

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Action)

N°: 500-06-000595-120
DATE: JUNE 19, 2023

ANTOINE PONTBRIAND
Plaintiff

vs.

APPLE INC.
Defendant

and

LE FOND D'AIDE AUX ACTIONS
COLLECTIVES
Impleaded Party

**JUDGMENT APPROVING A SETTLEMENT AGREEMENT
AND OTHER RELIEF**

1. This judgment is made pursuant to a motion for the approval of a proposed settlement agreement between Plaintiff Antoine Pontbriand and others, and Apple Inc. and Apple Canada Inc. (Apple).
2. Words bearing capital first letters in the present judgment have the meaning ascribed to them in the proposed Settlement and in the Distribution Protocol.

A. PROCEDURAL OVERVIEW

3. On February 24, 2012, Quebec Plaintiff filed a motion for authorization of a class action against Apple and publishers, seeking damages and other relief as a result of an alleged conspiracy between Apple and the publishers to fix, maintain and/or raise the price of eBooks sold to persons in Canada.
4. On October 16, 2012, the Court granted the motion to stay the Quebec Proceeding and ordered Quebec Class Counsel to provide the Court with periodical written reports on the progress of the National Proceeding.
5. On November 4, 2014, the Court approved a settlement between Plaintiffs and the Defendant Publishers, and approved Quebec Class Counsel Fees.

6. On March 21, 2017, and May 25, 2017, Plaintiffs and Apple attended mediation sessions with Mr. Justice Winkler of the Ontario Superior Court.
7. On November 14, 2018 Plaintiffs and Apple entered into the Agreement;
8. On December 20, 2018, the Defendant paid the Settlement Amount of \$12 000 000 which is since held in a Trust Account which accumulates interest.
9. On June 21, 2022, the Quebec Court granted the Authorization Order, authorizing the Quebec Proceeding as a class proceeding against Apple for the purpose of giving effect to and implementing the Agreement and approving the Notice of Certification, Authorization and Settlement Approval Hearing, as appears from said Judgment (Exhibit A-4).
10. The A-4 Judgment defined the group as follows:

“All persons in Quebec who purchased Eligible eBooks during the Settlement Class Period, except Excluded Persons, Persons who are in the National Settlement Class and Persons who validly Opt Out of the Quebec Settlement Class.”
11. The publication of the notice to members was performed as ordered by the A-4 judgment, as appears from sworn declarations provided to the Court (Exhibits A-6 and A-7).
12. On March 7, 2023, Justice Raikes of the Ontario Approval Court rendered his reasons for approving the Settlement (Exhibit A-8).
13. On the same day, the Ontario Approval Court rendered an order (Exhibit A-10) approving:
 - a. The Distribution Protocol (Exhibit A-11);
 - b. The Administration Protocol (Exhibit A-12);
 - c. The Notice of Distribution (Exhibit A-13); and
 - d. The Notice Dissemination Protocol (Exhibit A-14).
14. On May 16, 2023, the Ontario Approval Court rendered its reasons regarding Ontario Class Counsel Fees (Exhibit A-15).
15. The A-15 reasons approved fees of \$2,450,000 and disbursements of \$43,669.39, plus applicable taxes on both.

B. LITIGATION POSITIONS

16. Plaintiffs allege, among other things, that Apple conspired and succeeded to fix the prices for eBooks and to limit competition in the eBooks retail market in Canada during the Settlement Class Period.
17. Plaintiffs allege that said conspiracy breached section 45(1)(a) of the Competition Act and civil liability obligations pursuant to the Civil Code of Québec which renders Apple liable to pay compensatory damages;
18. Apple has denied and continues to deny having committed any fault or wrongdoing, and challenges the validity of the claims set forth in the action;
19. The principal question of fact and law to be dealt with on a collective basis identified by the judgment authorizing a class action is:

"Did Apple Inc. and the Defendant Publishers, or any of them, conspire with each other to fix, maintain, increase or control the price of eBooks in Canada during the Settlement Class Period?"

C. THE PROPOSED SETTLEMENT AGREEMENT

Settlement approval principles and basis

20. The reasonableness and fairness of a proposed settlement is determined pursuant to the following criteria:¹
 - a. The chances of success of the class action;
 - b. The importance and nature of the administered evidence;
 - c. The terms and conditions of the settlement;
 - d. Counsel's recommendation and experience;
 - e. The anticipated cost and time required to obtain a recovery;
 - f. As the case may be, the recommendation of a third party;
 - g. The number and nature of objections to the settlement; and
 - h. The parties' good faith and absence of collusion.

¹ A.B. c. *Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, par. 34.

The Settlement Agreement

21. The Agreement provides for the payment by Apple of the Settlement Amount of \$12 million, which was disbursed by Apple on December, 20, 2018 and was deposited in an interest-bearing trust account.
22. As of May 30, 2023, the trust balance containing the Net Publishers' Settlement Amount, the accrued interest on same, the Settlement Amount and the interest accrued on same totaled \$14 804 948.18 (Exhibit A-19).
23. The Settlement Amount is inclusive of all costs, fees and interest, and Apple has no financial responsibility for the implementation, administration and oversight of the distribution process.
24. Class Counsel's analysis of the appropriateness of Settlement Amount was based on:
 - a. The quantum of Court approved settlements that were entered into in the U.S.;
 - b. Expert evidence on potential damages filed in the National Proceeding and in the U.S. proceedings;
 - c. The distinctions of facts and legal background between the Canadian and U.S. administrative and judicial proceedings;
 - d. The information obtained from the negotiations that led to the Publishers' Settlement;
 - e. The information that stemmed from a challenge by Kobo of a consent agreement between publishers and the Commissioner of Competition in Canada;
 - f. The economic information obtained from Apple and Kobo;
 - g. The known proportion of the Canadian market vs the U.S. Market during the Class Period.
25. Those facts were presented to the Court in various affidavits (Exhibit A-17, Exhibit A-20 and Exhibit A-21).
26. According to the available data, the Canadian eBooks market during the Class Period was of approximately 2.59% of the U.S. market (Exhibit A-21);
27. Based on said proportions and on all economic information collected by Class Counsel, taking into account the longer Canadian Class Period, the

Publisher's Settlement amount and the Apple Settlement Amount combine to make an approximately 50% recovery of total estimated recoverable damages caused by the alleged conspiracy between Apple and the Defendant Publishers (Exhibit A-21);

28. It appears to the Court that the Settlement amount is fair, reasonable and advantageous for the Class;

Efforts toward direct distribution

29. The Settlement provides for the direct distribution to Class Members who purchased eBooks from Apple, either by way of direct distribution of credits into active iTunes and Kobo accounts, or by way of direct distribution of money through e-transfers on their valid email addresses;²
30. Class Counsel have invested considerable effort and energy into allowing such direct distribution to Class Members who purchased their eBooks through third party retailers in Canada (i.e. Kobo, Sony, Amazon and Google);
31. Class Counsel's efforts spanned years and yielded cooperation from Kobo, but necessitated proceedings and pleadings in United States courts that did not ultimately allow for the cooperation of other third party retailers (Exhibit A-17).

Efficiency and fairness of the proposed distribution

32. The A-11 Distribution Protocol and the A-12 Administration Protocol provide a cost-effective claims process and allows for the maximum amount of the Net Settlement Amount to be distributed to Settlement Class Members;
33. The proposed Distribution Protocol and Administration Protocol provide for:
 - a. Individual Monetary Benefit in the form of direct credits to all Settlement Class Members with active iTunes and Kobo accounts;
 - b. Individual Monetary Benefit in the form of direct monetary payment when a minimum of 12 Eligible eBooks were purchased and a Valid Email Address is available;
 - c. Individual Monetary Benefit payment through a claim process when a minimum of 12 Eligible eBooks were purchased;

² A-1 Settlement, sections 4.1, 4.2 and 4.3 and A-11 Distribution Protocol, section 6.

34. The Individual Monetary Benefit will be calculated once the total number of Eligible eBooks is known based on a. b. and c. above, rather than based on the universe of Eligible eBooks sold;
35. Although, under the A-11 and A-12 protocols, some members will not be compensated (Exhibit A-11, paragraph 6 (d)), the Settlement as a whole is in the best interest of the Class.

The Importance and nature of administrated evidence

36. The alleged collusion is between the world's largest publishers of eBooks and one of the world's largest distributors of eBooks.
37. Class Counsel acquired significant factual and economic information from a plurality of sources including experts, the Defendant Publishers, Apple, the Canadian administrative proceedings and the U.S. administrative and judicial proceedings (Exhibit A-17, Exhibit A-20, Exhibit A-21).

Counsel's recommendation and experience

38. Quebec Class Counsel, Sylvestre, Painchaud et associés, is a plaintiff class actions firm with recognized expertise in the field.
39. The firm has 44 years of plaintiff class actions experience, with many class actions pleaded through common issues trials and appeals of common issue trials at all Court levels.
40. The firm also has extensive experience in negotiating and overseeing class action settlements and their distribution processes.
41. The firm's partner responsible for this class action has 19 years of plaintiff class actions experience and is a member of the *Groupe d'experts sur l'action collective du Barreau du Québec*.
42. National Class Counsel are similarly experienced and reputable plaintiff class action lawyers.
43. Class Counsel's opinion and recommendation of the Settlement are based on their investigations, their review of the voluminous data gathered, and their consultation with relevant experts.
44. The Settlement required compromise and is the result of a balancing of risks to benefits.
45. The legal and jurisprudential contexts and the litigation risks supported by Plaintiffs justify the compromise arrived at in the Agreement.

The anticipated cost and time to obtain a recovery

46. A contested certification motion will follow if the Agreement is rejected.
47. Apple indicates that this litigation will be vigorously contested if it proceeds.
48. Multiple appeals would also have to be expected given the nature of the arguments by both parties.
49. Judicial closure of this litigation, if it were to follow its course to the end, would likely not happen for at least five more years of lengthy and expensive litigation, with uncertain results.

The number and nature of objections to the settlement

50. Members had until November 11, 2022 to send an opt-out form to the Claims Administrator.
51. The Claims Administrator received 93 opt-out forms including one after the opt-out period, of which 7 were from Quebec (Exhibit A-16).
52. No comments or objections to the Settlement were received (Exhibit 17 and Exhibit A-18).

The parties' good faith and absence of collusion

53. The parties' good faith and absence of collusion should be presumed, and nothing in the chronology exposed herein or in the content of the Settlement suggests otherwise.
54. The parties engaged in lengthy and informed negotiations, which yielded an Agreement that is in the best interest of the Class.

The support of the Plaintiff

55. Plaintiff Antoine Pontbriand supports the Settlement (Sworn declaration dated June 13, 2023).

Other considerations and conclusion

56. Justice Raikes of the Ontario Superior Court approved the Settlement and recognized it as fair and reasonable, and as a tangible economic benefit to the class (Exhibit A-8).

57. The A-1 Settlement, the A-11 Distribution Protocol, the A-12 Administration Protocol, the A-13 Notice of Distribution and the A-14 Notice of Distribution Dissemination Protocol are fair and in the best interest of the Class, and should be approved by this Court;

D. APPROVAL OF CLASS COUNSEL FEES AND DISBURSMENTS

58. The measure of what are fair and reasonable fees is stated in the Code of Professional Conduct of Lawyers, CQLR c. B-1, r. 3.1, (the "Code") at section 102:

102. The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:

- (1) experience;*
- (2) the time and effort required and devoted to the matter;*
- (3) the difficulty of the matter;*
- (4) the importance of the matter to the client;*
- (5) the responsibility assumed;*
- (6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;*
- (7) the result obtained;*
- (8) the fees prescribed by statute or regulation; and*
- (9) the disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.*

The Risk Assumed by Counsel

59. Although the element of risk is not specifically identified at section 102 of the Code, courts have held that they cannot disregard the fact that attorneys work on a case for a number of years without any guarantee of success;³
60. The risk assumed by Class Counsel is also directly related to the complexity of the claim and the specific difficulty of this matter;
61. From the outset, Class Counsel agreed to pursue this class action through its various stages on a contingency fee basis, accepting responsibility for all costs until a result is achieved, and only if a result is achieved;

³ *Guilbert c. Sony BMG Musique (Canada) inc.*, 2007 QCCS 432, paragraphs 40-41.

62. Throughout this litigation, Class Counsel has funded all disbursements and fees themselves. No interest has been charged to the class on any of the disbursements that have been incurred and the fees that have been accumulated;

Experience of Class Counsel

63. Class Counsel meet the experience requirement for the purpose of ascertaining the fairness and reasonableness of their fees in this case as per the Code;

Class Counsel's time and expenses

64. The involvement of Sylvestre Painchaud et associés in this matter started in February 2012.

65. The work done by Sylvestre Painchaud et associés up to this stage, in collaboration with the National Class Counsel, reflects their constant and skillful efforts, which ultimately led to a settlement against all Defendants.

66. As remarked by Justice R. Raikes in Exhibit A-15 (at para. 30):

«There is no suggestion that the negotiations were anything less than hard-fought. An independent experienced mediator assisted the parties. He endorsed the business terms of their compromise. This is no fast and easy settlement that benefits primarily the lawyers at the expense of the class. »

67. The Distribution Protocol provides for a wide access to justice through a mostly direct process of compensation to Class Members.

68. Since the approval of the Publishers' Settlement and up to May, 29 2023, Sylvestre Painchaud et associés has dedicated 414,58 hours valued at \$184 836,00 (Exhibit A-25);

69. Class Counsel will continue to devote time to fully implement the terms of the Settlement Agreement, including:

- a. Monitoring the implementation of the Agreement;
- b. Addressing questions and issues raised by the Settlement Class Members and the Claims Administrator;
- c. Reviewing the Administrator's updates;
- d. Reviewing the final distribution list; and

- e. Attending to any other matters that might be raised during the implementation of the Settlement Agreement, including motions for directions on behalf of class members;
70. Since the approval of the Publishers' Settlement by this Court in 2014, the *Fonds d'aide aux actions collectives* did not provide any financial assistance.

Difficulty of the Matter

71. As noted by Justices Raikes : «Apple Defendants give every indication that this litigation will be vigorously contested if it proceeds» and that «the outcome of a trial is far from certain» (Exhibit 8).
72. The difficulties raised by this particular action amply meet the threshold contemplated by the Code.

The result

73. The Settlement Amount represents an approximately 50% recovery of total estimated recoverable damages, obtained in the context of significant factual and legal challenges, which represent a result that is clearly in the best interest of the Class.

Presumption of validity of contingency fee agreements

74. On February 24, 2012, Class Counsel and Plaintiff signed a Convention d'honoraire et mandat professionnel (Exhibit A-23).
75. The validity of percentage fee agreements in the context of class actions has long been recognized by the Court; it is often perceived as an essential means of inciting firms to accept class action mandates, and thus, essential for access to justice.⁴
76. Such fee agreements benefit from a presumption of validity and should only be set aside if it is demonstrated that, in the circumstances, the agreement is unfair and unreasonable for the class or if one of the grounds for nullity under the CCQ is applicable.⁵
77. Class Counsel would not have agreed to assume the financial risks of the present class action without the prospect of the financial benefits agreed to with the Plaintiff.

⁴ *Schneider (Succession de Schneider) c. Centre d'hébergement et de soins de longue durée Herron*, 2021 QCCS 1808, par. 57 à 59.

⁵ *A.B. c. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, para. 51.

78. The Quebec portion of the Settlement Amount is \$ 1 200 000 plus accrued interest since December 20, 2018;
79. Based on the A-23 mandate and fee agreement, the contingency fee payable is \$ 231,187.50, plus GST and QST.
80. Quebec Class Counsel incurred disbursements of \$14,429.23 taxes included (Exhibit A-24).
81. Said fees and disbursements are reasonable and should be approved by the Court.

FOR THESE REASONS, THIS COURT:

82. **ORDERS** that the Agreement as amended is fair, reasonable and in the best interests of the Quebec Settlement Class;
83. **ORDERS** that the Agreement as amended, the A-11 Distribution Protocol, the A-12 Administration Protocol, the A-13 Notice of Approval and the A-14 Notice Plan of Dissemination are hereby approved and that the Agreement as amended shall be implemented and enforced in accordance with its terms, the terms of this Judgment and the terms of the Distribution Protocol;
84. **ORDERS** that in the event of a conflict between this Judgment and the Agreement as amended, this Judgment shall prevail;
85. **ORDERS** that this Judgment, including the Agreement as amended, is binding upon each member of the Quebec Settlement Class who did not validly opt out of the Quebec Proceeding;
86. **ORDERS** that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever, finally and absolutely released the Releasees from the Released Claims;
87. **ORDERS** that each Releasor shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Quebec or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Releasee or against any other Person who may claim contribution or indemnity, or other claims over for relief, from any Releasee in respect of the Released Claims;
88. **ORDERS** that on notice to the Court but without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out

- any of the provisions of the Agreement as amended or the Distribution Protocol;
89. **ORDERS** that no Releasee shall have any responsibility or liability relating to the administration of the Agreement or the Distribution Protocol or the administration, investment, or distribution of the Trust Account;
90. **ORDERS** that, in the event that the Apple Agreement is terminated in accordance with its terms or otherwise fails to take effect for any reason, this Order shall be declared null and void and of no force or effect without the need for any further order of this Court but with notice to the Class;
91. **ORDERS** that the levies of the *Fonds d'aide au recours collectif* shall be paid to it pursuant to the law based on the Quebec portion of the Settlement Amount;
92. **ORDERS** that the Agreement as amended is a transaction as per the Quebec Civil Code, and that such transaction be and is hereby homologated;
93. **APPROVES** Class Counsel fees in the amount of \$ 231,187.50 plus applicable taxes;
94. **APPROVES** Class Counsel disbursements in the amount of \$ 14,429.23 including taxes;
95. **ORDERS** that the Class Counsel fees, disbursements, and applicable taxes are to be paid from the Settlement Amount, payable pursuant to the terms of the Agreement as amended;
96. **THE WHOLE** without costs.



DAVID R. COLLIER, J.S.C.

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