the safety of the Plaintiffs' and Class members' smartphones to them and the public;
g. Whether Plaintiffs or Class Members are entitled to medical monitoring;
h. Whether Plaintiffs and the members of the Class have sustained financial loss, and the proper measure of any such financial loss;
i. Whether Plaintiffs and the members of the Class are entitled to restitution;
j. Whether Plaintiffs and the members of the Class are entitled to punitive damages, and the proper measure of any such damages; and
k. Whether Plaintiffs and the members of the Class are entitled to material damages, and the proper measure of any such damages.

73. Representative Nature of Plaintiffs: Plaintiffs' claims are typical of those held by the other members of the Class in that each of them owned, leased or used and/or own, lease or use one of Defendants' smartphones that exceed federal RF radiation exposure limits or otherwise expose them to dangerous EMF exposure.

74. Adequacy of Representation: Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs have retained trial counsel experienced in complex litigation including complex consumer class action litigation, and Plaintiffs intend to vigorously prosecute this action.

75. Plaintiffs have no interests in this action that are adverse or antagonistic to the interests of the Class.

76. Class action litigation is the only reasonable and proportionate recourse when compared with all other available means for the fair and efficient adjudication of this controversy. The damages, harm and financial detriment suffered by individual members of the Class are relatively minor compared to the burden and expense that would be entailed by individual prosecution of their claims against Defendants.

77. It would thus be practically impossible for the members of the Class, on an individualized basis, to effectively seek and obtain redress for the wrongs committed against them.

78. In addition, even if the Class members could —and realistically would be willing—to pursue such individualized litigation, this Court likely could not reasonably sustain the imposition on resources that individualized litigation over this controversy would entail.

79. Further, individualized litigation would create the danger of inconsistent or contradictory judgments arising from the identical factual predicate.

80. Individualized litigation would also result in a substantial increase in the time and expense required of the parties and the Court to address the issues raised by this litigation.

81. By contrast, litigation of the phonegate controversy outlined herein as a class action provides the benefits of adjudication of these issues in a single, unitary proceeding, provides substantial economies of scale, allows comprehensive supervision of the legal and factual issues raised herein by a single court, and presents no unusual management difficulties under the circumstances presented here.

82. Damages may be calculated from the data maintained in Defendants' and third-party carriers' records, so that the cost of administering a recovery for the Class can be minimized. The precise measure of damages available to Plaintiffs and the Class, however, is not a barrier to class certification.

THE AUTHORIZATION CRITERIA

Art 575 (1) Identical, Similar or Related issues of Law

Products unsafe for use as intended and provide insufficient warning of risk their use entails

83. A specific regime for hazardous consumer products and those with insufficient security warnings is established by the *Quebec Consumer Protection Act* and the *Civil Code of Quebec*. Article 906 of the *Quebec Civil Code* has been properly interpreted to extend that protection to electricity.[42] The relevant provisions of the *Quebec Consumer Protection Act* are:

> 37. Goods forming the object of a contract must be fit for the purposes for which goods of that kind are ordinarily used.
> 1978, c. 9, s. 37.
>
> 38. Goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use.
> 1978, c. 9, s. 38.
>
> 53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.
>
> See also ss. 8, 219, 221, 223.1 and 228.

84. The same rule applies where there is a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.

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[42] Baudoin, Deslauriers et Moore, *La responsabilité du fabriquant et du vendeur – l'évolution historique* 2-352 as concerns electrocution and explicitly tout doute sur la qualification des ondes et des diverses formes d'énergie qui sont réputés meubles corporels que leur source soit mobilière ou immobilière. As concerns electricity and Art. 609 *C.C.Q.* at *see Enterprise d'electricité du Centre-Ville c. Groupe Sedgeinc*, 2016 QCCQ 11464 at para. 36 holding that waves constitute a corporeal moveable good. In *3296008 Canada Inc. c. Groupe Commerce Cie. d'Assurances*, 2002 CanLII 10117 (QC CS) para. [32] L'électricité est considérée comme meuble corporel selon l'article 906 C.C.Q.

85. The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.

86. The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.

> 272. *If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act*, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, *the consumer may demand*, as the case may be, subject to the other recourses provided by this Act,
> (a) the specific performance of the obligation;
> (b) the authorization to execute it at the merchant's or manufacturer's expense;
> (c) that his obligations be reduced;
> (d) that the contract be rescinded;
> (e) that the contract be set aside; or
> (f) that the contract be annulled,
> *without prejudice to his claim in damages, in all cases*. *He may also claim punitive damages* [emphasis added].
> 1978, c. 9, s. 272; 1992, c. 58, s. 1; 1999, c. 40, s. 234.
>
> **906.** Waves or energy harnessed and put to use by man, whether their source is movable or immovable, are deemed corporeal movables.
>
> [...]
>
> **1468.** The manufacturer of a movable thing is bound to make reparation for Injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.
>
> **1469.** A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in design or manufacture, poor preservation or presentation, or the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them.
>
> The same rule applies to a person who distributes the thing under his name or as his own and to any supplier of the thing, whether a wholesaler or a retailer and whether or not he imported the thing.
>
> **1473.** The manufacturer, distributor or supplier of a movable thing is not bound to make reparation for injury caused by a safety defect in the thing if he proves that the victim knew or could have known of the defect or could have foreseen the injury.
>
> Nor is he bound to make reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the thing, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

87. The *Consumer Protection Act* sections 2, 37, 53, 216, 218, 223.1, 228, 238A, 253 and 272 provides for a specific regime of proof as concerns warranties of quality and the duty to warn the consumer as concerns consumer products, which, pursuant to Arts. 906 and 1468-9 C.C.Q. includes *inter alia* cellular telephony.

88. Recourses relying on sections 37 and 53 of the *Consumer Protection Act* require the consumer to show *only* that the product was not fit for the use it was intended (i.e. poses a serious health risk) or failed to provide a reasonable security warning and that the defect was not self-evident upon casual inspection by the consumer.[43]

89. This limited proof shifts the burden to the Defendant, who must show that there is no risk and that proper warnings were provided. The Defendant may *not* claim he was unaware of the defect or risk as he is presumed to have that knowledge.

90. « Le respect des normes par le commerçant ou le manufacturier ne met pas nécessairement ces parties à l'abri d'une conclusion de déficit d'usage »[44].

91. In *Fortin c. Mazda Canada Inc.*, 2016 QCCA 31 Honorable Mr. Justice Gagnon writing for the Court of Appeal held:

> [83] Cela dit, l'usage protégé par la garantie de qualité est autonome. Le respect des normes par le commerçant ou le manufacturier ne met pas nécessairement ces parties à l'abri d'une conclusion de déficit d'usage[45]. D'ailleurs, une importante jurisprudence appuie cette idée[46].
>
> [84] La garantie d'usage imposée au commerçant et au manufacturier crée pour ces parties une obligation de résultat[47]. Celle-ci repose essentiellement sur les attentes légitimes de l'acheteur. Or, quitte à le redire, de telles attentes ne sont pas tributaires des normes de l'industrie. Ce principe a été reconnu dans l'arrêt *Banque de Nouvelle-Écosse c. Raymond*[48]:
>
> > Cet énoncé comporte un sophisme de droit. Ce n'est pas parce qu'un objet a été fabriqué suivant les normes de construction que l'acheteur ne pourra demander l'annulation de la vente, s'il s'avère qu'il est impropre à l'usage auquel il est destiné et pour lequel il a été acheté et vendu. Ce que les intimés ont acheté, ce n'étaient pas des objets fabriqués conformément à certaines normes, mais ce qu'on leur a représenté comme étant des maisons mobiles et, partant, des bâtiments destinés à

[43] Bourassa, Sylvie, *Consumer Protection Act and Regulation Concerning its Application*, Yvon Blais, 2018, annotations to Articles 37 and 53;
[44] *Fortin c Mazda Canada inc*. 2016 QCCA 31, cited in Bourassa, Baudouin *supra*. As concerns electrocution see *Hydro-Québec c. Boyer* [1985] R.L. 165 para. 37.
[45] J. Edwards, *supra*, note 10, nos 326 et 327, p. 151; P.-G. Jobin avec la collaboration de M. Cumyn, *supra*, note 20, no 155, 197.
[46] *Groupe Commerce (Le), compagnie d'assurances c. New Holland Canada ltée*, J.E. 2004-467 (C.Q.), où le tribunal conclut que même si les boulons d'une presse à foin respectent les normes, ces derniers présentent tout de même un déficit d'usage; *Deschênes c. Desparois*, 2007 QCCS 1081, où le tribunal conclut que l'absence de drain français autour d'une maison constitue un vice caché même si les normes à l'époque de la construction d'une maison n'exigeaient pas ce type de drain; *Doucet c. Golding*, J.E. 2004-1548 (C.Q.); *Stepanian c. Marmor*, [2001] R.J.Q. 2704 (C.Q.), paragr. 37 et 38; *Vallée c. Méthot*, 2013 QCCQ 4719; *Economical Mutual Insurance Group c. Crane Canada inc*., 2010 QCCS 328, conf. par 2011 QCCA 2359; *Boisclair c. Desormeaux*, 2013 QCCS 3965, conf. par *Laframboise c. Boisclair*, 2015 QCCA 842, où la Cour confirme sur le fond, mais infirme sur la répartition des dommages.
[47] J. Edwards, *supra*, note 10, nos 326 et 327, p. 151.
[48] *Banque de Nouvelle-Écosse c. Raymond*, J.E. 87-299 (C.A.).

> l'habitation. À savoir si en l'espèce ce fut le cas, était essentiellement une question de fait.
>
> [85] Bref, le décideur qui choisit de trancher la question des attentes raisonnables du consommateur sur la seule base d'une norme quelconque commet une erreur en droit.

92. *Infineon*, confirmed by *Charles c. Boiron Canada Inc.* 2016 QCCA 1716, at para 45 confirms that statutory compliance is not decisive:

> [70] Article 1003(*a*) of the *C.C.P.* requires that "the recourses of the members raise identical, similar or related questions of law or fact".
>
> [71] According to the appellants, the only question common to the members of the proposed group is whether the appellants committed a fault. […]
>
> [72] This perspective is flawed. There is no requirement of a fundamental identity of the individual claims of the proposed group's members. At the authorization stage, the threshold requirement for common questions is low. As the Court of Appeal noted in *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826 (CanLII), at para. 22, even a single identical, similar or related question of law would be sufficient to meet the common questions requirement set out in art. 1003(*a*), provided that it is significant enough to affect the outcome of the class action.

[…]

> [96] The appellants are correct in asserting that compliance with statutory duties can inform questions with respect to civil law duties. However, compliance with statutory obligations is not always determinative of the issue of civil fault. As Kasirer J.A. rightly stated at para. 88 of his reasons, "[c]are must be taken . . . not to conflate the notion of civil fault and the violation of a statutory norm, whether in a commercial setting or elsewhere." He correctly pointed out that just because a failure to discharge a statutory obligation leads to a demonstration of fault in all but the most exceptional cases, it does not follow that a civil fault is absolved where there is no such failure. As J.-L. Baudouin and P. Deslauriers state in *La responsabilité civile* (7th ed. 2007), vol. I, at No. 1-188:
>
> > [translation] In principle, a failure to discharge a specific obligation imposed by a statute or a regulation, especially if it is intentional or serious, constitutes a civil fault, since it amounts to the breach of a mandatory standard of conduct established by the legislature. Nevertheless, adhering to such a standard does not in itself exempt one from liability.
>
> [97] They go on to state the following, at No. 1- 189:
>
> > [translation] . . . the mere fact that in a given case the defendant adhered to statutory or regulatory standards does not automatically rule out the possibility that he or she will nevertheless be held liable on the basis of the general law. Statutory provisions therefore do not have the effect of limiting the general obligation of good conduct in one's relations with others, and this means that it is not necessary

to prove the violation of a statutory or legal rule for another person to be held liable.

[98] Applying this principle, we cannot accept that the appellants are exempt from civil liability because their liability has not been proven under s. 45 of the *Competition Act*. The Court must consider the liability of the appellants under the broad standards of art. 1457 of the C.C.Q., not the narrower standards of s. 45 of the *Competition Act*, a penal provision.

93. The "reasonable expectations" of the Representatives, and all Quebec consumers, when purchasing Defendants' products or services was not to be exposed to dangerous levels of a toxic and addictive pollutant, namely non-ionizing radiation.

94. The manufacturers and vendors obligations are of result both pursuant to the *Consumer Protection Act* and the *Civil Code of Quebec*.

[…]

95. In *Sibiga* c. *Fido Solutions inc*., 2016 QCCA 1299 (CanLII), the Honourable Mr. Justice Kasirer:

> [128] The resolution of this issue is a common one in that, to quote McLachlin C.J. in *Dutton*, "it is necessary to the resolution of each class member's claim".[49] Contrary to what the Superior Court decided, it is not fatal to the commonality of the question that class members are not identically situated vis-à-vis the respondents. Moreover, as this Court decided in *Suroît*,[50] in *dicta* taken up by the Supreme Court in *Vivendi*, the determination of common issues need not lead to the complete resolution of the case, and it could give rise instead to small trials at the stage of the individual settlement of the claims. That too is not a bar to finding that article 1003(a) has been satisfied where, if anything, the Quebec rules are more flexible than those in other provinces as was noted in *Vivendi*, and common questions need not give rise to common answers.
>
> [129] In sum, applying the principles identified by the Supreme Court to the question identified in the motion for authorization, the judge committed a reviewable error in his interpretation of article 1003(a) and should have concluded that the appellant had established the existence of a common question that would advance the resolution of the dispute with respect to all the members of the class, and that would not play an insignificant role in the outcome of the case.

Failure to Warn

96. A second related category of liability, both under consumer protection legislation and at common law, is the failure to warn or to sufficiently warn of the danger posed or to provide instruction as to the manner of safe use of a product. The prevention of incorrect or dangerous use is one of the principle objectives of the duty to inform.[49] It is a continuing obligation as the manufacturer is required to inform users of risks even after the product is sold, *Hollis v Dow Corning,* an application of the precautionary principle.[50]

Fault-based Liability and Abuse of right: Articles 6, 7, 1457-8 and 1467-9 C.C.Q.

[49] Baudouin, Deslauriers and Moore, *infra* at para. 2-354 citing *Thibault c. St. Jude Medical Inc*. J.E. 2004-1924.
[50] Ibid at para.2-355.

6. Every person is bound to exercise his civil rights in accordance with the requirements of good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

CONDITIONS OF LIABILITY
§ 1. — General provisions

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

1458. Every person has a duty to honour his contractual undertakings.

Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is bound to make reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.

97. Another common issue is whether Defendants' EMF emissions constitute an attractive nuisance or fall within the civil law definition of a trap, defined for the Plaintiff/Petitioners by Mr. Justice Beetz in *Rubis* c. *Grey Rocks* as:

> The infinite variety of factual situations makes it impossible to define exactly what constitutes a trap. However, we can say that a trap is in general an intrinsically dangerous situation. The danger should not be apparent but hidden: for example, a door opening not onto a regular stairway, as might be expected, but onto vertical steps like those of a scaffold: *Drapeau v. Gagné*, [1945] Que. K.B. 303; [51]

98. It is self-evident that where a consumer product poses a significant undisclosed health risk, it is a "trap".

99. Abuse of rights was defined by the Supreme Court in *St. Lawrence Cement*:

> […]
>
> [25] Article 7 *C.C.Q.* places two limits on rights: a right may be exercised neither with the intent of causing injury nor in an excessive and unreasonable manner.

[51] [1982] 1 S.C.R. 452 at 466.

100. The Court then points out that in contradistinction to civil liability pursuant to Arts. 1457 and 1458 C.C.Q., the presumption that the act is lawful must first be rebutted by proving abuse. "Violation of a standard of conduct is therefore inextricably linked to the concept of abuse of rights"[52].

101. An owner causing abnormal annoyances without the intent to injure or excessive and unreasonable conduct does not abuse his or her rights as there is no wrongful conduct, as "abuse" implies blame[53]. A finding of abnormal annoyances is insufficient to establish abuse of right. However, the owner who commits fault is liable even where the damage is insufficient to meet the standard of abnormal annoyances.

102. Environmental standards place limits on the exercise of rights[54]. Plaintiffs allege the breach of sections 1 and 46.1 of the Quebec *Charter* and sections 19.1, 20, 21 and 22 of the *Environment Quality Act*.

103. In *Brochu* c. *Société des Loteries du Quebec*, [2002] R.J.Q. 1351 (S.C.) the Honorable Mr. Justice Banford authorized for failure to inform at para 57:

"Dans ces conditions, il prétend que l'intimée avait une obligation d'informer les usagers des dangers inhérents à l'utilisation de tels appareils. À cet égard, les prétentions du requérant n'apparaissent pas sans fondement, notamment à la lumière des principes émis par la Cour suprême dans l'arrêt *Banque de Montréal* c. *Bail Ltée* [...].

Relying in part on *Brochu* a second authorized addiction class action is *Letourneau c. JTI-MacDonald Corp*. 2005 CanLII 4070. Failure to warn of an inherently hazardous product forms part of the claim. As well, denial of the risk via "false science" and influence of government "regulations" were found by the Honorable Justice Pierre Jasmin:

> [51] Elles n'ont jamais communiqué, à tout le moins de façon directe, toute l'information sur les risques et les dangers de la consommation du tabac. Elles ont toujours prétendu que le tabac n'était pas nocif ou, à tout le moins, qu'il existait une controverse scientifique sur le sujet. Elles ont élaboré des stratégies de mise en marché pour tenter d'établir des associations dans l'esprit des consommateurs pour renforcer l'acceptabilité sociale de l'usage du tabac.
>
> ....
>
> [54] De plus, comme le démontrent les témoignages de dirigeants des intimées devant le Comité Isabelle (1968-1969) ou devant le Comité législatif de la Chambre des communes du Canada qui étudiait le projet de loi interdisant la publicité en faveur des produits du tabac et réglementant leur étiquetage (P.L.C-51) (1987-1988), la position des intimées a été des plus ambiguës. Elles n'ont jamais reconnu de façon claire, précise et non équivoque que le tabac représentait un danger pour la santé. Si on se fie aux témoignages de leurs représentants, même en ce qui concerne l'usage du tabac par les femmes enceintes, il n'y aurait aucune preuve scientifique des méfaits pour le fœtus et le tout ferait l'objet d'une controverse.

[52] *St. Lawrence Cement* at para 29.
[53] Ibid at para. 30.
[54] Ibid at para 32.

[55] Le cancer est une cause importante de décès.

[56] Le tabac peut aggraver l'état de santé des consommateurs.

"So dangerous an element as electricity"

104. The electrification cases hold those distributing electricity or selling electric products to a higher duty of care given the inherently dangerous nature of electricity. "Cette obligation est proportionelle au danger inherent a l'utilization du bien".[55] Electricity, as a moveable, falls within the ambit of Art. 1468 C.C.Q. by operation of Art. 906 C.C.Q., as noted by Baudoin, Deslauriers and Moore at para. 2-382.

105. In *The Royal Electric co.* vs. *Hévé* [1902] 32 S.C.R. 462, the supply of electric light was held by the Supreme Court of Canada to be an "operation of a dangerous nature", requiring the "exercise of a high degree of skill, care and foresight". Mr. Justice Taschereau held:

> They cannot have taken the high degree of care that the law demands from a company trading in so dangerous an element as electricity[56].

106. Given the particularly dangerous nature of electricity, the court presumed the liability of the Defendant, which it failed to rebut:

> I fully agree with the law as stated by Mr. Justice Hall that the defendants, while dealing in and disposing of a commodity of so recognised a dangerous character as electricity, are bound to a supervision and a diligence proportionate to the peculiar character and danger of the commodity to which they deal[57].

Their imprudence constituted negligence.

107. The principle was upheld by the Supreme Court of Canada in *Vandry* vs. *The Quebec Railway Light, Heat and Power co.* [1916] 53 S.C.R. 72 where responsibility *without fault* for failure to ground a transformer was held pursuant to Art. 1054 C.C. Mr. Justice Idington held:

> There could be found no excuse for attempting to supply electric current without testing to see if the fixtures were sufficient to ensure safety when protected by means of grounding. If so found it could and should protect by grounding. Otherwise it should, out of regard to the lives and property of others, refuse to turn its dangerous machine's destructive forces upon the property[58].

108. Mr. Justice Brodeur held that Defendants failed to rebut their presumed liability:

> Il est indéniable que l'accident a été causé par un courant électrique dont elle avait la garde et elle a en vertu de l'article 1054 du code civil engagé sa responsabilité, à moins qu'elle ne prouve qu'elle n'a pu empêcher le fait qui a causé les dommages.

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[55] Baudouin, Deslauriers et Moore, *La responsabilité du fabriquant* (2014) para. 2-377;
[56] Ibid at page 466. As concern traps causing electrocution, *Hydro-Québec c. Boyer* [1985] R.L. 165 para. 30 and 37.
[57] Ibid at page 470.
[58] At page 87

> Il est du devoir d'une compagnie qui exploite un commercé d'une nature aussi dangereuse de prendre toutes les précautions nécessaires pour empêcher tout accident qui pourrait se produire, ainsi que cette cour l'a décidé dans la cause de *Royal Electric Company v. Hévé*[59].

109. On appeal the House of Lords held that the presumption of liability for things under one's care could *only* be rebutted by proof of "inability to prevent the damage"[60]. The justification for this absolute liability without fault is "[recent] growth of scientific inventions and their exploitation"[61]. Lord Sumner concludes:

> [I]t is impossible to say that the escape of electricity into customers' houses and the consequent damage […] was a necessary incident of the exercise of the power to distribute high tension current[62].

110. In *Les Soeurs de la Charite de Quebec c. Dame Paradis*, 1966 B.R. 616, the Court of Appeal applied the presumption of liability in a case of electrocution due to lack of insulation. The Defendant was presumed to know of the defect in the thing under its control, *electric current*, and as no proof was made that the damage was unavoidable, the Sisters were held liable, though 15% of the liability was attributed to the victim.

111. Baudoin, Deslauriers and Moore[63] argue one basis for liability are inherently dangerous products and those with hidden defects which render the manufacturers and vendors liable. As concerns electricity they refer to cases of improper insulation *(Provencher c. Adressograph-Multigraph du Canada Ltee*, [1984] C.S. 290; J.E. 85-510 (C.A.), fire in a dryer caused by arcing due to improperly insulated wiring (*Citadelle c. Camco. Ltd*, 2007 QCCA 1763) and a fire in an electric massaging bed (*Groupe Ledor Inc. c. Usine Rotec Inc*., 2013 QCCS 6975). The latter case cites the comments of the Minister of Justice for Articles 1468 and 1469 C.C.Q.:

> [58] Finalement, les obligations de ces articles ne sont pas seulement extracontractuelles comme en font foi les commentaires du Ministre de la justice lors de l'adoption du *Code civil du Québec* :
>
> « Cet article, de droit nouveau, énonce des règles destinées à protéger le public contre les défauts de sécurité de produits manufacturés ou fabriqués. Le premier alinéa impose ainsi clairement au fabricant de la totalité ou d'une partie d'un bien meuble, et donc à tout participant au processus de fabrication du bien, l'obligation de réparer tout préjudice, corporel, moral ou matériel, causé à autrui par un défaut de sécurité du bien. » MINISTÈRE DE LA JUSTICE, *Commentaires* du *ministre de la Justice - Le Code civil du Québec*, t. 1, Québec, Les Publications du Québec, 1993.

112. The issues of an inherently dangerous consumer product, tobacco, and the burden of proof on Plaintiffs to prove causality for health damages were discussed by the Honorable Mr. Justice Riordon in *Letourneau* as follows:

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[59] At page 124
[60] *Quebec Railway Light Heat and Power co.* v. *Landry* [1920] 52 D.L.R. 136 [H.L.] at 143-4, per Lord Sumner
[61] Ibid at page 144
[62] Ibid at pages 147-8, confirmed by *La Securité Nationale c. Rondeau* 1993 CanLII 4072 (QCCA).
[63] *La responsabilite du fabricant et du vendeur- L'evolution historique*, Yvon Blais, 2014 paras. 2-351 to 2-363

[70] Même si le Tribunal rejette le témoignage de MM. Flaherty et Lacoursière pour les motifs qui seront exposés plus loin, il n'y a pas de raison de ne pas tenir compte de cette assertion puisqu'elle donne une idée de la connaissance qu'avait la compagnie de la situation. Il tombe pratiquement sous le sens que, bien vite, les compagnies en ont su d'avantage que le grand public sur le produit du grand public, puisque les premières étaient prévenues à ce sujet par leur personnel scientifique et par leurs sociétés affiliées. Le témoignage de ces experts amène à conclure que les compagnies étaient parfaitement au fait des risques et des dangers du tabagisme dès le début de la période visée.

[71] Le Tribunal reconnaît que ce qui précède n'est pas lié directement aux maladies en cause dans le dossier Blais. La plupart du temps, le Dr Greene et M. Gibb parlent de « maladie » de manière générale, et les historiens ne sont pas plus précis. Quoi qu'il en soit, le Tribunal n'y voit pas d'empêchement à en déduire la connaissance qu'avait ITL des maladies en cause. Personne ne peut raisonnablement douter que n'importe quel cadre de compagnie de tabac à l'époque aurait inclus le cancer du poumon, le cancer de la gorge et l'emphysème parmi les maladies vraisemblablement causées par le tabagisme.

[72] Le Tribunal conclut donc que pendant toute la période visée, ITL connaissait les risques et dangers que ses produits provoquent l'une des maladies en cause.

[73] Non seulement cette conclusion répond par l'affirmative à la deuxième question commune dans le cas d'ITL, mais elle élimine du même coup les moyens de défense qu'offre l'article 1473. Par conséquent, dans la mesure où ITL est trouvée coupable de la faute consistant à vendre un produit vicié par un défaut de sécurité, la seule défense possible est de prouver que les membres du groupe connaissaient ou auraient pu connaître ou prévoir le danger.

113. In *Richard v Time* [2012] 1 S.C.R. the Supreme Court awarded punitive damages under the CPA as follows:

> [181] The trial judge found that the respondents had intentionally violated the C.P.A. in a calculated manner [...]
>
> [183] These findings are fatal to the respondents' defense in the circumstances of this case. The violations in issue were intentional and calculated. Moreover, nothing in the evidence indicates that, after the appellant complained, the respondents took corrective action to make their advertising clear or consistent with the letter and spirit of the C.P.A. On the contrary, the evidence suggests that they rejected his entire claim and proposed nothing. An award of punitive damages was therefore justified.
>
> (a) Criteria for Assessing the Quantum[199] An assessment of the quantum of punitive damages must start with art. 1621 C.C.Q., which sets out some guiding principles that are intended to bring greater consistency and objectivity to the assessment of such damages (J.-L. Baudouin and P.-G. Jobin, Les obligations (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at para.912). Article 1621 C.C.Q. begins by stating that the amount awarded as punitive damages must never exceed what is necessary to fulfil their preventive purpose. The second paragraph of art. 1621 adds that the amount must be determined in light of all the appropriate circumstances, in particular (1) the gravity of the debtor's fault, (2) the debtor's patrimonial situation, (3) the extent of the

reparation for which the debtor is already liable to the creditor and (4), where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

[200] The gravity of the fault is undoubtedly the most important factor (*Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA2201, [2009] R.J.Q. 2743; *Fondation québécoise du cancer v. Patenaude*, 2006 QCCA 1554,[2007] R.R.A. 5; *Voltec ltée v. CJMF FM ltée*,[2002] R.R.A. 1078 (C.A.); Baudouin, Jobin and Vézina, at para. 912). It is assessed from two perspectives: the wrongful conduct of the wrongdoer and the seriousness of the infringement of the victim's rights.

[….]

[206] Also, in our opinion, it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law (Whiten, at para. 72).

114. *In Association Quebecoise de Lutte c. Volkswagen 2018 QCCS 174* the Superior Court authorized a claim for punitive damages alone, as follows:

[66] Certains diront qu'on ouvre potentiellement la porte à une prise en charge, par les citoyens, du rôle qui incombe avant tout à l'État. Peut-être. Mais ne s'agit-il pas justement ici d'une attaque intentionnelle, et non accidentelle, aux droits des citoyens eux-mêmes. Si l'État ne fait rien ou si les sanctions sont minimes, n'encourage-t-on pas la répétition de tels scénarios? Surtout si les bénéfices outrepassent grandement les conséquences. L'affaire, telle que présentée, mérite d'être débattue.

[67] Dans un jugement autorisant une requête pour autorisation d'exercer un recours collectif. M. le juge Bisson concluait en citant les propos suivants, tirés de l'arrêt de la *Cour d'appel Carrier c. Québec* (Procureur général):

> [80] La protection de l'environnement est une responsabilité confiée à tous les citoyens, alors que le pouvoir public est appelé à jouer un rôle sans cesse grandissant dans ce secteur d'activité. La pollution par le bruit n'échappe pas à cette responsabilité. Le recours collectif permet plus facilement d'assurer la mise en oeuvre des protections conférées par les lois contre les différentes nuisances environnementales. Il assure du même coup, grâce à la force du regroupement, un juste équilibre entre les personnes aux prises avec les conséquences de la violation alléguée et un contrevenant qui souvent jouit de ressources plus imposantes. Ainsi, les conduites en ce domaine jugées téméraires, déraisonnables ou illégales deviennent plus facilement à la portée de la sanction civile.

[68] Le Tribunal ne peut affirmer que la cause d'action n'est pas défendable. L'affaire est intéressante, surtout dans un contexte où les reproches n'ont rien de mineur. Face à

cela, il y lieu de conclure à l'apparence de droit quant au recours réclamant des dommages punitifs.

A breach of the "right to live in a healthful environment in which biodiversity is preserved" provided for by Section 46.1 of the Quebec Charter *[…]*

A breach of the rights to Life, Liberty and Security of Person

115. Punitive damages should be awarded pursuant to section 272 the Quebec *Consumer Protection Act, The Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms* C-12.

Injunctive relief

116. Given the considerable health risks, failure of Defendants to warn and their false advertising, Plaintiffs are entitled to claim injunctive relief of three (3) kinds, which are claimed herein:

First, class members are entitled to proper product warnings which indicate the actual SAR levels of the Affected phones, the likely upshot of that radiation, and warnings that are prominent and easily located including at the point of sale and when devices are powered up;

Second, given members' overexposure, they are entitled to a software fix that reduces the level of radiation transmitted by the phones, to the lower of either the actual SAR advertised on the phones, or that which is safe. Such a software fix would create "polling only when required". The software fix would diminish i) frequency, i.e,, how often the phone receives transmissions, ii) intensity, how strong the signal transmitted is and iii) volume, i.e., how much data is transmitted; In the alternative class members are entitled to replacement phones with similar functionality but emitting only a safe level of radiation (a consumer recall); and

Third, the class members are entitled to an Order by this Honorable Court that Defendants seriously study the health effects of the affected phones and similar consumer products and report their findings for scientific review.

117. In *Canada Paper Co.* v. *Brown* [1922] 63 S.C.R. 243 the neighbor of a pulp and paper mill sued the mill's operator over noxious odors and fumes and sought an injunction. Anglin J., writing for himself and Davies C.J. refer to the concept of nuisance and confirmed that the annoyances were in excess of anything that could be justified in the context of neighborhood relations. Brodeur J. relied both on the abuse of right of ownership and on excessive annoyances caused by the odors[64]. Injunction to cease polluting was recognized by the Honorable Mr. Justice Carl Lachance who

[…]
[64] *Saint Lawrence Cement* at para. 44.

recognized the validity of such an order, once expert evidence could be heard in *Regroupement des citoyens du quartier c. Alcoa* 2007 QCCS 2691:

> [108] La sixième conclusion vise à forcer Alcoa « *de cesser d'émettre des HAP au-delà d'un niveau que déterminera le Tribunal après consultation d'un expert indépendant* ». […]
>
> [113] Les arguments de faits et de droit soulevés par la requérante semblent sérieux et, en cette matière où la santé des gens peut être mise en péril au point qu'une étude biologique est en cours, nous estimons que la conclusion est recevable à ce stade-ci.
>
> [114] Lors de l'audition au fond, le Tribunal déterminera avec l'éclairage de la preuve si les émissions respectent les lois et pourra, en conséquence, accorder, modifier ou refuser cette demande d'injonction.

118. In *Citoyens pour une qualité de vie/Citizens for a Quality of Life c. Aéroports de Montréal*, 2007 QCCA 1274 (CanLII) the Court of Appeal authorized injunction conclusions re noise pollution:

> [94] Bien que sensible à ces arguments, j'aurais été aussi d'avis, comme ma collègue, de ne pas retirer les conclusions en injonction au stade de l'autorisation. L'affaire présente en effet certaines similarités avec l'arrêt *Nadon c. Ville d'Anjou**[44]*** au terme duquel notre Cour a autorisé un recours collectif en dommages-intérêts et en injonction. Je retiens d'une façon plus particulière que, dans le cas à l'étude, tout comme dans l'affaire *Nadon**[45]***, les conclusions en injonction sont intimement liées au raisonnement soutenant la demande de condamnation à des dommages-intérêts.

119. *Kennedy c. Colacem Canada inc.*, 2015 QCCS 222 (CanLII) relied upon sections 6, 46.1 and 49.1 of the *Quebec Charter* and section 19.1ff *Environment Quality Act* to issue a positive injunction to cease polluting:

> **C) LES CONCLUSIONS EN INJONCTION :**
>
> [131] La requérante argumente que, puisque les troubles et inconvénients, la faute contractuelle et les émissions de contaminants subsistent encore à ce jour, elle a droit à ce que la Cour émette une injonction permanente pour les faire cesser.
>
> [132] Cette réclamation de la requérante repose sur les articles 19.1, 19.2 et 19.3 de la LQE, les articles 6, 46.1 et 49 de la Charte et l'article 751 Cpc. La conclusion recherchée est la suivante :
>
> ACCUEILLIR la requête en injonction de la requérante enjoignant à l'intimée de respecter ses obligations en tant que bon voisin et de cesser de polluer en vertu des articles 19.1, 19.2 et 19.3 de la *Loi sur la qualité de l'environnement* et/ou les articles 6, 46.1 et 49 de la *Charte des droits et libertés de la personne* et/ou de l'article 751 Cpc;
>
> […]
>
> [153] Cette décision est antérieure à l'arrêt *Carrier* de la Cour d'appel. Cela suffit pour l'écarter. Au surplus, il y a des distinctions concernant le poids des inconvénients et la demande de fermeture de l'usine, pas du tout en cause dans le présent dossier. Enfin, il

existe d'autres précédents de la Cour supérieure ayant autorisé l'exercice de recours collectifs en environnement avec des conclusions en injonction imprécises, comme la décision *Comité d'environnement de Ville Émard (C.E.V.E.) et al. c. Domfer Poudres Métalliques Ltée*, dont voici la conclusion en injonction autorisée par la Cour :

> « ORDONNE à l'intimée Domfer, à ses dirigeants et à ses contremaîtres de cesser l'émission de contaminants à partir de l'usine de poudre de fer de la rue Allard à Ville Lasalle, notamment de poussières, d'odeurs et de bruit, de façon à respecter ses obligations de bon voisinage et toutes celles édictées par les lois et règlements applicables, et ce dans les six mois de l'ordonnance à intervenir; »

[Footnotes omitted]

Medical Monitoring

120. The cost of medical monitoring in the present matter should be considered a legitimate claim based on U.S. environmental law precedent. Medical monitoring has not to our knowledge been recognized in Quebec as free healthcare is available. The situation is different as concerns Petitioners' claim as they and class members suffer from a non-recognized medical ailment. In particular, the Quebec Minister of Health instructed doctors not to find a causal relationship between EMF exposure and any health damages (**Exhibit P-18**[65]). As such, the reason for which medical monitoring has not been recognized is inapplicable in the present circumstances, while the reasons for its being ordered in American environmental, pharmaceutical and implant jurisprudence is operative.

NEGLIGENT MISPRESENTATION AGAINST […] SAMSUNG

121. The […] Samsung Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth here.

122. […] Samsung had a duty to communicate accurate information to Plaintiffs about the RF exposure from their Galaxy Phones.

123. Defendant intentionally misrepresented the safety of affected Galaxy phones, assuring Class Members that they had been adequately tested, and were safe to use on and in close proximity to their bodies at all hours of the day and night, despite information within its knowledge indicating that the RF exposure was linked to cancer and other health risks.

124. Even when repeatedly faced with a wealth of warnings from scientists and the dangers associated with RF exposure from smartphones, Defendant continues to make no effort to protect or warn current or prospective owners of its affected Galaxy phones. Rather, Defendant has turned a blind eye to these inconvenient truths, opting to double-down on statements that the phones are safe to use without restriction on placement.

[65] April 15, 2015 letter from Horacio Arruda, M.D., Direction Générale de la santé publique, Ministère de la Santé et des Services sociaux du Québec to [confidential], accessible at : http://collectiveactionquebec.com/uploads/8/0/9/7/80976394/exhibit_r-4_letter_from_dr_horacio_arruda_15_apr_2015.pdf.

125. Plaintiffs, in reliance on Defendant's claims regarding the ways in which the affected Galaxy phones were safe to and should be used, continued to use and place the affected Galaxy phones on and in close proximity to their bodies.

126. Plaintiffs' reliance was justified given Defendant's superior position of authority and knowledge.

127. As a result, on information and belief, Plaintiffs have been exposed to harmful levels of RF radiation that could negatively affect their health for many years to come.

128. Plaintiffs and Class members are thus entitled to the establishment of a medical monitoring program that includes, among other things: (i) Establishing a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and (2) Notifying all Class members in writing that they may require frequent medical monitoring necessary to diagnose conditions resulting from RF radiation exposure.

NEGLIGENT MISPRESENTATION AGAINST […] APPLE

129. The […] Apple Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth here.

130. […] Apple had a duty to communicate accurate information to Plaintiffs about the RF exposure from their iPhones.

131. Defendant intentionally misrepresented the safety of the iPhones, assuring Class Members that the iPhones had been adequately tested, and were safe to use on and in close proximity to their bodies at all hours of the day and night, despite information within its knowledge indicating that the RF exposure was linked to cancer and other health risks.

132. Even when repeatedly faced with a wealth of warnings from scientists and the dangers associated with RF exposure from smartphones, Defendant continues to make no effort to protect or warn current or prospective owners of its iPhones. Rather, Defendant has turned a blind eye to these inconvenient truths, opting to double-down on statements that the iPhones are safe to use without restriction on placement.

133. Plaintiffs, in reliance on Defendant's claims regarding the ways in which the iPhone was safe to and should be used, continued to use and place the iPhone on and in close proximity to their bodies.

134. Plaintiffs' reliance was justified given Defendant's superior position of authority and knowledge.

135. As a result, on information and belief, Plaintiffs have been exposed to harmful levels of RF radiation that could negatively affect their health for many years to come.

136. Plaintiffs and Class members are thus entitled to the establishment of a medical monitoring program that includes, among other things: (i) Establishing a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and (2) Notifying all Class

members in writing that they may require frequent medical monitoring necessary to diagnose conditions resulting from RF radiation exposure.

NEGLIGENCE AGAINST APPLE

137. The Apple Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth here.

138. Apple owed Plaintiffs a duty to exercise reasonable care in selling smartphones that emitted RF radiation at safe levels when placed on or in close proximity to their bodies.

139. Defendant failed to exercise reasonable care when, after knowingly designing and manufacturing iPhones whose RF exposure exceeded safe limits when used on or in close proximity to the human body, it did not take any measures to warn or protect Plaintiffs and Class members from RF exposure and, instead, covered up any risks by misrepresenting the safety of the smartphones.

140. Defendant knew or should have known that Plaintiffs and the Class members would foreseeably suffer injury from RF radiation exposure as a result of Defendant's failure to exercise ordinary care.

141. Defendant's negligence proximately caused Plaintiffs' and the Class members' damages and their increased risk of harm as documented herein.

142. Plaintiffs and Class members are therefore entitled to the establishment of a medical monitoring program that includes, among other things: (1) Establishing a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and (2) Notifying all Class members in writing that they may require frequent medical monitoring necessary to diagnose conditions resulting from RF radiation exposure.

NEGLIGENCE AGAINST SAMSUNG

143. The Samsung Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth here.

144. Samsung owed Plaintiffs a duty to exercise reasonable care in selling smartphones that emitted RF radiation at safe levels when placed on or in close proximity to their bodies.

145. Defendant failed to exercise reasonable care when, after knowingly designing and manufacturing affected Galaxy phones whose RF exposure exceeded safe limits when used on or in close proximity to the human body, it did not take any measures to warn or protect Plaintiffs and Class members from RF exposure and, instead, covered up any risks by misrepresenting the safety of the smartphones.

146. Defendant knew or should have known that Plaintiffs and the Class members would foreseeably suffer injury from RF radiation exposure as a result of Defendant's failure to exercise ordinary care.

147. Defendant's negligence proximately caused Plaintiffs' and the Class members' damages and their increased risk of harm as documented herein.

148. Plaintiffs and Class members are therefore entitled to the establishment of a medical monitoring program that includes, among other things: (1) Establishing a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and (2) Notifying all Class members in writing that they may require frequent medical monitoring necessary to diagnose conditions resulting from RF radiation exposure.

VIOLATIONS OF THE CANADIAN COMPETITION ACT (CCA)

149. The […] Plaintiffs incorporate by reference all paragraphs as though fully set forth herein.

150. This claim is brought by the […] Plaintiffs on behalf of the Quebec and nationwide […] Class.

151. The *Canadian Competition Act (CCA)* proscribes acts of unfair competition, including any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. Defendant's conduct, as described herein, was and is in violation of the *CCA*.

152. Defendant's conduct violates the *CCA* in at least the following ways: Defendant failed to disclose that the Affected Phones (i) emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels; and (ii) that the RF radiation exposure was far worse than a reasonable consumer would expect given the premium paid for these smartphones over a cellphone; (iii) defendants misleading advertising makes deceptive and false representations to promote their phones and have done so intentionally and fraudulently; (iv) defendants engage and have engaged in distorting test results and making false health claims misrepresenting the risks posed by their products (ss. 52, 74.01, 74,02 and 74,03 (5)). They proffer false science, by design.

153. Defendants intentionally and knowingly misrepresented material facts regarding the Affected Phones with an intent to mislead Plaintiffs and the Class.

154. In purchasing or leasing the […] Phones, Plaintiffs and the other Class members were deceived by Defendant's failure to disclose that the phones emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels.

155. Plaintiffs relied upon Defendant's false misrepresentations when purchasing their phones and as a result suffered an injury-in-fact and lost money.

156. Plaintiffs relied on Defendant's material representations and/or omissions that the […] phones they were purchasing were safe to use and free from defects.

157. Defendant owed Plaintiffs and the Class a duty to disclose the truth about its the RF radiation exposure from its Affected Phones, because Defendant: (i) possessed exclusive knowledge of the levels of RF radiation exposure emitted from its phones; and (ii) misrepresented and/or made incomplete representations concerning the levels of RF radiation exposure when the phones were used or carried on or in close proximity to the body.

158. Plaintiffs and the other Class members were injured and suffered ascertainable loss, injury-in-fact, and/or actual damage as a proximate result of Defendant's conduct in that Plaintiffs and the other Class members overpaid for their smartphones, and/or their smartphones have suffered a

diminution in value. These injuries are the direct and natural consequence of Defendant's misrepresentations and omissions.

159. Defendant's violations present a continuing risk to Plaintiffs as well as to the general public. Defendant's unlawful acts and practices complained of herein affect the public interest.

160. Absent those misrepresentations and omissions, Plaintiffs and the other Class members would not have purchased or leased these smartphones, would not have purchased or leased these smartphones at the prices they paid, and/or would have purchased or leased less expensive alternative cellphones that did not emit RF radiation exposure at unsafe levels.

161. Accordingly, Plaintiffs and the other Class members have suffered injury in fact, including lost money or property, as a result of Defendant's misrepresentations and omissions.

162. Plaintiffs request that this Court enter such orders or judgments as may be necessary to restore to Plaintiffs and members of the Class any money it acquired by unfair competition, including replacement of the devices with safe equivalent phones of equivalent functionality, a software patch to reduce emissions to a safe level, restitution and/or restitutionary disgorgement, punitive damages and for such other relief as may be appropriate.

[…]

VIOLATIONS OF THE QUEBEC CONSUMER PROTECTION ACT AGAINST APPLE

163. The Apple Plaintiffs incorporate by reference all paragraphs as though fully set forth herein.

164. This claim is brought by the Apple Plaintiffs on behalf the Province of Quebec and of the nationwide Apple Class.

165. Defendants violated the Quebec Consumer Protection Act (CPA) in numerous respects. Defendant failed to disclose that the […] Phones (i) emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels; and (ii) that the RF radiation exposure was far worse than a reasonable consumer would expect given the premium paid for these smartphones over a cellphone, and falsely claimed their phones were safe in breach of sections 37, 218, 219, 223,1 and 228 CPA.

166. Defendant intentionally and knowingly misrepresented material facts regarding the […] Phones with an intent to mislead Plaintiffs and the Class.

167. In purchasing, using or leasing the […] Phones, Plaintiffs and the other Class members were deceived by Defendant's failure to disclose that the phones emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels.

168. Plaintiffs and Class members reasonably relied upon Defendant's false misrepresentations and omissions. They had no way of knowing that Defendant's representations were false and gravely misleading. Plaintiffs and Class members did not, and could not, unravel Defendant's deception on their own.

169. Defendants knew or should have known that its conduct violated the CPA.

170. Defendants owed Plaintiffs and the Class a duty to disclose the truth about its the RF radiation exposure from its […] Phones, because Defendant: (i) possessed exclusive knowledge of the levels of RF radiation exposure emitted from its phones; (ii) misrepresented and/or made incomplete representations concerning the levels of RF radiation exposure when the phones were used or carried on or in close proximity to the body; and (iii) knowingly mislead consumers that the phones posed no health risk.

171. Plaintiffs and the other Class members relied on Defendant's material representations and/or omissions that the […] Phones they were purchasing were safe to use and free from defects.

172. Defendant's conduct proximately caused injuries to Plaintiffs and the other Class members.

173. Plaintiffs and the other Class members were injured and suffered ascertainable loss, injury-in-fact, and/or actual damage as a proximate result of Defendant's conduct in that Plaintiffs and the other Class members overpaid for their smartphones, and/or their smartphones have suffered a diminution in value. These injuries are the direct and natural consequence of Defendant's misrepresentations and omissions.

174. Defendant's misrepresentations and omissions alleged herein caused Plaintiffs and the other Class members to make their purchases or leases of their Affected Phones.

175. Absent those misrepresentations and omissions, Plaintiffs and the other Class members would not have purchased, used or leased these smartphones, would not have purchased, used or leased these smartphones at the prices they paid, and/or would have purchased or leased less expensive alternative cellphones that did not emit RF radiation exposure at unsafe levels and would have taken steps to minimize their exposure.

176. Plaintiffs were deceived by Apple's failure to disclose the true nature of its Smartphones.

177. Plaintiffs demand judgment against Defendant under the CPA for injunctive relief including a corrective software patch reducing emissions, punitive damages, public notice of the risks posed as may be appropriate and an award of attorneys' fees and costs.

178. Defendants were given notice of its violations of the CLRA pursuant to CAL. CIV. CODE § 1782(a). The notice was transmitted to Defendants on August 23, 2019.

VIOLATIONS OF THE QUEBEC CONSUMER PROTECTION ACT AGAINST SAMSUNG

179. The Samsung Plaintiffs incorporate by reference all paragraphs as though fully set forth herein.

180. This claim is brought by the Samsung Plaintiffs on behalf of the Province of Quebec and the nationwide Samsung Class.

181. Defendants violated the Quebec Consumer Protection Act ("CPA") in numerous respects.

182. Defendants failed to disclose that the […] Phones (i) emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels; and (ii) that the RF radiation exposure was far worse than a reasonable consumer would expect given the premium paid for these smartphones over a cellphone; (iii) intentionally mislead consumers that the phones posed no health risk and could be safely used in close proximity to the head and body.

183. Defendants intentionally and knowingly misrepresented material facts regarding the […] Phones with an intent to mislead Plaintiffs and the Class.

184. In purchasing, using or leasing the […] Phones, Plaintiffs and the other Class members were deceived by Defendant's failure to disclose that the phones emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels.

185. Plaintiffs and Class members reasonably relied upon Defendant's false misrepresentations and omissions. They had no way of knowing that Defendant's representations were false and gravely misleading. Plaintiffs and Class members did not, and could not, unravel Defendant's deception on their own.

186. Defendant knew or should have known that its conduct violated the CPA.

187. Defendant owed Plaintiffs and the Class a duty to disclose the truth about its the RF radiation exposure from its […] Phones, because Defendant: (i) possessed exclusive knowledge of the levels of RF radiation exposure emitted from its phones; (ii) misrepresented and/or made incomplete representations concerning the levels of RF radiation exposure when the phones were used or carried on or in close proximity to the body; and (iii) intentionally mislead consumers that the phones posed no health risk and could be safely used in close proximity to the head and body.

188. Plaintiffs and the other Class members relied on Defendant's material representations and/or omissions that the […] Phones they were purchasing were safe to use and free from defects.

189. Defendant's conduct proximately caused injuries to Plaintiffs and the other Class members.

190. Plaintiffs and the other Class members were injured and suffered ascertainable loss, injury-in-fact, and/or actual damage as a proximate result of Defendant's conduct in that Plaintiffs and the other Class members overpaid for their smartphones, and/or their smartphones have suffered a diminution in value. These injuries are the direct and natural consequence of Defendant's misrepresentations and omissions.

191. Defendant's misrepresentations and omissions alleged herein caused Plaintiffs and the other Class members to make their purchases or leases of their […] Phones.

192. Absent those misrepresentations and omissions, Plaintiffs and the other Class members would not have purchased, used or leased these smartphones, would not have purchased or leased these smartphones at the prices they paid, and/or would have purchased or leased less expensive alternative cellphones that did not emit RF radiation exposure at unsafe levels.

193. Plaintiffs were deceived by Samsung's failure to disclose the true nature of its Smartphones.

194. Plaintiffs demand judgment against Defendant under the CPA for injunctive relief as may be appropriate including the measures set out at para. 116 above, and an award of attorneys' fees and costs.

[…]

195. Defendant failed to disclose that the that the […] Phones (2013 forward) (i) emitted RF radiation exposure when used or carried on or in close proximity to the human body at unsafe levels; and (ii) that the RF radiation exposure was far worse than a reasonable consumer would expect given the premium paid for these smartphones over a cellphone.

196. Defendant caused to be made or disseminated throughout Quebec, through advertising, marketing and other publications, statements that were untrue or misleading, and which were known, or which by the exercise of reasonable care should have been known to Defendant, to be untrue and misleading to consumers, including Plaintiffs and the other Class members.

197. Defendant has violated the Consumer Protection Act because the misrepresentations and omissions regarding the functionality, reliability, and safety of the […] Phones as set forth in this Complaint were material and likely to deceive a reasonable consumer.

198. Plaintiffs and the other Class members have suffered an injury in fact, including the loss of money or property, as a result of Defendant's unfair, unlawful, and/or deceptive practices.

199. In purchasing, using or leasing their […] Phones, Plaintiffs and the other Class members relied on the misrepresentations and/or omissions of Defendant with respect to the functionality, reliability, and safety of the […] Phones.

200. Defendant's representations turned out not to be true because the […] Phones emit unsafe levels of RF radiation exposure when used or carried on or in close proximity to the body.

201. Had Plaintiffs and the other Class members known this, they would not have purchased, used or leased their smartphones and/or paid as much for them. Accordingly, Plaintiffs and the other Class members overpaid for their smartphones.

202. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendant's business.

203. Defendant's wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in Quebec and nationwide.

204. The facts concealed and omitted by Defendant to Plaintiffs and the other Class members are material in that a reasonable consumer would have considered them to be important in deciding whether to purchase, used or lease the […] Phones or pay a lower price. Had Plaintiffs and the other Class members known of the higher RF radiation exposure at the time they purchased or leased their […] Phones, they would not have purchased, used or leased those smartphones, or would have

paid substantially less than they did. Plaintiffs' and the other Class members' injuries were proximately caused by Defendant's fraudulent and deceptive business practices.

205. Plaintiffs, individually and on behalf of the other Class members, request that this Court enter such orders or judgments as may be necessary to restore to Plaintiffs and the other Class members any money Defendant acquired by unfair competition, including restitution, replacement of the devices with safe equivalent phones, a software patch to reduce emissions to a safe level, and/or restitutionary disgorgement, punitive damages and for such other relief as may be appropriate.

[…]

575(2) the facts alleged appear to justify the conclusions sought;

206. The threshold here is also low; a *prima facie* case will suffice.[66] Hearsay evidence, including scientific studies are to be considered.[67] In *Letourneau* the second criterion was discussed as follows:

> **b) Les faits allégués justifient-ils les conclusions recherchées?**
>
> [61] Il est utile de rappeler encore une fois qu'au niveau des autorisations, le Tribunal n'a pas à se prononcer sur le droit mais sur l'apparence de droit. En somme, il s'agit de déterminer si *prima facie*, il est possible ou vraisemblable que le juge du fond en arrive à la conclusion recherchée, c'est-à-dire la responsabilité des intimées, s'il est d'avis que les faits allégués ont été prouvés à sa satisfaction.
>
> [62] Ainsi, tant en vertu du C.c.B.C. que du C.c.Q., les intimées pourraient être tenues responsables en vertu de leur obligation de renseignement qu'elles n'auraient pas remplie adéquatement.
>
> [63] Les intimées prétendent que depuis plusieurs années, les fumeurs sont très bien informés des méfaits de la cigarette pour la santé. Or, dans leurs allégations, les requérants insistent sur le fait que ce ne sont pas les intimées qui ont fourni l'information et que de toute manière l'information que pourraient avoir les fumeurs est tout à fait insuffisante et contrée par de l'information trompeuse véhiculée par la publicité des intimées relativement à leurs différents produits. Ainsi, en présentant leur cigarette douce ou légère comme étant moins dangereuse pour la santé, ou comme pouvant créer moins de dépendance, les intimées pourraient avoir commis une faute.
>
> [64] Il pourrait également y avoir faute civile des intimées si le juge du fond conclut qu'elles ont fait défaut d'informer ou du moins d'informer suffisamment les consommateurs des dangers de leurs produits ou des particularités les rendant impropres à un usage courant.
>
> [65] Il pourrait également conclure que cette obligation de renseignement est continue et particulièrement intense lorsque le bien est intrinsèquement dangereux, comme l'est la cigarette.

[66] See *Oratoire Saint-Joseph*, *supra* at para. 42, citing *Infineon* at para. 94.
[67] *Letourneau* at para. 43 citing *Bellavance c. Klein*, 1996 CanLII 6079 (QCCA); *Lambert (Gestion Peggy) c. Ecolait.*

[66] Les requérants allèguent que les fautes commises par les intimées sont intentionnelles puisqu'il ne s'agit pas d'un produit utile mais au contraire qui est potentiellement dangereux pour la santé. Ce produit est utilisé pour satisfaire à la dépendance engendrée par la nicotine qui y est contenue et ne peut donc être consommé sans danger puisque la cigarette tue des dizaines de milliers de canadiens à chaque année.

[67] Le juge du fond pourrait donc arriver à la conclusion que les intimées n'ont pas été de bonne foi en mettant sur le marché un produit dangereux et en ne divulguant pas pleinement et de façon précise les risques associés à son usage.

207. Citing at length the duty to inform recognized in *Brochu* as concerns addictive products and in *Hollis* as concerns inherently dangerous ones, Mr. Justice Jasmin held:

[75] Les intimées ont allégué que c'est en toute connaissance de cause que les fumeurs continuent de fumer et qu'elles ne peuvent donc être tenues responsables de ce choix éclairé. Il est utile de reprendre ici quelques observations de l'honorable juge Banford dans la cause *Brochu* c. *La Société des loteries et des jeux du Québec*[18].

« [57]. *Dans ces conditions, il prétend que l'intimée avait une obligation d'informer les usagers des dangers inhérents à l'utilisation de tels appareils. À cet égard, les prétentions du requérant n'apparaissent pas sans fondement, notamment à la lumière des principes émis par la Cour suprême du Canada dans l'arrêt Banque de Montréal c. Bail ltée, notamment les propos suivants :*

Le fabricant, par exemple, connaît ou est présumé connaître les risques et dangers créés par son produit, ainsi que les défauts de fabrication dont il peut souffrir. Ces informations exercent une influence certaine dans les décisions du consommateur relativement à l'achat et à l'usage de ces produits. Le plus souvent, le consommateur fait confiance au fabricant à cet égard ou se trouve dans l'impossibilité de connaître ces informations. Il en va de même pour les autres manifestations de l'obligation de renseignement.

[58] *Ainsi, si un danger de dépendance lié à l'usage des ALV existe n'est-il pas réaliste de plaider, comme le requérant, que pour effectuer un choix éclairé, les usagers doivent en être adéquatement informés?*

[59] *Par conséquent, si un tribunal bien au fait de l'ensemble de la situation en venait à la même conclusion, il pourrait reconnaître le bien-fondé du recours du requérant et condamner l'intimée à compenser le préjudice subi en raison de cette situation. «*

[76] Dans l'arrêt *Hollis* c. *Dow Corning Corporation*, l'honorable juge La Forest apporte les commentaires suivants relativement à l'obligation de mise en garde du fabricant d'un produit qui peut très bien s'appliquer aux intimées :

« Il est bien établi en droit de la responsabilité délictuelle au Canada que le fabricant d'un produit a le devoir de mettre les consommateurs en garde contre les dangers inhérents à son utilisation, dont il est ou devrait être au courant.

[…]

L'obligation de mise en garde vient corriger le déséquilibre des connaissances entre le fabricant et les consommateurs en prévenant ces derniers de l'existence d'un danger et en leur permettant de prendre des décisions éclairées concernant l'utilisation sécuritaire du produit.

[…]

Si l'utilisation ordinaire présente des dangers importants, une mise en garde générale sera rarement suffisante; elle devra au contraire être suffisamment détaillée pour donner au consommateur une indication complète des dangers précis que présente l'utilisation du produit.

[…]

Les tribunaux de notre pays reconnaissent depuis longtemps que les fabricants de produits destinés à être ingérés ou consommés par l'organisme ou à y être autrement placés, et donc fortement susceptibles de causer des dommages aux consommateurs, sont en conséquence soumis à une norme de diligence élevée au regard du droit de la négligence. »

[77] Le juge du fond pourrait vraisemblablement en arriver à la conclusion, s'il est satisfait de la preuve, que les intimées ont commis une faute en négligeant d'informer adéquatement les fumeurs des conséquences précises que comporte l'utilisation des cigarettes, et notamment de la dépendance causée par la nicotine. Il pourrait également en venir à la conclusion que les intimées sont responsables s'il est d'avis qu'elles n'ont pas fait tout en leur possible pour créer une cigarette dont le taux de nicotine est tellement bas ou absent qu'il amènerait une bonne partie des fumeurs à se départir beaucoup plus facilement de leur dépendance et à éventuellement cesser de fumer.

[78] Une telle obligation pourrait sembler exorbitante pour les intimées puisqu'à la longue, ceci pourrait éventuellement mener à la disparition complète de leurs opérations puisqu'il n'y aurait plus de fumeurs. N'est-ce pas là le souhait de tous les gouvernements aux prises avec le coût exorbitant des soins de santé causé par les méfaits du tabac? Quelle personne sensée, fumeuse ou non-fumeuse, pourrait prétendre aujourd'hui que la cigarette a une quelconque utilité. Au contraire, la cigarette est non seulement inutile, mais elle est dangereuse et crée de sérieux problèmes de santé et, dans bien des cas, cause des problèmes tels que l'emphysème, le cancer et les maladies cardiaques.

[79] Peut-on affirmer que les fumeurs qui sont dépendants de la nicotine ont fait un choix éclairé en décidant de fumer et, comme le prétendent les intimées, que c'est en toute connaissance de cause et parce qu'ils le désirent qu'ils continuent à fumer? Peut-on penser que les fumeurs aux prises avec un cancer du poumon, sont heureux de leur sort? Peut-on sincèrement croire que les fumeurs, qui représentent maintenant la minorité, qui sont souvent pointés du doigt, qui doivent se réfugier dans des endroits qui leur sont réservés, ou qui doivent s'entasser les uns sur les autres en plein hiver à l'extérieur pour fumer, sont vraiment heureux de leur sort et souhaitent continuer à être dépendants de la cigarette? Il est permis d'en douter.

[80] Le Tribunal en vient à la conclusion que les faits allégués par les requérants paraissent justifier les conclusions recherchées.

[References omitted]

208. Most recently, in *Oratoire St. Joseph* the Supreme Court of Canada held:

> "Article 571 para. 1 C.C.P. defines the class action as a procedural means enabling a person who is a member of a class of persons to sue on behalf of all the members of the class and to represent the class. Article 574 para. 1 C.C.P. provides that prior authorization of a court is required for a person to institute a class action. At the authorization stage, the court plays a screening role and must simply ensure that the applicant meets the four conditions of art. 575 C.C.P. If the conditions are met, the class action must be authorized. The court will consider the merits of the case later. This means that the application judge is ruling on a purely procedural question. The Court has given a broad interpretation and application to the conditions of art. 575 C.C.P.[68]".

209. Oratoire St. Joseph was adopted in *Atchom Makoma c. Procureure général du Québec* 2019 QCCS 3583 as follows:

> [24] Au stade de l'autorisation, le débat ne doit pas porter sur le fond de l'affaire [23]. Quoique, le demandeur doit alléguer suffisamment de faits pour remplir son fardeau [24], la Cour suprême souligne dans la décision L'Oratoire Saint-Joseph qu'au « stade de l'autorisation, le juge doit prêter une attention particulière, non seulement aux faits allégués, mais aussi aux inférences ou présomptions de fait ou de droit qui sont susceptibles d'en découler et qui peuvent servir à établir l'existence d'une « cause défendable. » [25].
>
> [25] L'étape de l'autorisation permet de filtrer les demandes et vise à éviter que les dossiers procèdent lorsque les réclamations sont insoutenables ou frivoles [26]. Le requérant doit convaincre le Tribunal de la possibilité d'une cause défendable. Ainsi, il a un fardeau de démonstration et non de preuve [27], selon la prépondérance des probabilités et le Tribunal doit tenir les faits allégués pour avérés à moins qu'ils n'apparaissent « invraisemblables ou manifestement inexacts »[28].
>
> [26] Lorsqu'il y a plusieurs défendeurs, le demandeur n'a pas à avoir une cause d'action personnelle défendable contre chacun des défendeurs [29][69].

"Complexity"/Medical Causality

210. In *Krantz* defendants postulated incredible complexity to justify refusal of a noise class action: "No Expert or Judge will be able to consider all this data." "The case should be split up into numerous individual suits" (which Plaintiffs could never afford) "or many separate Class Actions" (which would clog the legal system – and would perhaps be denied on the basis of causality). Not only is

[68] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35. https://www.canlii.org/en/ca/scc/doc/2019/2019scc35/2019scc35.pdf
[69] *Atchom Makoma c. Procureure générale du Québec*. http://t.soquij.ca/a2TQw

complexity no defense, the argument misrepresents the burden of proof. The plaintiff is not bound to prove scientific causality[70], but need only show an inference, which defendants must then rebut[71].

211. A related claim was raised by Defendants in Warranty in *Krantz* on a Motion to Dismiss on the basis of "*de minimis non curat lex*" and proportionality. *Krantz c. Québec (Procureur General)* 2012 QCCS 4522. Mr. Justice Sénécal wisely dismissed the Motion stating:

> [36] Quoi qu'il en soit, le fait d'être impliqué dans un « gros dossier » n'est pas en soi un motif de rejet d'action.
>
> [37] Plus important, sauf en cas d'application de la règle «*de minimis non curat lex*»[3], la règle de proportionnalité, à elle seule, ne peut justifier le rejet d'un recours. À cet égard, le Tribunal partage l'avis de M. le juge Dugré dans *Tanguay c. Hydro-Québec*, J.E. 2011-1146, EYB 2011-190711 (C.S.) :
>
> > « *D. LE PRINCIPE DE LA PROPORTIONNALITÉ DEVRAIT-IL ENTRAÎNER LE REJET DU RECOURS COLLECTIF INTENTÉ EN L'ESPÈCE (ART. 4.2C.P.C.)?*
> >
> > *[58] Ce moyen d'Hydro repose sur l'art. 4.2 C.p.c. Or, à la lumière du texte de cet article, même si les parties et le juge doivent s'assurer que les actes de procédure choisis et ceux autorisés ou ordonnés soient proportionnés à la nature et à la finalité de la demande et à la complexité du litige, il demeure que cette règle de proportionnalité ne constitue pas un motif autonome de rejet ou d'irrecevabilité du recours collectif qui a déjà été autorisé par cette Cour le 15 février 2007.*»
>
> [38] De l'avis de la Cour, cela vaut pour n'importe quelle action.
>
> [39] En cas de requête en rejet, la règle de proportionnalité peut justifier le rejet d'une action seulement lorsque cette action est trouvée par la Cour comme étant par ailleurs abusive au sens de l'article 54.1 C.p.c. [*Tanguay* précitée et *Préfontaine c. Lefebvre*, 2011 QCCA 196 (CanLII), J.E. 2011-300, EYB 2011-185695 (C.A.)]. Autrement, cette règle ne peut justifier à elle seule le rejet d'une action.
>
> [40] Cela dit, en l'absence de démonstration d'abus mais en présence de disproportion, le juge a le loisir d'encadrer le déroulement des procédures comme l'indique la Cour d'appel dans l'arrêt *Préfontaine* précité :
>
> > « *[19] Je reconnais également qu'un juge peut conclure qu'un acte de procédure est d'une nature disproportionnée au point de devenir un abus ; en contre-partie, on sait que les plaideurs de mauvaise foi ont tendance à agir de façon disproportionnée. Toutefois, il faut se prémunir contre un amalgame total de ces deux mesures procédurales qui visent, en principe, à remédier à des situations différentes et comportent généralement des sanctions distinctes. Ainsi, un juge n'hésitera pas, la plupart du temps, à rejeter une procédure abusive mais, par contre, il se limitera à encadrer celle qui est disproportionnée.* »

[70] Andrew A. and Lawrence E. Marino, "The Scientific Basis of Causality in Toxic Tort Cases". Dayton Law Review, Vol. 21 pp. 1-62, 1995 and Lara Koury, "Causation and Health in Medical, Environmental and Product Liability" Vol. 25 (1) Windsor Yearbook of Access to Justice, 2007, pages 135-166.

[71] *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Benhaim c. St-Germain*, [2016] 2 S.C.R. 352*; McGee vs. National Coal Board* [1973] 1 W.L.R. 1 (H.L.); *Bonnington Castings Ltd. vs. Wardlaw* [1956] UKHL1.

> [41] En l'espèce, l'appel en garantie contre 176493 et Alliance n'apparaît ni abusif, ni disproportionné.
>
> [42] Le pouvoir du juge, en application de l'article 54.1 C.p.c., doit être exercé avec prudence, comme le rappelle la Cour d'appel. Ne peut être rejetée sommairement qu'une procédure vouée à l'échec alors que cela est clair. Ce n'est pas le cas ici.
>
> [43] Par ailleurs, une déclaration d'abus comporte une part de blâme. Il n'existe rien de tel en l'espèce.
>
> [44] Dans le présent cas, le Tribunal ne voit aucun motif de rejet de l'action en garantie présentée par DJL contre 176493 et Alliance.[72]

212. Another version of the complexity argument is the straw man. By postulating a duty for plaintiffs to prove causality and resulting damages to the standard of scientific causality, they challenge class actions on the basis they are frivolous. There is no such duty on plaintiffs.

213. In the context of tobacco, Mr. Justice Riordon discusses the burden of proof, holding:

> [723] Before looking at the evidence of the Companies' experts, let us start by dealing with a constant criticism levelled at Dr. Siemiatycki's work: that his model and methodology do not conform to scientific or academic standards and sound scientific practice.
>
> [724] The Court recognizes that sound practice in scientific research rightly imposes strict rules for carrying out experiments and arriving at verifiable conclusions. The same standards do not, however, reflect the rules governing a court in a civil matter. Here, the law is satisfied where the test of probability is met, as recognized in Québec by article 2804 of the Civil Code: "Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof".
>
> [725] Here, there is clear demonstration that smoking is the main cause of the Diseases. We have also found fault on the Companies' part. Given that, and the fact that the law does not require "more convincing proof" in this matter, we must apply the evidence in the record to assess causation on the basis of juridical probability, using article 2804 as our guidepost.
>
> [726] Baudouin notes that a plaintiff is never required to prove the scientific causal link but need only meet the simple civil law burden. He further notes that the requirements of scientific causality are much higher than those for juridical causality when it comes to determining a threshold for the balance of probabilities.
>
> [727] In the case of *Snell c. Farrell*, Sopinka J. of the Supreme Court of Canada provided valuable guidance in this area: The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. […] It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

[72] *Krantz c. Québec (Procureur General)*, 2012 QCCS 4522.

> [728] Hence, it is not an answer for the experts to show that the Plaintiffs' evidence is not perfect or is not arrived at by "a method of analysis which has been validated by any scientific community" or does not conform to a "standard statistical or epidemiological method".
>
> [729] Given its unique application, Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validated or invalidated by any scientific community. He, on the other hand, swore in court that its results are probable, even to the point of being conservative. We place great confidence in that.

214. Lara Khoury addresses this issue in "Causation and Health in Medical, Environmental and Product Liability" 2007 (25:1) *Windsor Journal of Access to Justice*, 135. As concerns product liability she notes that factual presumptions have been employed as concerns health injuries in cases of animal health. The Court of Appeal has presumed causation based on the available facts with a particular emphasis on time concomitance and absence of alternative causes[73]. Defendants must then rebut the presumption. Scientific accuracy is not required in drawing a presumption of causation. It is sufficient to seek the most rational explanation of the injury. Factual presumptions only need to be established on the balance of probabilities, a standard that allows for a margin of doubt[74].

215. As concerns environmental liability Prof. Khoury notes that factual presumptions have been used sparingly as concerns causation. In *Ferme G. Maurice inc. v. Corp. municipal de St.-Claude* (S.C., 1993)[75] the court presumed the causal link between cattle miscarriages and fecal coliform contamination of a stream from which the cattle drank. As (i) there was a clear time concomitance between the pollution and the injury, (ii) when the animals were exposed to presumed source of pollution they became sick and miscarried, (iii) when the animals stopped being exposed to the presumed source good health returned, and (iv) there was no other explanation for the injury, causation was presumed.

216. In *St. Lawrence Cement Inc*. v. *Barrette* [2008] S.C.C. 64, the Supreme Court in a neighborhood annoyance noise and dust case at para. 108 applied a presumption of fact to conclude that members were similarly injured:

> Therefore, the court can draw from the evidence a presumption of fact that the members of the group have suffered a similar injury (J.-C. Royer, *La preuve civile* (3rd ed. 2003), at p. 649). It may also divide the group into subgroups, each of them made up of members who have suffered a similar injury.

217. Khouri at pages 162 to 165 justifies the use of inference or presumptive proof of causation in the fields of environmental and product liability as claims tend to be against commercial or industrial entities which operate for profit and have little incentive to better investigate the harmful effects of their products. She further notes that in many cases the polluter or manufacturer controls the information concerning the risks associated with their products. Reversal of the burden of proof is justified when the causal information is in the hands of the industry, in particular where the defendant, through his negligence, prevents the plaintiff from being able to make the causal demonstration (*Snell v Farrell*).

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[73] Khouri at page 150, citing *Lacasse c. Octave Labrecque Ltée.*, [1995] R.R.A. 596 (C.A.),
[74] *Lacasse, infra, Ferme Denijoy inc. v. Co-op St.-Tite,* [1994] R.R.A. 240, *Ferme avicole Bernard v. Co-op agricole des Bois Francs*, [1991], R.R.A. 682.
[75] Khouri, *supra*, at pages 157-8.

218. In *Fédération des Médecins spécialistes du Québec c. Conseil pour la protection des malades*, 2014 QCCA 459 (CanLII), the Honourable Mr. Justice Fournier considered proof of causality via presumption (Art. 2849 C.C.Q.) as follows:

> [139] Voici comment cette notion est expliquée par les auteurs Baudouin et Deslauriers:
>
> **1-622** – *Position générale* – La seule constante véritable de toutes les décisions est la règle selon laquelle le dommage doit avoir été la conséquence logique, directe et immédiate de la faute.
>
> […]
>
> **1-642** – *Présomption* – La jurisprudence exige donc simplement d'un lien de causalité direct et immédiat par simple prépondérance de preuve. Parfois, la chose équivaut à un véritable renversement du fardeau. Si, par exemple, le demandeur réussit à établir qu'un acte précis, parmi tous ceux qui ont pu être à l'origine du dommage, offre un degré de probabilité plus élevé, il place alors sur les épaules du défendeur la charge d'établir, par preuve contraire, que le fait reproché n'est pas causal. Il en est de même lorsque, dans des circonstances normales, le dommage qui pouvait résulter de la faute était normalement prévisible.
>
> […]
>
> **1-644** – *Règle générale* – La règle générale qui se dégage de l'ensemble de ces situations est donc la suivante : les tribunaux n'exigent pas que le demandeur établisse le lien causal au-dessus de tout doute et d'une manière certaine. Il suffit simplement que la preuve rapportée rende simplement probable l'existence d'un lien direct.

575 (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;

219. The members of the Classes are so numerous as to render the rules of mandate difficult or impracticable. Although the precise number of Class members is unknown, based upon information and belief Plaintiffs allege that the Class contains a million members. The true number of Class members is known by Defendants, however, and, thus, may be notified of the pendency of this action through electronic mail, first class mail and/or by published notice or recall.

575 (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

220. The Court of Appeal has recognized that proportionality provides access to justice for related victims who otherwise cannot withstand the cost, complexity and expense of protracted proceedings.

221. *Sibiga* confirmed in *Commission Scolaire de la Jonquière c. Marcil*, at para. 16:

> [144] Limiting the class to consumers who travelled only to the U.S. would, at this stage, be an arbitrary exercise of discretion. The prima facie case that Quebecers travelling to

> Europe or elsewhere were improperly charged roaming fees is based on the same reasoning that suggests that travelers to the U.S. other than the appellant were improperly charged: the difference is only in the numbers that, in the case of the U.S., makes the inference more probable. Moreover, there seems to be no logical reason why consumers should have to introduce separate class actions for each country in which roaming charges were levied – the respondents seem to suggest, in their written argument, that this is the only way forward. This position strikes me as contrary to the application of the principle of proportionality that a judge is called on to undertake based on article 1003 C.C.P. [76]

222. In *Abicidan c. Bell*, the Court of Appeal confirmed that the Representative is not required to represent the entirety of the case to be brought:

> [41] Même si le demandeur n'allègue pas avoir vu toutes les publicités après 2012, le Tribunal est d'avis qu'il y a apparence de droit pour toute la période, depuis le début de 2010. En effet, il est suffisant que le demandeur ait vu quelques publicités prétendument trompeuses, et non pas toutes. Autrement, l'exercice d'une action collective pour une même violation alléguée de la LPC serait plutôt illusoire. La question fondamentale touchant la publicité de Bell Canada attaquée est donc ici la même pour tous les membres du groupe visé. La situation se distingue donc ici du cas de l'affaire *Billette c. Groupe Dumoulin Électronique Inc.*[20], dans lequel la Cour supérieure avait limité l'autorisation d'exercer un recours collectif à la seule faute subie par la requérante, et non pas aux autres causes d'action potentielles que d'autres membres du groupe pourraient avoir.[77]

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[76] Cited and relied upon in *Comm. Scolaire de la Jonquière c. Marcil* 2017 QCCA 652 at para. 16. […]

[77] See *Krantz,* 2006 (Authorization decision):

[191] Rappelons que le requérant n'a pas à établir qu'il est le représentant «parfait» ou «idéal». Il suffit qu'il puisse assurer «*une représentation adéquate des membres*» (art. 1003 d) C.p.c.).

[192] Pour pouvoir assurer une telle représentation, on recherche idéalement un membre sérieux, qui a une bonne connaissance du dossier, qui s'est impliqué personnellement, qui a un intérêt certain et évident pour la question en litige[50] et qui pourra bien mener le recours. Le représentant n'a toutefois pas à posséder toutes ces qualités, encore moins au même degré.

[193] Dans *Guilbert c. Vacances Sans Frontières ltée**[51]*, la Cour d'appel, sous la plume de M. le juge LeBel, maintenant à la Cour suprême, retenait les critères suivants :

« *[…] Il s'intéresse visiblement au problème, a fait une enquête raisonnable, est au courant des difficultés survenues et il paraît capable de diriger les démarches nécessaires pour mener à bien ces procédures. […] Si, par ailleurs, il se montre apte à gérer le recours, le requérant peut obtenir le statut de représentant.* »

[194] D'autre part, le représentant n'a pas à posséder toutes et chacune des caractéristiques des membres du groupe [52]. Il suffit qu'il en possède certaines. Tant mieux s'il est représentatif.

[195] Rappelons enfin que les tribunaux favorisent une approche libérale dans l'interprétation du critère de l'article 1003 d). Dans l'affaire *Greene c. Vacances Air Transat inc.**[53]*, la Cour d'appel énonce:

« *Il est sans doute souhaitable que le meilleur des membres se voit conférer le statut de représentant. Toutefois, la perfection n'étant pas de ce monde, notre Cour a choisi de ne pas sacrifier la représentation adéquate à l'élitisme afin de favoriser l'exercice du recourscollectif. D'ailleurs, les affaires Guilbert c. Vacances Sans Frontière ltée, Château c. Placements Germarichinc. et Lasalle c. Kaplan illustrent cette tendance de notre Cour à privilégier une approche libérale dans le choix du représentant.* »

223. As concerns toxic tort litigation the refusal to limit the class due to the subjective nature of certain environmental damages was explained in *Arrouart c. Anacolor inc.* 2018 QCCS 650:

> [80] De plus, la Cour d'appel, dans l'arrêt *Carrier* c. *Québec (Procureur général)* où les requérants invoquaient une pollution sonore provenant de l'autoroute Laurentienne, en accueillant l'appel d'un jugement ayant refusé l'autorisation d'exercer le recours collectif (tel qu'il était désigné alors), se prononçait ainsi :
>
> [73] Je ne vois aucune erreur de principe dans l'énoncé qui précède qui justifierait l'intervention de la Cour. Il est possible que les nuisances vécues par les membres du groupe le soient à des degrés divers. Il faut cependant se garder de mettre sur le même pied l'autorisation d'un recours collectif et son exécution finale. Il appartiendra au juge du fond de distinguer les questions individuelles que soulève le recours. À cet égard, celui-ci jouit de la discrétion suffisante afin de modifier le groupe en cours d'instance de sorte à prendre en compte certaines caractéristiques révélées par la preuve et ainsi être en mesure de mieux traiter la diversité des réclamations individuelles dont il est saisi. La description définitive du groupe sera également l'une des considérations du jugement final, sans compter que la loi prévoit des modalités particulières concernant l'analyse des réclamations individuelles lorsque le jugement acquiert l'autorité de la chose jugée (articles 1037 et s. *C.p.c.*).
>
> [Référence omise]
>
> [81] C'est le propre des dommages corporels et moraux que leur nature et leur intensité soient évaluées de façon à tenir compte de l'individu qui les subit. Est-ce que la proposition de la demanderesse d'uniformiser la valeur de ces dommages en fonction de la zone occupée par le membre sera retenue par le juge du fond? Les parties auront la prérogative de soumettre davantage d'arguments sur le fond du litige pour mieux orienter sa décision, s'il l'estimait nécessaire.

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[196] En l'espèce, si le requérant n'est pas le représentant «idéal», il n'en est pas loin. Il demeure dans un immeuble immédiatement adjacent à une section de l'autoroute Ville-Marie où les travaux ont eu lieu. Il fait partie du milieu visé par le recours. En fait, il a subi au premier chef les effets du bruit et de la poussière.

[197] Par ailleurs le requérant connaît bien le dossier et toute la problématique qu'il sous-tend. Il a fait des recherches, a rencontré des gens et a même localisé sur une carte l'origine des plaintes qui ont été reçues par Transports Québec en rapport avec les travaux. Il a amassé de façon extensive l'information sur les problèmes qui se sont posés, leur nature et leur origine. Il connaît aussi des questions techniques.

[198] Le requérant n'a pas résidé sur les lieux pendant les premiers mois de 1998 où les travaux ont commencé, mais cela n'est pas requis. Il y a résidé pendant la très grande partie du temps où les travaux ont été effectués et où ils ont apparemment créé bruit et poussière. Le requérant a lui-même été affecté de la plus grande façon par le bruit et la pollution qu'il dénonce.

[…] COLLECTIVE ACTION

224. The […] Plaintiffs bring this […] Collective Action, individually, and on behalf of all similarly situated consumers […]:

a. Quebec Consumer Protection Act
b. Quebec Civil Code
c. Quebec Charter
d. Canadian Charter
e. Radiation Emitting Devices Act
f. Canadian Competition Act

225. The acts, practices, misrepresentations and omissions by Defendants described above, and Defendants dissemination of deceptive and misleading advertising and marketing materials in connection therewith, occurring in the course of conduct involving trade or commerce, constitute unfair methods of competition and unfair or deceptive acts or practices within the meaning of each of the above-enumerated statutes.

226. Defendants acts and practices created a likelihood of confusion or of misunderstanding and misled, deceived or damaged Plaintiffs and members of the Class in connection with the sale or advertisement of the […] Phones. Defendant's conduct also constituted the use or employment of deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived or damaged in violation of each of the above-enumerated statutes.

227. Plaintiffs, on behalf of themselves and the other Class members, seek monetary damages, treble damages injunctive relief including a software patch limiting emissions to a safe level, medical monitoring and such other and further relief as set forth in each of the above enumerated statutes.

[…]

UNJUST ENRICHMENT […]

[…]

228. At all times relevant hereto, Defendants designed, manufactured, produced, marketed and/or sold the […] Phones.

229. Defendants benefitted from its unlawful acts by receiving payments for the sale of the […] Phones.

230. Plaintiffs and members of the Class conferred upon Defendants, without knowledge that the […] Phones emitted RF radiation exposure at unsafe levels when used or carried or in close proximity to the human body, benefits that were non-gratuitous.

231. Defendant appreciated, or had knowledge of, the non-gratuitous benefits conferred upon it by Plaintiffs and members of the Class. Defendant accepted or retained the non-gratuitous benefits conferred by Plaintiffs and members of the Class, with full knowledge and awareness that, as a result of Defendant's unconscionable wrongdoing, Plaintiffs and members of the Class were not

receiving product of high quality, nature, fitness or value that had been represented by Defendant and reasonable consumers would have expected.

232. Retaining the non-gratuitous benefits conferred upon Defendant by Plaintiffs and members of the Class under these circumstances made Defendant's retention of the non-gratuitous benefits unjust and inequitable.

233. Because Defendant's retention of the non-gratuitous benefits conferred by Plaintiffs and members of the Class is unjust and inequitable, Plaintiffs and members of the Class are entitled to, and hereby seek disgorgement and restitution of Defendant's wrongful profits, revenue, and benefits in a manner established by the Court.

[…]

WHEREFORE, Plaintiffs and members of the Classes seek Authorization against Defendants, as follows:

(a) Certifying the classes and subclasses and recognizing them as Representatives

(b) Finding against Defendants as concerns the injunctive relief sought;

(c) Awarding Plaintiffs and the Class the costs of medical monitoring, damages suffered by Plaintiffs and the Class, restitution to Plaintiffs and the Class of all monies wrongfully obtained by Defendant;

(d) Award of Punitive damages pursuant to the Quebec Consumer Protection Act;

(e) Replacement of all models referred to with safe telephones of equivalent value and functionality and /or a software patch reducing emissions;

(f) Such other and further relief that the Court deems just and proper.

GRANT the present Motion;

AUTHORISE the present Collective Action;

ATTRIBUTE to Tracey Arial, Erika and Zoe Patton, Vito DeCicco, Alex Tasciyan, Mathew Nucciaroni and Claire O'Brien the status of Representatives and act for the following group:

> 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.

IDENTIFY as follows the principle questions of fact and law to be considered collectively:

1. Did Defendants mislead, fail to inform, or fail to warn as concerns the Affected Phones?

2. What amount of compensatory damages are due to class members for those failures?

3. Are the Class Representatives and members entitled to equitable disgorgement of all profits made by Defendants on the Affected Phones in the province of Quebec?

4. Are the designated Representatives and members of the group entitled to have Defendants replace the Affected Phones with equivalent models that when properly tested comply with all relevant norms, do not emit radiation and do not pose a significant health risk?

5. Are the Class Representatives and members entitled to medical monitoring and if so in what manner?

6. Do Defendants faults and emissions constitute a "contaminant", "contaminant release", "hazardous material", "energy vector", "plasma", "ray" or "material wave" within the meaning of section 1 of the *Environment Quality Act*?

7. Do Defendants faults and omissions constitute a breach of sections 19.1 to 22 of the *Environment Quality Act*?

8. Do Defendants faults and omissions constitute intentional breaches of sections 1, 6, 7, 24, 39, 44, 46.1, 48 and 49 of the *Charte des droits et libertés de la personne*?

9. What punitive/exemplary damages are due by Defendants to class members for those breaches?

10. Did the Affected phones sold and marketed in Quebec by Defendants respect regulatory or other norms?

11. Are the Affected Phones sold and marketed by Defendants emitting into the environment emissions or pollutants exceeding prescribed norms?

12. Did Defendants, illicitly and intentionally, falsify their testing results for the Affected Phones?

13. Given the application of Article 1621 (2) C.C.Q., the gravity of Defendants unconscionable behaviour, their disproportionate patrimonial and informational advantage over consumer victim class members, what is the proper amount of punitive damages required to dissuade, denounce and prevent Defendants (and similar companies) future bad conduct?

14. Do Defendants faults and omissions constitute a breach of sections 8, 37, 53, 216, 218, 219, 223.1, 228, 238(a), 253, 272 of the *Consumer Protection Act*?

15. What compensatory damages are due by Defendants to class members for those breaches?

16. What punitive/exemplary damages are due by Defendants to class members for those breaches?

17. Arial et als. CPA Conclusions restated:

a) Did Apple and Samsung contravene their duty to inform consumers of the SAR levels and related health risks in the phones they manufactured and sold from 2013 onwards?

b) In the absence of such information, did Apple and Samsung contravene sections 37 et 38 CPA as concerns the SAR levels and related health risks in the phones they manufactured and sold from 2013 to today?

c) Did Apple and Samsung fail in their duty to inform Quebec consumers with their representations as concerns the SAR levels and related health risks in the phones they manufactured and sold from 2013 in violation of sections 37, 53, 216, 218, 219, 223.1, 238 (a), 253 and/or 228 CPA?

d) Without that adequate information concerning the SAR levels and related health risks in the phones they manufactured and sold from 2013 to today are Quebec consumers entitled to the recourse stipulated at section 272 CPA and if so which ones?

e) Should Apple and Samsung, pay compensatory and or punitive damages to class members and in what amount ?

18. Are the designated Representatives and members of the group entitled to have Defendants issue a software patch that would reduce the EMF/radiation emission on the Affected Phones and if so what should be the content of that software patch?

19. Are the designated Representatives and members of the group entitled to have Defendants reimburse all sums spent in the present proceedings including Expert fees and disbursements?

20. To what amount of compensatory damages is each member of the group entitled?

21. Are the designated Representatives and members of the group entitled to have Defendants publicize Non-Ionizing Radiation Protection EMF hazard warning signs for wireless users of Affected mobile phones and what should be the content and location of those warnings?

IDENTIFY as the conclusions sought:

GRANT the Petitioners' Motion Seeking Authorization to Institute a Collective Action on behalf of all members;

DECLARE Defendants have contravened sections 2, 8, 37, 53, 216, 223,1, *218, 219, 228, 238(a)*, 253 and 272 of the *Consumer Protection Act*;

DECLARE Defendants have contravened article 1457 *C.C.Q.*;

DECLARE Defendants have contravened sections 19.1 to 22 of the *Loi sur la qualité de l'environnement*;

DECLARE Defendants have contravened sections 1, 6, 7, 24, 39, 46.1 et 49 de la *Charte des droits et libertés de la personne*;

CONDEMN Defendants to solidarily pay to group members the sum of thirteen thousand dollars per year (13 000 $), per member, for the past three (3) years and for each additional year until such time as the

radiation pollution is curtailed, with interest at the legal rate as well as the special indemnity provide for at article 1619 du *C.C.Q.* calculated from the date of Notice;

CONDEMN Defendants to pay to group members the cost of medical monitoring;

ORDER Defendants to publicize Non-Ionizing Radiation Protection EMF hazard warning signs for wireless users of Affected mobile phones and determine the content and location of those warnings;

THE WHOLE with costs, Expert fees, « d'enquêtes » as well as all costs of publishing Notice to Members;

FIX the delay to request exclusion from the class as 60 days following publication of the Notice to Members, after which members not requesting exclusion be deemed Class Members;

ORDER publication of a Notice to Members consistent with the requirements of the Art. 579 *C.C.P.* within sixty (60) days of a decision approving the Notice;

DECLARE that all members of the class who have not requested their exclusion from the class in the prescribed delay be bound by any judgment rendered on the class action to be instituted and **ORDER** Defendant to pay for said publication costs;

(a) **ORDER** collective recovery in accordance with articles 595 to 598 of the *Code of Civil Procedure*; **ORDER** that each member's claim be individually assessed, but if impracticable, **ORDER** la distribution of the *reliquat* collectively recovered to be used to implement measures for the benefit of Class Members to be determined by this Honourable Court;

(b) **THE WHOLE** with interest and additional indemnity provided for in the *Civil Code of Quebec* and with full costs, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action;

(c) **ORDER** the publication of a notice to the class members in accordance with Article 579 of the *Code of Civil Procedure*, pursuant to a further order of the Court, and **ORDER** Defendant to pay for said publication costs;

(d) **FIX** the delay for a class member to opt out of the class at 60 days from the date of the publication of the notice to the members and

(e) Such further and other relief that this Honourable Court deems just.

DECLARE Defendants committed a fault in failing to take all necessary measures to cease or considerably diminish the radiation pollution suffered members;

ORDER Defendants lower the level of radiation pollution (SAR) to an acceptable level, in the manners set out at para. 116, at their sole expense and within six (6) months;

SOLIDARILY CONDEMN Defendants to pay interest and the special indemnity on all amounts awarded, from the date of Notice;

December 15th, 2019

Respectfully submitted,

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