# SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000722-146

DATE: NOVEMBER 24, 2016

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**BEFORE THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.**

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**RENÉ CHARBONNEAU**
Petitioner
v.
**APPLE CANADA Inc. & APPLE Inc.**
Respondents

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JUDGMENT

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[1] The original "Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative" was taken by the Petitioner on December 3, 2014, and amended on May 28, 2015[1].

[2] The Petitioner, a purchaser of a 2011 MacBook Pro laptop computer, asserts an "action in damages and restitution for product liability, misrepresentation, false advertising and latent defect"[2], all related to his purchase on April 10, 2011 of a 2011 MacBook Pro laptop computer manufactured and sold by the Respondents which developed graphic defects on September 8, 2014 just outside the three-year warranty period.

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## FACTUAL CONTEXT

[3] The Court reproduces extracts from the parties' summaries of the relevant facts, as re-organized by the Court. The Respondents' Plan of Argument summarizes certain

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[1] Hereafter, the "Amended Motion".
[2] Amended Motion, para. 116.

relevant facts which are noted in bold italics in quotes. The Court has added additional relevant facts from the Petitioner's Amended Motion Seeking Authorization (which are shown in regular typeface). Using this method, the reader can discern the source of the text in this section.

[4] ***"The Petitioner proposes a Canada-wide class action on behalf of:***

> ***All persons in Canada (subsidiarily in Quebec) who purchased and/or own a 2011 MacBook Pro Laptop equipped with Advanced Micro Devices (AMD) graphics processing unit (GPU), manufactured, distributed, sold or otherwise put onto the marketplace by the Respondents, or any other Group(s) or Sub-Group(s) to be determined by the Court."*** [3]

[5] ***"The Petitioner alleges that Apple sold 2011 MacBook Pro Laptops (the "Laptops") in which the solder used to connect the Advanced Micro Devices Graphics Processing Unit to the Laptops' main circuit board was lead-free, which increased the likelihood of graphics problems due to short-circuiting whenever the solder developed either "tin whiskers" or cracks from changes in temperature".*** [4]

(this Court's emphasis)

[6] The Laptops were sold from 2011 to May 2012. The Respondents represented that the 2011 Laptops were 3 times faster than their 2010 counterparts when running graphically intensive programs. To achieve this speed, an AMD-manufactured General Processing Unit was added. The result was additional heat, a problem exacerbated by the aluminum unibody used by the Respondents. The Petitioner alleges that the Respondents had suffered a very similar problem with their 2008 models. The Petitioner further asserts that the Laptops were the most expensive and feature-packed laptops sold by the Respondents and according to the Petitioner, these Laptops were "marketed to Consumers and professionals who were seeking a durable, high-performance product that was suitable for graphics-intensive tasks".

[7] ***"The Petitioner alleges that Apple's behavior was misleading and that Apple "benefit[ed] from its own turpitude,"*** [5] ***failed to warn class members of the alleged graphics defect and sold consumers replacement logic boards which were also lead-free and therefore similarly defective"***. The Petitioner alleges that the Respondents had corrected the problems with their 2008 models through a recall. The Petitioner asserts that the Respondents knew or should have known that the Laptops were not fit for the purpose for which they were intended and that the Respondents knowingly offered inadequate repair options that did not address the root cause, the lead-free solder. He asserts that he took the Laptop into the Apple store for repairs on 3

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3 The Court uses the term "Laptop" to describe the 2011 MacBook Pro laptop computers in issue.

4 Amended Motion, para. 14 to 18. The Court uses the term Graphics Defect to describe these alleged graphics problems.

5 Amended Motion, para. 102.

occasions, paid $622.65 in repair costs and the Graphic Defect was never fixed. On November 12, 2014, Apple Canada replaced the Laptop. On February 19, 2015, Apple Canada advised him of their Repair Extension Program, under which he was reimbursed $622.65 for his repair costs.

[8] ***"The Petitioner alleges that Apple released a software update to resolve the defect, but which restricted the Laptops' operating speed and performance capabilities"***[6]. The Petitioner asserts this was done on purpose and in bad faith since the Respondents knew from the early complaints received from consumers that the Laptops could not meet the 3x performance speed represented when the Laptops were first sold.

[9] ***The Petitioner admits that in February 2015, Apple announced a Repair Extension Program ("REP")[7] but alleges that it only did so "in an attempt to circumvent the present class action[8]."*** The Petitioner alleges that this REP did not address all the types of damages being claimed in these proceedings, notably punitive damages.

[10] ***The Petitioner qualifies Apple's conduct as "wild and foolhardy", "reckless", "malicious, oppressive, high-handed" and states that it was "a marked departure from ordinary standards of decency."[9]*** The Petitioner bases these alleged qualifications on the assertion that the Respondents put the Laptops on the market knowing that they would experience the Graphics Defects as a result of the Respondents' similar difficulties with their 2008 Laptops.

**Legal Context**

***General Principles***

[11] At the authorization stage, the role of the Court is to filter out frivolous applications. The burden on the Petitioner is one of demonstration of an appearance of right, known also as an "arguable case", and not the usual civil evidential standard "on the balance of probabilities"[10].

[12] The Supreme Court of Canada in the 2013 judgment of *Infineon Technologies AG* [11] confirmed that the *CCP* art. 575 criteria required a "low threshold" of review by the Superior Court at the authorization stage. Equally, that judgment established that the approach taken by the Superior Court in analyzing the application of the CPC art. 575 criteria should be generous and liberal and not restrictive[12].

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6 Amended Motion, para. 42 to 42.8.
7 The Court uses the term "REP" to mean the Apple Repair Extension Program.
8 Amended Motion, para. 22, 56.1 and 56.3.
9 Amended Motion, para. 103 and 104.
10 *Infineon Technologies AG* v*. Option Consommateurs,* 2013 SCC 59, para. 57 to 68, para. 65.
11 Ibid. Also see: *Vivendi Canada Inc*. v. *Dell'Aniello*, 2014 SCC 1, para. 37 to 38 and *Albilia* v. *Apple Inc*., 2013 QCCS 2805, para. 52 to 61. In the days before the issuance of the present judgment, the judgment in *Charles* v. *Boiron Canada inc.* was handed down by the Court of Appeal which emphasizes this "low threshold test" (see 2016 QCCA 1716 at para. 71 and 72).
12 Ibid. note 9, *Infineon* para. 69.

[13] The Petitioner must assert specific facts; if the Petitioner asserts only generalities, the Superior Court must be vigilant to determine that the legal syllogism being proposed by the Petitioner meets even the low standard of "arguable case".

[14] In addition to taking the facts alleged in the Application as proven, the Court must also consider the evidence in the record, being: (a) the exhibits and (b) the transcript of the limited examination permitted by the Court of the Petitioner[13].

[15] As for the Legislator's general intent in legislating class actions into the *Code of Civil Procedure*, the Petitioner's Plan of Argument correctly asserts, based on principles recently reiterated by the Supreme Court of Canada in *Bank of Montreal v. Marcotte*[14]:

> ***«Class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. ... In addition, given the costs and risks inherent in an action before the courts, many people would hesitate to institute an individual action against the Respondent. Even if the class members themselves could afford such individual litigation, the court system could not support the number of claims and would consequently be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondent would increase delays and expenses to all parties, as well as to the Court system."***

## AUTHORIZATION OF THE CLASS ACTION

[16] The Court will now consider whether this application meets the four criteria of *CCP* art. 575 (1) - (4). The headings are the actual wording of each of those sub-sections.

### a) Art. 575 (1): Whether the Recourses of the Members Raise Identical, Similar or Related Questions of Law or Fact

[17] The Petitioner proposes the following Identical, similar or related questions of fact and law to be decided for all class members :

a. Whether the 2011 MacBook Pro Laptops suffer from a common Graphics Defect;
b. Whether (...) Respondents knew of and failed to warn Class Members of the Graphics Defect;
c. Whether Respondents failed to disclose material information to Class Members ;

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[13] *Union des consommateurs* c. *Bell Canada*, 2012 QCCA 1287, para. 88, motion for leave to the SCC refused, January 17 2013, 34994.
[14] 2014 SCR 55, para. 43.

d. Whether Respondents' omission of material facts is misleading and/or reasonably likely to deceive a reasonable Consumer;
e. Whether Respondents' purported software update to address "graphical stability" and/or the Logic Board replacements, resolved the Graphics Defect;
f. Whether Respondents should have recalled the MacBook Pro Laptops;
g. Whether the 2011 MacBook Pro Laptops have not or will not perform in accordance with the reasonable expectations of ordinary Consumers;
h. Whether Respondents are liable to pay compensatory damages to the Class Members, including without limitation the repair costs disbursed and the reimbursement of the initial purchase price, and if so in what amount?
i. Whether Respondents are liable to pay exemplary or punitive damages to the Class Members, and if so in what amount?

[18] The Respondents argue that any claims are best dealt with on an individual basis and that to do so would best meet the principle of proportionality:

> ***1. since there is no allegation that all the Laptops are defective or unfit or that all purchasers are aggrieved;***
>
> ***2. since the Petitioner only argues that there "is increased likelihood of a short circuit", purchasers may never have a problem or the problem may have been corrected under the Repair Extension Program [15] ; or***
>
> ***3. Since there is no allegation that the REP has not completely satisfied any purchaser who has had the problem.***

[19] The Court is satisfied that there is a series of common issues concerning whether the Laptops have this Graphics Defect; how and when this alleged defect manifests itself; what effect the Graphics Defect has on the use of the Laptop; whether compensatory damages are required and if so how should these be calculated; and whether there are intentional breaches of the *Consumer Protection Act* of such a nature that punitive damages are warranted and how they should be calculated.

[20] In view of the similarity of the questions of fact and law involved in this proceeding, the Court determines that this first criterion has been met.

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[15] This Program was instituted by the Respondents in February 2015 following the institution of these proceedings in December 2014.

**b) Art. 575 (2): The Facts Alleged Seem to Justify the Conclusions Sought**

**Sufficiency of the Facts Alleged**

[21] The Respondents assert that the Petitioner has provided no factual basis for his claims but rather only :

***a. opinions expressed in online chat forums;***

***b. unproven allegations in a U.S. action; and***

***c. an online article written by an apparently unqualified individual.***

[22] In addition, the Respondents suggest that: ***"The proposed class action would make plaintiffs of purchasers who are perfectly happy with their Apple products and of those perfectly happy with the REP".***

[23] The Petitioner also refers to and files an amended California Class Action regarding the Graphic Defect[16]. At the authorization hearing, the Respondents asserted that this class action is no longer before the courts. The Petitioner responded that this can occur under California law without court approval. In the absence of any jurisconsult, the Court is in no position to determine the evidential status or weight of these proceedings and so will say nothing further about them in this judgment.

[24] The following main headings of the Petitioner's 48-page Amended Motion demonstrate the extent of the detail of the allegations :

- **The Graphics Processing Units**
- **Apple's Durability Advantage**
- **The 2011 MacBook Pro Laptops' Immediate Failure**
- **The Source of the Graphics Defect**
- **Apple Restricts the Laptops' Performance**
- **Apple's Inadequate Response to the Graphics Defect**
- **Facts that Have Occurred since the Institution of the Present Proceedings:**
  - **Facts Giving Rise to an Individual Action by the Petitioner**
  - **Conditions Required to Institute a Class Action**
  - **Nature of the Action and Conclusions Sought**

[16] Exhibit P-2A.

[25] The Court is satisfied that the Petitioner has met the low threshold from *Infineon* for the following reasons:

25.1.1. the Petitioner is a knowledgeable professional in the computer technology field who recites the problems his Laptop presented over a period of months after his three-year warranty had expired;

25.1.2. at the authorization stage, the Petitioner is not required to produce expert evidence[17];

25.1.3. he has alleged numerous sources of complaint regarding the Graphics Defect: consumer complaints (para 28 and 43; Exhibit P-6); articles in industry publications (para. 37 and 46, Exhibit P-5 and 7); online petitions complaining of the Graphic Defects ( para. 54; Exhibit P-9); confirmations by Apple in the REP (Exhibit P-30) that a “small percentage” of the Laptops suffered from "distorted video, no video or unexpected system restarts";

25.1.4. he has produced emails from many Laptop purchasers who assert they have suffered similar problems[18]; and

25.1.5. the Petitioner asserts that Respondents' representatives have confirmed to him that the problems he suffered should not have occurred on his three year old computer[19]; and Apple asserts its laptops have batteries that last up to five years: thus implying a similar life for the laptop[20].

**Punitive Damages**

[26] At paragraph 19 of their Plan, the Respondents assert that the punitive damages claim has no factual basis:

> ***"…there is here no corroborated indication of any <u>actual remaining harm</u> to anyone and none of any need to deter…***
>
> ***The Motion’s bald assertion that Apple’s actions “show a malicious, oppressive and high-handed conduct that represents a marked departure from ordinary standards of decency”[21] is purely gratuitous. It is devoid of any factual content or corroboration, and fails to anchor the claim in any specific legislative provisions that could give rise to punitive damages, in Quebec or anywhere."***

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[17] *Infineon* at para. 128.
[18] Exhibit P-28.
[19] Exhibit P-19.
[20] Exhibit P-3 and P-26.
[21] Amended Motion, para. 104.

**(this Court's emphasis)**

[27] Here are the facts which the Petitioner alleges in its Amended Motion:

> ***[102] Indeed, Apple has known about the Graphics Defect for years, has received thousands of complaints from Customers (…) and refused to recall and properly repair the Class Member's MacBook Pro Laptops only announcing the inadequate Extension Repair Program after class action proceedings had been instituted (in what we respectfully submit is an unlawful attempt to circumvent the class actions proceedings and the supervisory role of this Honourable Court). Apple (...) chose to earn additional profit, benefiting from its own turpitude, by selling replacement Logic Boards to Class Members such as Petitioner, whereas Apple (…) knew that the replacement Logic Board has the same defect and that the same problem will reoccur;***
>
> ***[103] Respondents' above detailed actions qualify its fault as intentional which is a result of wild and foolhardy recklessness in disregard for the rights of the Class Members, with full knowledge of the immediate and natural or at least extremely probable consequences that its actions would cause to the Class Members.***

[28] The Petitioner has not referred in the Amended Motion to specific articles of the *Consumer Protection Act* ("CPA") that he asserts have been violated and for which he claims punitive damages, nor, to this point, have the Respondents sought particulars.

[29] That said, the Petitioner asserts his claim is based on "product liability, misrepresentation, false advertising and latent defect". At the hearing, Petitioner's counsel confirmed that the claim for punitive damages, for those members who are Quebec residents is based exclusively on the *Consumer Protection Act*. The Court notes the potential application of the *Consumer Protection Act* art. 37 and 38 (fitness for purpose and durability in normal use for a reasonable length of time); art. 53 and 54 (consumers recourse against manufacturer for latent defect and breaches of art. 37 and 38) and art. 219, 220 and 221 (false or misleading representations).

[30] To the extent that a merchant or manufacturer breaches one of the above obligations, then the Quebec *Consumer Protection Act* provides for a potential claim for punitive damages as follows:

| | |
|---|---|
| 272. **If the merchant or the manufacturer fails to fulfill an obligation imposed on him by this Act, by the regulations (…) the consumer may** | 272. **Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement[…] le consommateur, sous** |

| | |
|---|---|
| **demand, as the case may be, subject to the other recourses provided by this Act,** | **réserve des autres recours prévus par la présente loi, peut demander, selon le cas:** |
| **(…)** | **[…]** |
| ***(c)* that his obligations be reduced;** | ***c)* la réduction de son obligation;** |
| ***(d)* that the contract be rescinded;** | ***d)* la résiliation du contrat;** |
| ***(e)* that the contract be set aside; or** | ***e)* la résolution du contrat; ou** |
| ***(f)* that the contract be annulled,** | ***f)* la nullité du contrat,** |
| **without prejudice to his claim in damages, in all cases. <u>He may also claim punitive damages.</u>** | **sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.** |

(this Court's emphasis)

[31] The Court of Appeal has confirmed:

> ***In summary then, once the Court is convinced that a merchant has violated its obligations under the C.P.A., then the Court must determine whether the merchant displayed ignorance, carelessness or serious negligence or, acted intentionally, maliciously or vexatiously. In such event, the Court determines if and to what extent the punitive damages are called for, taking into account the criterion of prevention or dissuasion, the behaviour of the merchant both before and after the violation, the legislative purpose of the C.P.A. and the other criteria set forth in article 1621 CCQ[22].***

[32] Punitive damages may be awarded independently of compensatory damages [23] although *CCQ* art. 1621 requires that a particular law permit punitive damages, such as the *Consumer Protection Act*, *R.S.Q*., ch. P-40.1. The Supreme Court of Canada underscores the preventive and educative role played by punitive damages and their

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[22] *Dion v. Compagnie de services de financement automobile Primus Canada* 2015 QCCA 333 at para. 123.

[23] *De Montigny* v. *Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64 at para. 53 and following.

objective to punish and dissuade a wrongdoer (and others in society) from committing intentional and socially unacceptable practices[24].

[33] The Court of Appeal underscores the Supreme Court of Canada's statements on the important burden of proof on a plaintiff seeking punitive damages under the *Consumer Protection Act:*

> ***Ainsi, le tribunal appelé à décider s'il y lieu d'octroyer des dommages-intérêts punitifs devrait apprécier non seulement le comportement du commerçant avant la violation, mais également le changement (s'il en est) de son attitude envers le consommateur, et les consommateurs en général, après cette violation. Seule cette analyse globale du comportement du commerçant permettra au tribunal de déterminer si les impératifs de prévention justifient une condamnation à des dommages-intérêts punitifs dans une affaire donnée[25].***

[34] Whether the Petitioner can prove its allegations regarding punitive damages on the merits remains to be seen. However, it has alleged sufficient facts to raise an arguable case, including:

> 34.1.1.1. that the Respondents knew of the Graphic Defect problem from 2008 and knew or should have known that this was an issue for their 2011 Laptops and yet failed to disclose the problem to potential customers; and
>
> 34.1.1.2. that after consumers suffered the Graphic Defect problem, the Respondents proposed (a) "software patches" and (b) replacement of hardware components, that they allegedly knew or should have known would not remedy the Graphic Defect caused by the lead-free solder.

[35] For these reasons, the Court cannot say that the Petitioner has no factual basis for the claim for punitive damages[26].

**Whether the REP Removes All Causes of Action**

[36] The Petitioner dismisses the legal effect of the REP with the following allegations in its Amended Motion:

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[24] Ibid. at para 49.

[25] *Richard* c*. Time Inc*., 2012 CSC 8, para. 178 cited in *Perreault* v. *McNeil PDI Inc.*, 2012 QCCA 713 at para. 41-42.

[26] To the same effect, see *Albilia* v. *Apple inc.*, at note 10, para. 60.

> ***56.3 […] it is clear that Apple's unilateral yet inadequate Repair Extension Program, announced only after the institution of the present class action proceedings, is merely an attempt to circumvent the present class action and the supervisory role of this Honourable Court;***
> ***56.4 In any case, the said Repair Extension Program does not remedy or address all of the different damages suffered and claimed by the Class Members herein and Apple has not explained how (if at all) it solved the Graphics Defect going forward;***
> ***56.5 Accordingly, Apple ignored Class Members' complaints, worldwide, for nearly 4 years and only reacted once class action proceedings had been instituted;***
>
> (this Court's emphasis)

[37] The Petitioner confirms that on Nov. 12, 2014 "his defective MacBook Laptop Pro" was replaced with a "new MacBook Pro Laptop" and on March 25, 2015, he was reimbursed the $622.65 that he spent on unsuccessful repairs.

[38] By way of Motion, the Respondents sought to file the following evidence:

> ***25. The first proposed affidavit (attached as Exhibit APM-1) will provide a description of the REP now alleged by Petitioner, by the person responsible for implementing it.***
>
> ***26. The second proposed affidavit (Exhibit APM-2, not attached pending permission to submit it under seal), which Apple hereby requests to file under seal due to confidentiality concerns, would provide indicative sales numbers and describe the response to the REP to date.***

[39] By judgment dated February 19, 2016, the Court, inter alia:

> ***… GRANTS the Respondents with the option to file an affidavit that provides its indicative sales numbers and describes the response to the REP to date, within 32 days following the Court's judgment on the Respondents' request to seal that affidavit.***

[40] On March 22, 2016, the Respondents confirmed that they no longer wished to file any additional affidavits.

[41] Accordingly, the only evidence regarding the REP is filed in the Amended Motion as well as the information regarding the REP itself: Exhibit P-30 that was personally sent to the Petitioner.

[42] Nonetheless, the Respondents chose to make the following statements in their Plan of Argument:

> **20** ***"Through the REP, Apple has already provided relief to all members, [footnote] making the proposed class action a needless waste of judicial resources…"***
>
> The footnote says:
>
> ***Through the REP, Apple will repair affected Laptops free of charge. Apple is in the process of contacting customers who have already paid to have a Laptop repaired through Apple or an Apple Authorized Service Provider. These customers will obtain a reimbursement for the cost of that repair.***

[43] Since the Respondents chose not to file the additional evidence they were given permission to file, the references in paragraph 42 of this judgment do not form part of the record.

[44] The Respondents assert that the REP negates any purpose for the alleged class action because:

> ***44.1.1. the REP provides all members with relief;***
> ***44.1.2. the Petitioner has failed to show any continuing legal interest in the class;***
> ***44.1.3. the jurisprudence encourages manufacturers to resolve consumer complaints extra-judicially; and***
> ***44.1.4. the REP is not an admission of defect but an initiative undertaken "to maintain client loyalty and as a matter of corporate or product goodwill".***

[45] The REP on the facts before the Court does not address the issue of alleged punitive damages. On this basis alone, the REP does not resolve all claims for relief.

[46] Furthermore, class members who have experienced Graphic Defects may be entitled to reimbursement of the purchase price, in the alternative or in addition to the two options provided by the REP[27].

[47] However, Exhibit P-30 (the notice received by the Petitioner explaining the REP) proposes two options only for persons who receive this REP notice:

> (a) take the Laptop to an authorized repair facility for free of charge repair; and/or

[27] Exhibit P-30.

(b) "Apple is contacting customers who paid for a repair either through Apple or an Apple Authorized Service Provider to arrange reimbursement [28]".

[48] Eligibility for relief under the REP is within a defined time period: "until February 27, 2016 or three years from its original date of sale, whichever provides longer coverage to you."

[49] There is no present evidence that a Laptop with lead-free solder causing a Graphics Defect is repairable in view of the Petitioner's alleged facts concerning his own experience particularly that after three attempted repairs by Apple, the Petitioner was provided with a new Laptop in 2014. There is no evidence of whether the replacement was a 2011 or a 2014 model.

[50] Exhibit P-30 does not state whether this REP notice has been sent to all direct purchasers or who else received the notice.

[51] Now to the jurisprudence that the Respondents cite. In her minority opinion, Chief Justice Nicole Duval-Hesler underscores that manufacturers should be encouraged in their extra-judicial settlement efforts and "to reimburse as best they can»[29]. That case did not involve an alleged product defect but rather a levy illegally imposed by the Government and passed on to consumers by the manufacturer.

[52] Similarly, the other two cases cited by the Respondents involved respondents providing full purchase price reimbursement for the defective products, which is what the petitioners in those two cases were requesting[30]. This jurisprudence is distinguishable on the facts: the REP makes no mention of the option of replacement of the Laptop or reimbursement of purchase price. Hence, the REP does not subsume all the relief requested in the present case.

[53] The Petitioner has made out an arguable case for reimbursement of repair costs and potentially the purchase price and punitive damages, which given the low threshold at this authorization stage, means that this second criterion is met. Of course, the full burden remains on the Petitioner at any hearing on the merits to prove its alleged damages on the balance of probabilities.

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[28] The Court's note: reimbursement of repair costs.

[29] *Apple Canada Inc.* v. *St-Germain*, 2010 QCCA 1376 at para. 104 and following. Mr. Justice Morrisette for the majority confirmed that legitimate questions were raised by the trial judge including: extent of publication of the reimbursement program, percentage of uptake etc. No such evidence is yet in the record in the present case.

[30] *Benoît* v. *Amira Enterprises Inc.*, 2013 QCCS 4653 at para. 44 to 49 and *Perreault v. McNeil PDI Inc.*, 2012 QCCA 713 at para. 41-42.

**c) Art. 575 (3): The Composition of the Group Makes It Difficult or Impracticable to apply the Rules for Mandates to Sue on Behalf of Others or for Consolidation of Proceedings;**

[54] The Respondents do not contest this criterion.

[55] Exhibit P-28 is a series of emails from potential class members sent to the Petitioner's attorneys' web site. These emails purport to show customers of the Respondents who had Graphic Defects with the Laptops. Clearly, only the Respondents possess the exact details of all their sales to potential class members, their names, whereabouts and sales transactions.

[56] The Petitioner has asserted that his new Laptop cost him in excess of $2000. It is clear that the wrongs alleged by the Petitioner would, although important, not make it worthwhile for each of the customers who may have suffered damages, to sue individually.

[57] These circumstances are those envisioned by this third criterion, which is met.

***d) Art. 575 (4) : The Class Member to Whom the Court Intends to Ascribe the Status of Representative is in a Position to Properly Represent the Class Members***

[58] The Respondents argue that the Petitioner should not be ascribed the quality of representative because:

> ***"Here, the Petitioner has no claim. He sought and has received a refund for the cost of repairs to his Laptop,[31] and makes no allegation that it did not make him whole. He therefore lacks the legal interest to represent a group which continues to claim damages from Apple, unless it be to represent a group which insists on suing even after having availed itself of a complete fix.[32]"***
>
> (this Court's emphasis)

[59] The Supreme Court of Canada in *Infineon* confirmed the doctrine of Prof. P.C. Lafond who said that "adequate representation" [33] requires three factors: interest in the suit, competence and absence of conflict with class members.[34] The Supreme Court of Canada also requires that these criteria be interpreted liberally and that «***No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly***".

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[31] See pages 22 and 23 of the examination transcript of Petitioner, Mr. Rene Charbonneau.
[32] *Leblanc* v. *United Parcel Service du Canada ltée,* 2012 QCCS 4619 at para. 329 to 331.
[33] The expression used in the former *CCP.* The present *CCP* art. 575 (4) refers to "properly represent".
[34] *Infineon note 9* at para. 149.

[60] The Court of Appeal has also considered the state of the law regarding representativity particularly with multiple un-related defendants (not the case here) and the influence of the recent Supreme Court of Canada judgment in *Bank of Montreal v. Marcotte* [35] :

> ***[90] The Supreme Court in Marcotte held that the law permits a class representative to act as such <u>even when the representative has no direct cause of action or legal relationship with each defendant. …</u> The Supreme Court underlined the malleability of the sufficient interest criterion to act as a class representative.***
>
> ***[91] Decisions of this Court previous to Marcotte had held that once a class action is authorized a defense that the class representative had no direct cause of action would not be entertained.***
>
> ***[92] In Marcotte, the Supreme Court disagreed with this, but stated that: Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action.***
>
> ***(References omitted) (this Court's emphasis)***

## Analysis

[61] However, the Petitioner in this case must nonetheless still have at least ONE cause of action against the Respondents.

In the present case, the Court must answer the threshold question:

> Does the Petitioner have a cause of action since he has been provided with a replacement computer and reimbursed the $622.65 he spent on unsuccessful repairs at Apple stores in Montreal?

[62] The Court determines he does.

[63] The Petitioner has an arguable cause of action for himself based on the punitive damages claim, which as we have seen earlier, is a "stand alone" right. This provides him with sufficient interest in the suit.

[64] Furthermore, he has no conflict of interest with other potential class members and has technical competence, being an analyst with 4 years' experience in the technology sector and having earned a Bachelor's degree in 2012 in Management

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[35] 2014 SCC 55, para. 90.

Information Systems from Concordia University (which included multiple courses in computer hardware and software).

[65] Therefore, the Court is satisfied that all four criteria of *CCP* art. 575, *CCP* have been met.

***Art. 576: Composition of the Class***

[66] The class definition proposed by the Petitioner is:

> "All persons in Canada (subsidiarily in Quebec) who purchased and/or own a 2011 MacBook Pro Laptop equipped with Advanced Micro Devices (AMD) graphics processing unit (GPU), manufactured, distributed, sold or otherwise put onto the marketplace by the Respondents, or any other Group(s) or Sub-Group(s) to be determined by the Court." [36]

[67] The Respondents argue: ***"The proposed class is flawed, imprecise and overbroad. It includes people who never had any problem, or who have had their Laptop repaired or replaced without charge, or who have obtained a refund, or who could still make claims if they want to"*** (Court's note: presumably claims under the REP).

**Governing Law**

[68] In *Brito* v. *Pfizer Canada Inc., et al*.[37], the Superior Court confirms that the Court can both modify the class definition and that the definition of the class must be founded on objective criteria, be based on a rational foundation, must not be imprecise or circular, and must not be dependent on the outcome on the merits of the case.

[69] In addition to confirming this approach to defining the class, Mr. Justice Nicholas Kasirer writing for the Quebec Court of Appeal in the 2016 judgment of *Sibiga c. Fido Solutions Inc.*[38] has confirmed the following caveat to be applied in determining the definition of the class:

> **…**
>
> ***141- By the same token, at the authorization stage, it seems to me that one should exercise caution before limiting the dimension of the class as stated by the Petitioner. After all, the consequence of excluding members of the class at this early stage is a serious one…***

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[36] The Court will also use the term "Laptop" to describe the laptop computers in issue.
[37] 2008 QCCS 2231, par. 66.
[38] 2016 QCCA 1299.

[70] Later in the same judgment Mr. Justice Kasirer gives these reasons to support such principles: (a) to allow the respondents to narrow the class at the authorization stage would be unfair because of their "Informational advantage" and (b) an overly rigorous definition would defeat the Supreme Court of Canada's liberal approach to class actions: "***In situations in which claims are often modest, there are many claimants and dealing with cases on an individual basis would be difficult. »***[39]

## Analysis

[71] Mindful of this approach established by the Court of Appeal, the Court exercises its discretion to define the class as follows at this juncture of the proceedings:

i. all persons in Quebec, who purchased and/or own a 2011 MacBook Pro Laptop which suffers from a Graphics Defect;

ii. all persons, who purchased in Quebec, a 2011 MacBook Pro Laptop which suffers from a Graphics Defect, equipped with Advanced Micro Devices (AMD) graphics processing unit (GPU), manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents; or

iii. any other Group(s) or Sub-Group(s) to be determined by the Court.

### *Is this a National Class Action?*

[72] The jurisdiction of the Superior Court in permitting a class action for Canada-wide class members is governed by *CCQ* art. 3148:

> ***In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:***
>
> ***1° the defendant has his domicile or his residence in Québec;***
>
> ***2° the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;***
>
> ***3° a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;***

[39] Ibid. at para. 149.

> ***4° the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;***
>
> ***5° the defendant has submitted to their jurisdiction….***

[73] The authorization application must meet one or more of these criteria. Unless the Petitioner can meet this jurisdictional threshold, the fact that: (a) consumers in other provinces may have experienced the same problems; (b) that this is the only class action on this issue in Canada; or (c) that other provinces may be presumed to have similar consumer protection legislation, does not establish jurisdiction for the Quebec Superior Court – contrary to the Petitioner's assertions.

[74] The Quebec Legislator has not seen fit to adopt the practise in other provinces of providing specific jurisdiction to their superior courts over national class actions where the applicant themselves has a personal cause of action within the court's jurisdiction and the other non-jurisdictional requirements for a class action are met. Annex A hereto provides an overview of this legislation in other provinces.

[75] The Legislator, in the recent reforms of the *Code of Civil Procedure* in *CCP* art. 577 al. 3 gives the Superior Court the mandate to protect Quebec resident class members regarding multi-jurisdictional class actions outside Quebec by disallowing "the discontinuance of an application for authorization or permitting another plaintiff to institute a class action involving the same class and subject matter.

[76] In the 2016 Court of Appeal judgment of *Charles v. Boiron*[40], Madam Justice Marie-France Bich has referred to the wisdom of possible legislative reform of the class action authorization process. In the context of potential reforms, the Legislator may also wish to consider introducing similar legislation in Quebec regarding the "opting in or out" of non-Quebec residents in Quebec class action proceedings, keeping in mind the objectives of: judicial efficiency and avoiding conflicting judgments in different provinces, the comity between Superior Courts in Canada and the principle of proportionality by deciding common questions once and for all.

Now, back to the specifics of the present case.

**The Petitioner's Position**

[77] The Petitioner alleges that class members come from across Canada based on emails of dissatisfied consumers received on the website of the Petitioner's attorneys[41].

[78] Firstly , the Petitioner's assert that this Court should authorize a national class action since Article 3148(3) *CCQ* is satisfied : (a) for Petitioner and other Quebec residents in that the fault was committed in Quebec, injury was suffered in Quebec, and an injurious act occurred in Quebec and (b) for class members in other provinces since

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[40] *Charles* v. *Boiron Canada inc*., 2016 QCCA 1716 at para. 76.
[41] Exhibit P-28.

(i) Article 3148 (3) *CCQ* is fulfilled by the simple fact that Petitioner's personal cause of action meets the criteria of this article and (ii) there are common questions/issues of law and fact for the entire national class.

[79] Secondly, the Petitioner asserts that Apple Canada had elected domicile in Westmount, Qc. at the time that the Respondents were selling the Laptops in Canada and that *CCQ* art. 3148 (1) is therefore satisfied.

**The Respondents' Position**

[80] The Respondents argue that the criteria of *CCQ* art. 3148 are not met and so this is not a national class action.

In response to the Petitioner's first argument: the Respondents assert:

> ***…The Petitioner has surprisingly omitted from his authorities the recent decision[42] which puts this issue to rest and establishes that, when no factor confers jurisdiction to Quebec courts, article 3148 CCQ bars them from extending jurisdiction over non-residents[43].***

[81] In response to the Petitioner's second argument, the Respondents assert:

> ***…Quebec courts have authorized multi-jurisdictional class actions when respondents have their headquarters or their domicile here,[44] but Apple does not.[45] Apple's compliant out-of-province registration does not change this. "***
>
> ***…Apple is not headquartered in Quebec and there is no real or substantial connection between non-resident purchasers and the courts of Quebec[46].***

**Governing Law**

[82] At present, the complete extent of the Superior Court's jurisdiction – including in class actions – is contained within the four corners of *CCQ* art. 3148.

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42 *Amram* v. *Rogers Communications Inc*, 2015 QCCA 105 at para. 23 leave to appeal to SCC dismissed.

43 *Ibid*.

44 *Brito v. Pfizer Canada Inc.*, 2008 QCCS 2231 at para. 87 and 113; *Amram* v. *Rogers Communications Inc. et al.*, 2015 QCCA 105, at para. 23, leave to appeal to SCC dismissed.

45 *Albilia* v. *Apple*, 2013 QCCS 2805 at para. 51 (Tab 25); *Nova* v. *Apple Inc.*, 2014 QCCS 6169 at para. 86-87.

46 *Schnurbach* v. *Full Tilt Poker Ltd.*, 2013 QCCS 411 at para. 82-84. See also *Albilia* v. *Apple*, 2013 QCCS 2805 at para. 49 to 51 and *Cunning* v. *Fitflop Ltd.*, 2014 QCCS 586 at para. 47-51.

**Analysis**

[83] Potential class members who are Quebec resident owner/purchasers of the Laptops are able to claim jurisdiction of the Quebec Superior Court since their claims fall within *CCQ* art. 3148 (3).

[84] However, the Court agrees with the Respondents that the Quebec Superior Court does not have jurisdiction over a national class based on the facts as pleaded.

[85] Firstly, art. 3148 (1) is not met because neither Respondent has their domicile or residence in Quebec: the so-called "election of domicile" in the *CIDREQ* does not create legal domicile under art. 3148 (1) and Apple Canada has only "establishments in Quebec". There are no allegations that the alleged wrongs suffered by out of province consumer/owners (a) "relate to activities in Quebec" or (b) arise from "any contract that was to be performed in Quebec".

[86] Secondly, to meet the criteria of art. 3148 (3), it is not sufficient that only the Petitioner's personal cause of action meets this requirement but rather, ALL class members must have an individual cause of action that meets one or more of the criteria of this article. It is well known that the Legislator did not intend that the *Code of Civil Procedure* create substantive rights[47].

[87] The following are the reasons for these conclusions.

***CCQ* art. 3148 (1)**

[88] Non-resident class members may be included in a class action before the Superior Court provided that the respondent is domiciled or resident in Quebec, pursuant to *CCQ* art. 3148 (1)[48].

[89] The Respondents are neither domiciled nor resident in Quebec within the meaning of CCQ art. 3148 (1).

[90] The Petitioner argues that the Court "cannot disregard" that Apple Canada chose to "elect domicile" in Westmount QC at a lawyers' office under the heading in the *CIDREQ*: "Adresse du domicile élu (adresse de correspondence) »[49].

[91] What is determinative are CCQ art. 307 and 308 which state respectively that the domicile of a legal person is the address of its head office and that domicile can only be changed by "following the procedure established by law".

[92] An "election of domicile" is not a change of domicile under *CCQ* art. 308, which is confirmed by the fact that on the face of the *CIDREQ* under the heading "Adresse du domicile", Apple Canada notes an address in Markham, Ontario. In particular, art. 33 of the *Loi sur la publicité des entreprises*[50] which requires the CIDREQ filing requires the

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47 See note 59.
48 *Brito* v. *Pfizer Canada inc*., 2007 QCCS 2231 at para. 87 and 113.
49 See Exhibit P-1, CIDREQ of Apple Canada dated April 15, 2013.
50 RLRQ c. P-44.1.

corporation to state its domicile as well as the mention of the “elected domicile” i.e. person with a Quebec address mandated for the purpose of receiving documents.

### *CCQ* art. 3148 (2)

[93] The Petitioner cites *Interinvest (Bermuda) Ltd. c. Herzog*, 2009 QCCA 1428, par. 12-13, 16-19, 28-41 for the proposition "that the faults and wrongful decisions by Apple do not have to emanate from its Quebec establishment in order to ground jurisdiction."

[94] The Court cannot accept this argument because of the 2015 judgment of *Syndicat canadien de la function publique v. SCEP*[51] where the Court of Appeal confirms that while it is not necessary for the contested activity to be undertaken by the Quebec-based business establishment, the petitioner must show "que la contestation par son objet est relative à son activité au Quebec". The Court must undertake a two-step analysis: (1) determine what the object of the litigation is and (2) whether this object is connected in one way or another with the respondent's activity in Quebec.

[95] To pose this question in the present case is to answer it. By way of illustration, the claim by the Vancouver consumer of a Laptop purchased in Vancouver has NO relation to the Respondents’ Quebec operations. Again, the fact that the Petitioner's personal claim meets this test does not "open the door" for other non-resident claimants, whose individual causes of action must meet this criterion each on their own merits[52].

[96] This criterion is met by Quebec residents who purchased Laptops. It would also be met by the limited class of non-residents who purchased their Laptops in Quebec.

### *CCQ* art. 3148 (3)

[97] The Supreme Court of Canada confirms that “a class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.” [53]

[98] Based on this reasoning, a potential national class member resident in Vancouver who purchased a Laptop in Vancouver would not have "a basis for Court proceedings in Quebec" because the cause of action does not fall within any of the jurisdictional criteria of CCQ art. 3148[54].

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[51] 2015 QCCA 1392 at para. 39-42.

[52] *Zoungrana* v. *Air Algerie*, 2016 QCCS 2311 at para. 70-71, leave to appeal sought to the Supreme Court of Canada (en appel).

[53] *Bou Malhab* v. *Diffusion Métromédia CMR Inc.*, [2011] 1 S.C.R. 214 at para. 52.

[54] *Amram* v. *Rogers Communications Inc.,* 2015 QCCA 105 at para. 23, leave to appeal to SCC dismissed. See also the similar case of *Albilia* v. *Apple Inc*., 2013 QCCS 2805, where Mr. Justice Pierre Nollet found that the Petitioner "had failed to establish a real and substantial connection for residents outside Quebec" at para. 49.

**Does the Existence of Common Questions Provide a Basis for Jurisdiction to the Quebec Superior Court over a National Class.**

[99] The Petitioner relies on the Manitoba Court of Appeal decision *Meeking* v. *Cash Store Inc. et al*, [55] that " the existence of common questions of law or fact for the entire national group is enough to create a real and substantial link with the province, giving jurisdiction to its Court" to say that this principle applies in addition to art. 3148 to constitute a source of jurisdiction for the Quebec Superior Court to permit a national class in the present case.

[100] The jurisprudence is clear that the Courts cannot add to the criteria in *CCQ* art. 3148 which codify the only criteria sufficient to allow jurisdiction for Quebec courts:

- *Spar Aerospace* v *American Mobile Satellite*:
  "[T]he criterion of a "real and substantial" link is a common law principle that should not be imported into the civil law. Similarly, it would be contrary to principles of interpretation to add this criterion into art. 3148 where it is also not specifically mentioned".[56]

- *Lapointe Rosenstein Marchand Melançon LLP* v *Cassels Brock & Blackwell LLP*:
  "[T]he list of presumptive connecting factors must be updated "as the needs of the system evolve" … *Van Breda did not* purport to set out "a complete code of private international law"; it specifically foresaw that the principles and factors governing jurisdiction would be "developed as problems arise before the courts. The CCQ, on the other hand, *does* purport to set out a complete code of private international law. [57]"

[101] The Supreme Court of Canada has made it clear that the class action provisions of the *Code of Civil Procedure* are procedural only and do not create substantive rights [58]. One corollary is that the claim of each class member –whether Quebec resident or non-resident – must meet at least one of the criteria of *CCQ* art. 3148.

[102] For all these reasons, the Petitioner has not shown that non-residents have any jurisdictional claim to the Quebec Superior Court and accordingly, any authorization must be restricted to Quebec residents[59] and consumers purchasing their Laptop in Quebec.

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[55] 3013 MBCA 81 at para. 97, leave to appeal to the SCC granted but appeal discontinued in 2016
[56] *Spar Aerospace*. v *American Mobile Sattelite*, 2002 SCR 78 at para 49.
[57] *Lapointe Rosenstein Marchand Melançon LLP* v *Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para. 30.
[58] *Bisaillon* v *Concordia University*, 2006 SCC 19 at para 22.
[59] At para. 107 and 108 of the Amended Motion, the Petitioner limits his assertions to there being "tens of thousands" Laptop sales which are widespread in Quebec and in Canada.

**Subgroups: *CCP* art. 576**

**Governing Law**

[103] This article now gives the Court discretion to create sub-groups, if warranted by the evidence.

[104] The Petitioner makes reference to professionals who use the Laptops for earning an income, including graphic artists, as well as non-professional users.

[105] Professor P-C Lafond[60] discusses the utility of subgroups, particularly in consumer class actions:

> ***Cette méthode consiste à subdiviser les membres en plusieurs catégories en fonction des caractéristiques communes de leur réclamation et des dommages subis […] Le concept d'individu est remplacé par un sous-groupe et l'estimation individuelle est de la sorte écartée au profit d'une méthode d'indemnisation plus générale, souple et expéditive. L'établissement de sous-groupes révèle aussi son utilité dans les cas où les dommages sont sensiblement les mêmes mais avec des intensités variantes d'un membre à l'autre […] Elle convient pareillement très bien à aux réclamations de consommateurs qui ont subi des dommages distincts du fait d'un comportement commun du défendeur.***
>
> (this Court's emphasis)

**Analysis**

[106] Based on the sole conclusions alleged before this Court, there is no distinction to be made between the alleged compensatory damages or the alleged punitive damages for professional users as opposed to non-professional users. For this reason, there is no present need for the Court to use its discretion to create any subgroups[61].

***Respondents' Allegation that Petitioner's Conclusions are Overly Broad***

[107] The Respondents contest the Petitioner's following non-limitative conclusion:

> ***"CONDEMN the Defendants solidarily to pay … a sum to be determined in compensation of the damages suffered, including but without limitation the reimbursement of the purchase price, and the reimbursement of repair costs, and ORDER collective recovery of these sums."***

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[60] Pierre-Claude Lafond, Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution (Cowansville: Éditions Yvon Blais, 2006).

[61] Ibid. at 204.

**(this Court's emphasis)**

[108] The Respondents argue that:

> ***"The Petitioner's catch-all term "including but without limitation" not only renders this Conclusion unduly overbroad, but is fundamentally contrary to the purpose of the Code-imposed request for authorization. This Court can only authorize claims actually submitted to it by the appropriate motion, not vague and unstated eventual claims.***
>
> ***…***
>
> ***The Petitioner's argument that he now includes in the non-limitative claims for remote and consequential damages would push the proposed action outside the very consumer context on which he relies, and would further exacerbate the proposed action by allowing even more claims that are fundamentally individual in nature, such as those for compensation for loss of income or loss of work product.[62] Such claims rest on facts that are in no way common to the class and are in any event incompatible with the "collective recovery" the Petitioner seeks in the very same Conclusion."***

[109] The Petitioner argues in response:

> "The Amended Motion for Authorization (dated May 28, 2015) has always clearly indicated and alleged not only the personal claims of the Petitioner but also included the following passages regarding the claims of the class members, which are being claimed in the present proceedings (Apple therefore never being taken by surprise):
>
> > par. 56.2 (b) "…some MacBook Pro Laptop owners refused to disburse the above mentioned repair costs and discarded their non-functional MacBook Pro Laptop";
> > par. 56.2 (c) "owners …were left no other choice but to purchase a new laptop";
> > par. 56.2 (e) "Apple only reacted … after hours of negotiations and threats to pursue legal action (additional damages suffered by said Class Members)";
> > par. 56.2 (g) "That many Class Members suffered stress, loss of time, loss of work product, and/or loss of income due to the recurring computer crashes/failure";
> > par. 56.2 (h) "That the resale value of these defective MacBook Pro Laptops are either nil or at the very best significantly reduced";
> > par. 92 "…suffered actual damages when they purchased…";
> > par. 93 "…inter alia out-of-pocket expenditures for repairs and attempted repairs…, as well as the cost related of a replacement

[62] Amended Motion, para. 56.2 g).

laptop…";
par. 94 "…diminished value…";
par. 95 "…suffered or will suffer damages inasmuch as they did not get the full benefit of their laptop, including during "repairs", as a direct and proximate result of…";
par. 99 "…reimbursement of any repair costs previously disbursed…"

**Governing Law**

[110] *CCP* art. 576 requires that any judgment authorizing the class action, amongst other things, identify "**the main issues to be dealt with collectively and the conclusions sought in relation to those issues"**.

[111] *CCP* art. 576 must be read in conjunction with *CCP* art. 18 al. 2 and art. 10: the Court's role is to properly manage the procedure while the role of counsel is to "determine its subject matter" (of the litigation).

[112] At this authorization stage, the Court must determine how it is to deal with the non-limitative words ***"including but without limitation".*** Firstly, the Court must determine whether *CCP* art. 99 under the heading "Form and Content of Pleadings", applies to the application for authorization under *CCP* art. 572. For the reasons that follow, the Court decides that it does and that in accordance with *CCP* art. 99, the conclusions must be: "***clear, precise and concise"***.

[113] Under the former *Code of Civil Procedure*, it was clear that the then *CCP* articles on pleadings, articles 76 and 77, governed an application to authorize a class action both because of specific articles 1010.1, 1012, 1045 and 1051 of the former *Code of Civil Procedure,* as well as the jurisprudence[63].

[114] However, the Legislator has not seen fit to re-introduce into the present *Code of Civil Procedure* a similar article to former *CCP* art. 1051.

[115] Even so, the Court determines that, on their face, *CCP* art. 99 and its complementary article art. 574 (under the heading: Authorization to Institute Class Actions), are *prima facie* compatible:

| ***CCP* art. 99** | ***CCP* art. 574** |
|---|---|
| ***"A pleading must specify its nature and purpose and state the facts on which it is based and the conclusions sought.*** | ***"The application for authorization must state the facts on which it is based and the nature of the class action, and describe the class on*** |

[63] *Royer-Brennan* v. *Apple Computer Inc*., 2006 QCCS 4689 at para. 14 and *Asselin* v. *Fiducie Desjardins*, 2013 QCCS 2398, at para. 17 and 22.

| | |
|---|---|
| ***….***<br>***The statements it contains must be clear, precise and concise, presented in logical order and numbered consecutively..."*** | ***whose behalf the person intends to act.***<br>***…"*** |

[116] In the *Code of Civil Procedure*, art. 99 is found under chapter V: Pleadings, which is part of Title V: Procedure Applicable to All Judicial Applications (this Court's emphasis) which is in Book I: General Framework of Civil Procedure.

[117] For its part, *CCP* art. 574 is under the heading: Authorization to Institute Class Action, which is found in chapter II within Title III – Special Rules for Class Actions, which is in Book IV: Special Procedural Routes.

[118] Since an authorization for a class action is a judicial application and since *CCP* art. 99 is compatible with *CCP* art. 574, the economy of the drafting of the *Code of Civil Procedure* confirms the Legislator's intention that *CCP* art. 99 apply also to authorizations for class actions.

[119] Therefore, the Court determines that the conclusions presented by a petitioner under *CCP* art. 574 must be "clear, precise and concise". This interpretation is consistent with *CCP* art. 10, second paragraph which states: ***"The Court cannot adjudicate beyond what is sought by the parties. If necessary, the Court may correct any improper term in the conclusions set out in a written pleading in order to give them their proper characterization in light of the allegations in the pleading".***

[120] Correcting improper terms, however, does not require that the Court take on the role of counsel and determine precisely what relief a party wishes to assert in a conclusion.

[121] Art. 576 requires the Court to identify "the main issues to be dealt with collectively and the conclusions sought in relation to those issues".

[122] Regarding the former *CCP* art. 1005 which used the words "identifies the principal questions to be dealt with collectively and the related conclusions sought", Professor P-C Lafond says that any other issues that the Court wishes to add must be connected to the conclusions as pleaded.[64] Legal author Yves Lauzon adds that former CPC art. 1005 does not confer jurisdiction on the Court to substitute its own

[64] Pierre-Claude LAFOND, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution* (Cowansville: Éditions Yvon Blais, 2006) at 20.

conclusions for those being asked for. [65] This reasoning is entirely consistent with *CCP* art. 10 al. 2 abovementioned.

**Analysis**

[123] The Petitioner refers to the following additional potential losses suffered by some class members: (a) the cost of purchasing a replacement laptop (the Court notes: which may not have been an Apple product), (b) moral damages for stress and inconvenience, (c) loss of re-sale value of the Laptop and (d) loss of work product and loss of income due to the Graphic Defect (which presumably would be for professional users).

[124] The Petitioner alleged none of these claims in his conclusions and the Court cannot include them in the conclusions "by implication" simply because of the words "including but without limitation".

[125] Despite being aware of this issue and despite the assertion at paragraph 56.3 of the Amended Motion that the REP "does not address all of the different damages suffered and claimed by the Class Members herein", the Petitioner chose not to amend his conclusions at the authorization hearing.

[126] The Petitioner asserts at length the inconvenience he suffered seeking to have Apple Canada repair his allegedly defective Laptop. Nonetheless, he makes no claim for moral damages.

[127] Moral damages may be claimed in class actions, despite their outwardly personal nature. In *Binette* c *Syndicat des chauffeures et chauffeurs de la Corp. métropolitaine de Sherbrooke, section locale 3434 (S.C.F.P.)*, JE 2004-952, AZ-50223258 (Azimut), the Superior Court awarded moral damages of $25 per class member for the stress and inconvenience caused by an illegal bus drivers' strike in Sherbrooke. The Court underscored that moral damages are intended to compensate, and should not be used as a deterrent. In that case, the Court was satisfied by the testimony of twelve class members that they had suffered common moral damages:

> ***[46]. En matière de recours collectif, les dommages s'apprécient collectivement et non pas individuellement. La partie demanderesse invoque trois chefs: le stress, les troubles et les inconvénients.***
>
> ***[47] Bien que les dommages et inconvénients subis varient d'une personne à l'autre, certains dommages apparaissent ici comme étant communs. En effet, à partir des témoignages des 12 usagers entendus en demande, le tribunal tire des présomptions graves, précises et concordantes.***

[65] Yves LAUZON, Commentary on article 576, in Luc CHAMBERLAND, éd., *Le Grand Collectif. Code de procédure civile. Commentaires et annotations*, vol 2 (Montréal: Éditions Yvon Blais, 2015) (EYB2015GCO588) (La référence).

[128] More recently, in *Martin* c. *Société Telus Communications*, 2014 QCCS 1554, the Superior Court held that, even in consumer protection class actions, claims for moral damages are subject to the same rules of evidence. A mere allegation of inconvenience was not sufficient, because there needs to be evidence of actual prejudice:

> ***[94] […] La preuve d'un préjudice moral requiert donc davantage que la démonstration d'un simple trouble et inconvénient. Une simple affirmation générale ou l'allégation d'un préjudice quelconque ne suffisent pas, même si une somme nominale est demandée.***
>
> ***[…]***
>
> ***[101] […] [L]a présente demande de dommages moraux vise davantage à accomplir un rôle dissuasif qu'à compenser un préjudice moral véritablement subi. Or, l'octroi de dommages moraux poursuit un objectif compensatoire. La fonction punitive, exemplaire ou dissuasive, elle, relève des dommages punitifs.***

[129] Be that as it may, the Petitioner has not specifically claimed for moral damages.

[130] Therefore at the present time, the Court must determine only whether the Petitioner has made out an arguable case for compensatory damages being "the reimbursement of the purchase price and of the repair costs" by way of collective recovery[66] and punitive damages under the *Consumer Protection Act* also by way of collective recovery.

[131] If, as and when they are made, the Court will deal with any future requests for amendments and any opposition to such proposed amendments.

**CONCLUSIONS**

## FOR THESE REASONS, THE COURT:

[132] **GRANTS** the present Motion;

[133] **AUTHORIZES** the bringing of a class action in the form of an originating demand to institute proceedings in damages and restitution for product liability, misrepresentations, false advertising, and latent defect;

[134] **ASCRIBES** to the Petitioner the status of representative of the persons included in the Group herein described as:

Between February 1, 2011 and May 31, 2012:

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[66] Amended Motion, para. 117.

1. all persons in Quebec, who purchased and/or own a 2011 MacBook Pro Laptop which has suffered a Graphic Defect or any other Group(s) or Sub-Group(s) to be determined by the Court; and

2. all persons, who purchased in Quebec a 2011 MacBook Pro Laptop which has suffered a Graphic Defect, equipped with Advanced Micro Devices (AMD) graphics processing unit (GPU), manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents or any other Group(s) or Sub-Group(s) to be determined by the Court;

[135] **IDENTIFIES** the principle questions of fact and law to be treated collectively as the following:

a. Whether the 2011 MacBook Pro Laptops suffer from a common Graphics Defect;

b. Whether (...) Respondents knew of and failed to warn Class Members of the Graphics Defect and if they knew, when they knew or should have known;

c. Whether Respondents failed to disclose material information to Class Members;

d. Whether Respondents' omission of material facts is misleading and/or reasonably likely to deceive a reasonable Consumer;

e. Whether (a) Respondents' software updates to address "graphical stability" and (b) Respondents' Logic Board replacements, resolved the Graphics Defect ?;

f. Whether Respondents were legally obligated to recall the 2011 MacBook Pro Laptops such as was allegedly done for similar problems that occurred with the 2008 MacBook Pro Laptops;

g. Whether the 2011 MacBook Pro Laptops have not or will not perform in accordance with:

   i. the standard of fitness for the purposes for which the Laptops are normally used;

   ii. the standard of durability for normal use for a reasonable length of time, having regard to the price, terms of the contract and conditions of use for the Laptops; and

   iii. in accordance with any pre-sale representations made by the Respondents to potential purchasers.

h. Whether Respondents are liable to pay:

   a. compensatory damages to the Class Members (a) for any repair costs disbursed and (b) the reimbursement of the initial purchase price if the Laptop was purchased from the Respondents;

   b. Whether Respondents are liable to pay punitive damages to the Class Members, and if so in what amount?

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

a. **GRANTS** the class action of the Plaintiff and each of the Class Members;

b. **DECLARES** the Defendants solidarily liable for the damages suffered by the Plaintiff and each of the Class Members;

c. **CONDEMNS** the Defendants solidarily to pay to Plaintiff and each of the Class Members a sum to be determined: (a) in compensation of the damages suffered for (i) the reimbursement of the purchase price and (ii) the reimbursement of repair costs and **ORDER** collective recovery of these sums;

d. **CONDEMNS** the Defendants solidarily to pay to Plaintiff and each of the Class Members a sum to be determined in punitive damages and **ORDER** collective recovery of these sums;

e. **CONDEMNS** the Defendants solidarily to pay interest and additional indemnity on the above sums according to law from the date of service of the Motion to authorize the bringing of a class action;

f. **ORDERS** the Defendants to deposit in the office of this Court the totality of the sums which form part of the collective recovery, with interest, additional indemnity, and costs;

g. **ORDERS** that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

h. **CONDEMNS** the Defendants solidarily to bear the costs of the present action including experts' fees and notice fees;

i. **RENDERS** any other order that this Honourable Court shall determine and that is in the interest of the Class Members;

[137] **DECLARES** that all Class Members who have not requested their exclusion from the Group in the prescribed delay, be bound by any Judgment to be rendered on the class action to be instituted;

[138] **FIXES** the time limit for requesting exclusion from the class at 30 days from the date of publication of the notice to members, from which time the members of the class who have not requested exclusion therefrom will be bound by any and all judgments that are rendered in the class action;

[139] **ORDERS** the publication of a notice to the members of the group in accordance with the terms and conditions determined by the judge of the Superior Court assigned to the case, the whole pursuant to articles 576 and 579 *CCP*; and **CONVENES** the parties to a hearing at a date to be fixed with them to discuss the issues of the notice to the Class Members and the costs relating to the said notice;

[140] **THE WHOLE** with costs.

**MARK G. PEACOCK, J.S.C.**

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Dates of hearing: July 7 and 8, 2016

# ANNEX A

## PROVINCES WITH OPT-IN SCHEMES FOR NON-RESIDENTS IN MULTI-JURISDICTIONAL CLASS ACTIONS

Newfoundland: *Class Actions Act*, SNL 2001, c C-18.1.

- s. 17(2): "A person who is not a resident of the province may opt in … where that person, if they were resident in the province, would be a member of the class involved in the action."

British Columbia: *Class Proceedings Act*, RSBC 1996, c 50.

- s. 16(2): "[A] person who is not a resident of British Columbia may … opt in … if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding."

New Brunswick: *Class Proceedings* Act, RSNB 2011, c 125.

- s. 18(3): [A] person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt in…"

## PROVINCIES WITH OPT-OUT SCHEMES FOR NON-RESIDENTS IN MULTI-JURISDICTIONAL CLASS ACTIONS

Saskatchewan: *Class Actions Act*, SS 2015, c 4.

- Opt-out scheme
- s. 4(1)(c): Notice must be given to the representative plaintiff in a multi-jurisdictional class proceeding commenced elsewhere in Canada
- s. 6(2): Guidelines to consider where a multi-jurisdictional class action has already been commenced elsewhere in Canada
- s. 6.1: The court may either certify the multi-jurisdictional class action, refuse to certify it, or certify a portion of the proposed class.

Alberta: *Class Proceedings Act*, SA 2003, c C-16.5

- Note: formerly an opt-in scheme
- s. 2(2)(b): Notice must be given to the representative plaintiff in a multi-jurisdictional class proceeding commenced elsewhere in Canada
- s. 5(6): Guidelines to consider where a multi-jurisdictional class action has already been commenced elsewhere in Canada
- s. 9.1(1): The court may either certify the multi-jurisdictional class action, refuse to certify it, or certify a portion of the proposed class.

Manitoba: *Class Proceedings Act*, CCSM 2002, c C130.

- s. 6: A class may comprise persons resident in Manitoba and persons not resident in Manitoba
- No specific guidelines

**The following do not have any provisions related specifically to multi-jurisdictional class actions, or non-resident class members.**

- Ontario: *Class Proceedings Act*, SO 1992, c 6.
- Nova Scotia: *Class Proceedings Act*, SNS 2007, c 28.

**The Northwest Territories, Nunavut, and Yukon do not have class action legislation.**