

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000843-173

DATE: August 21, 2018

BY THE HONOURABLE KAREN M. ROGERS, J.S.C.

FRANK BERDAH
-and-
9316-1305 QUÉBEC INC.
-and-
GIOVANNI PAQUIN
Applicants

v.

PROCUREURE GÉNÉRALE DU QUÉBEC / ATTORNEY GENERAL OF QUEBEC
Defendant

JUDGMENT

(Re-Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs)

JR1825

[1] Annoyances suffered by neighbours as a result of the ongoing construction work relating to the Turcot Interchange and other highways, interchanges and road links in the Montreal area is at the heart of these proceedings (the “**Project**”).

[2] The Applicants seek the Court’s authorization to bring a class action in injunctive and declaratory relief and damages against the Attorney General of Quebec (“**AGQ**”)¹ for the inconvenience and damages suffered by a defined class of residents who claim:

- The Project caused them abnormal neighbourhood disturbances, triggering the AGQ’s liability under the no-fault regime provided for at Article 976 CCQ;
- The ministère des Transports, de la Mobilité durable et de l’Électrification des transports (“**MTMDET**”), on whose behalf the AGQ is acting, violated their guaranteed rights to the peaceful enjoyment of their property,² and to a healthy environment,³ and
- The MTMDET is at fault for having failed to take the necessary steps to reduce the impact of the Project upon its neighbours and reduce the disturbances to an acceptable level.

[3] The Application was heard on January 22 and 23, 2018, at a time when the named Defendants included the AGQ, but also a consortium and its partners,⁴ **KPH Turcot, un partenariat S.E.N.C.** (collectively “**KPH**”), and a contractor, who was granted a design-built contract for certain work relating to the Project.⁵

[4] At the beginning of the second day of hearing, after the oral arguments of KPH’s attorney, the Applicants requested permission to discontinue the authorization proceedings against KPH, which discontinuance was granted at hearing, and a written Judgment followed.

¹ AGQ will also refer and include the ministère des Transports, de la Mobilité durable et de l’Électrification des Transports on whose behalf the AGQ is acting.

² CQLR, c. C-12, Article 6.

³ CQLR, c. C-12, Article 46.1.

⁴ Construction Kiewit Cie and Parsons Canada Ltd.

⁵ Exhibit P-4.

[5] In fact, throughout the hearing on the authorization, the Applicants were reactionary to the Defendants' oral arguments, which led to a significant modification to the class description, even at the beginning of the hearing.

[6] At the end of the hearing, Applicants sought authorization to produce a list of potential class members who had signed up to class counsel's website before the class description was modified.

[7] The Court authorized the production of the list⁶, but granted the AGQ until February 23, 2018 to set out in writing any arguments it wished to submit to the Court.

1. THE AMENDMENT TO THE CLASS DESCRIPTION

[8] On February 1st, 2017, Mr. Frank Berdah ("**Mr. Berdah**") and his company, 9316-1305 Quebec Inc., operating under the name of Galuchat ("**Galuchat**"), filed the first *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs* (the "**Application**"), against the AGQ and KPH, on behalf of the following group:

All natural and legal persons who have suffered damages from the maintenance work of the Turcot interchange (the "Turcot Project")

[9] On or around April 6, 2017, the Application was amended to include a third Applicant ("**Amended Application**"), Mr. Giovanni Paquin ("**Mr. Paquin**"), a natural person.

[10] On or around October 4, 2017, the Court heard requests by KPH and AGQ to adduce certain relevant documents as new Exhibits, for the purpose of the authorization hearing, which requests were consented to by the Applicants.

[11] On December 21, 2017, the Court authorized the said requests.

[12] Within the first hour of the authorization hearing, the Applicants presented an oral demand to replace the initial description of the class with the following description:

All persons, owners or tenants who, at any time since July 2012, resided within a circumference of 350 meters from the Turcot Project in the Cities of Montreal (including the South West Borough, Ville-Marie and Notre-Dame-de-Grâce), Montreal West and Westmount.

(The "**Modified Class**").

[13] Although the requested modification was significant, it was not contested, and the Court accepted to modify the description of the class.

⁶ Exhibit P-19.

[14] On the second day of the hearing, in response to the oral pleadings of the Defendants, the Applicants presented a second oral demand to modify the description of the class to replace “July 2012” by “Spring 2015”.

[15] Again, the Court accepted the oral request to amend.

[16] At the end of the hearing, the Applicants, again, modified the description of the class by substituting “Spring of 2015” with “March 21, 2015”.

[17] The AGQ opposed the amendment for its tardiness, and the prejudice suffered by it, as a result of the oscillating class definition over such a short time span. The matter was taken under advisement.

[18] Although, the Court empathizes with the challenges faced by the Defendant at a hearing on authorization when the class description is subject to several modifications, including a significant one, the effect of the latest proposed amendment is simply to substitute a season by a specific date.

[19] The Court will allow the amendment as it meets the criteria of Article 206 C.C.P.

[20] Thus, the final class description upon which the Application in authorization is to be decided is:

All persons, owners or tenants who, at any time since March 21st, 2015, resided within a circumference of 350 meters from the Turcot Project in the cities of Montreal (including the South-West Borough, Ville-Marie and Notre-Dame-de-Grâce), Montreal West and Westmount.

(The “**Final Class Description**”)

[21] The conclusions sought by the Applicants⁷ on behalf of the class, should the action be authorized, are as follows:

“GRANT the present application;

AUTHORIZE the bringing of a class action in the form of an Originating Application in declaratory judgment, injunctive relief and damages;

APPOINT the Applicants the status of representative plaintiffs of the persons included in the Class herein described as:

Class:

English:

⁷ Given the discontinuance against KPH, the Court has adjusted the conclusions and questions to refer to “Defendant” rather than “Defendants”, has deleted the conclusion and question relating to solidarity between Defendants and reference to “solidarity” in certain conclusions for the same reason, and has adjusted “Defendants” to the singular mode when required.

All persons, owners or tenants who, at any time since March 21st, 2015, resided within a circumference of 350 meters from the Turcot Project in the cities of Montreal (including the South-West Borough, Ville-Marie and Notre-Dame-de-Grâce), Montreal West and Westmount.

French :

Toutes les personnes, propriétaires ou locataires, qui, à un moment donné depuis 21 mars 2015, ont résidé dans un périmètre circonférentiel de trois cent cinquante (350) mètres du Projet Turcot, dans les villes de Montréal (incluant les arrondissements du Sud-Ouest, Ville-Marie et Notre-Dame-de-Grâce), Montréal-Ouest et Westmount.

(hereinafter referred to as the “Class”)

or any other Class to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Does Defendant infringe on Class members’ rights to peaceful enjoyment of their property (article 6) and their right to a healthy environment (article 46.1) as set out in Quebec’s *Charter of Human Rights and Freedoms*?
- b) Does Defendant contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?
- c) Does Defendant contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the *Note d’instruction* 98-01 under section 94 of said Act?
- d) Does Defendant contravene the municipal noise by-laws for the cities impacted by the Turcot Project?
- e) Has Defendant caused Class members abnormal and intolerable inconveniences, thereby failing in its obligation of good neighbourly conduct?
- f) Did Defendant err in the design, construction, installation, maintenance and operation of equipment with respect to the Turcot Project?
- g) Was Defendant negligent of the well-being of the Class members, their tranquility and their right to peaceful enjoyment of their property?
- h) Are Class members entitled to moral damages?

- i) Are Class members entitled to compensatory damages for trouble and inconvenience, Defendant's violation of their rights, and/or for the loss of value of their property?

[...]
- k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the *Environment Quality Act*, aimed at reducing the noise emitted by the Turcot Project, so that it is reduced to acceptable levels both qualitatively and quantitatively?
- l) Does Defendant violate article 976 of the *Civil Code of Quebec*?
- m) Does Defendant violate article 1457 of the *Civil Code of Quebec*?
- n) Is it necessary to issue an injunction against the Defendant?

IDENTIFY the conclusions sought by the Class action to be instituted as being the following:

GRANT Plaintiffs' action against Defendant on behalf of all the Class members;

DECLARE the Defendant liable for the damages suffered by the Applicants and each of the Class members;

ORDER the Defendant to take the necessary measures to reduce the noise generated by the Turcot Project, to acceptable levels, both qualitatively and quantitatively, based on the evidence that will be submitted to the Court;

CONDEMN the Defendant to pay the designated Plaintiffs and each of the class members an annual amount, to be determined, as of March 21, 2015, and until such time that sufficient noise mitigation measures have been implemented;

CONDEMN the Defendant to compensate the designated Plaintiffs and the Class members for the diminution in value to their property;

CONDEMN the Defendant to pay to each Class member a sum to be determined in compensation for any other damages which the Court may determine;

CONDEMN the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;

ORDER that the claims of individual Class members be the object of collective recovery if the proof permits and alternately, by individual recovery;

ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

CONDEMN the Defendant to bear the costs of the present action, including class counsel's professional fees and disbursements, the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honourable Court shall determine;

DECLARE that all members of the Class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

ORDER the publication of a notice to the members of the Class in accordance with article 579 *C.C.P.* within sixty (60) days from the judgement to be rendered herein in the "News" sections of the Saturday editions of *LA PRESSE*, *LE JOURNAL DE MONTRÉAL*, and *THE MONTREAL GAZETTE*;

ORDER that said notice be published on the Defendant's various websites, Facebook pages and Twitter accounts, in a conspicuous place, with a link stating "Notice of a Class Action Concerning the Turcot Project – Avis d'une action collective concernant le projet échangeur Turcot";

ORDER the Defendant to send an Abbreviated Notice by regular mail and by e-mail to each Class member, to their last known physical and e-mail addresses, with the subject line "Notice of a Class Action – Avis d'une action collective";

RENDER any other order that this Honourable Court shall determine;

The whole with costs including publications fees."

2. PRELIMINARY COMMENTS

[22] Notwithstanding the substantial modification to the class description and the discontinuance against KPH, the allegations of the Application and conclusions sought have not been adjusted.

[23] The consequence is that important parts of the Application are either irrelevant in the context of the class description, or unclear as to their application.

[24] For example, the initial allegations pertaining to the composition of the class⁸ are in no way relevant as regards the Final Class Description.

[25] The use of Defendants in the plural sense is made throughout the proceeding, and it is unclear whether liability under 1457 C.C.Q. is also being sought against the AGQ, or whether it is simply an oversight and should have been removed upon the discontinuance against KPH.

[26] The last minute modifications to the class description, and the Applicants' failure to adjust their allegations accordingly, have the direct effect of rendering the Court's task at this stage of the proceedings more challenging. It must now assess and try to infer from the original allegations, what their relevant application is with respect to the Final Class Description.

3. THE CONTEXT

3.1 The Reconstruction of the Turcot Interchange

[27] The Turcot Interchange is an important hub, easily identifiable by its elevated structures, located on the Island of Montreal, South West of the Montreal downtown core which interconnects Highways 15, 20 and 720 ("**interconnecting highways**").

[28] It is an essential road link between Montreal's downtown area and the Champlain Bridge on its east side, and the Montreal-Pierre Elliott Trudeau International Airport on its west side.⁹

[29] The reconstruction of the Turcot Interchange began in 2009 and is currently expected to be completed in 2020.

[30] It is a massive undertaking which includes the demolition and reconstruction of other interchanges as well,¹⁰ and certain segments of the interconnecting highways, the relocation of parts of a transcontinental railway,¹¹ the demolition of old roads and the construction of new road links.¹²

⁸ Application, par. 37 to 43.

⁹ Exhibit P-1: Extract of the website of Transports, Mobilité durable et Électrification des transports Québec.

¹⁰ Exhibit P-2 : Angrignon, De la Vérendrye, Montreal West Interchanges.

¹¹ Exhibit P-2: the railway used by the Canadian National Railway.

¹² Exhibit P-2.

[31] The works extend over several kilometers, throughout the Cities of Montreal, Westmount and Montreal West,¹³ and involve multiple structures, some elevated some not, and various phases and schedules.¹⁴

3.2 The Applicants

[32] It is admitted that neither of the Applicants own property within 350 meters of the “Turcot Interchange” or the “Project”.¹⁵

[33] Mr. Berdah is the owner of the Applicant Galuchat.

[34] He does not, nor has he resided within 350 meters of the Turcot Interchange or the Project.¹⁶

[35] Since February 2015, Galuchat has occupied a rented premise,¹⁷ adjacent to the Project, in which it operates a furniture upholstery store.

[36] In the context of the Project, a sound barrier wall was erected parallel to Saint-Jacques Street, in Montreal, cutting off Galuchat’s premises from a useable public road and making it difficult to access the store.

[37] Since July 2012, Mr. Paquin has resided in an apartment near the Project,¹⁸ which he rents.

[38] Galuchat’s and Mr. Paquin’s premises are located in the same sector in the borough of Notre-Dame-de-Grâce (“NDG”), which sector is bordered by Saint-Jacques Street, Addington Street, Upper Lachine Road and Girouard Avenue.¹⁹

[39] Although not specifically alleged, but nonetheless inferable from the allegations and exhibits, the construction works, which caused the alleged neighbourly annoyances, appear to be the dismantling and construction of the Saint-Jacques overpass in the NDG borough, which overpass is located between Girouard Avenue and Decarie Boulevard, and services vehicles and pedestrians crossing over Highway 15²⁰ (“**Saint-Jacques overpass**”).

[40] The Saint-Jacques overpass work is included in the Project.

¹³ Exhibits P-2, PGQ-1 and PGQ-2.

¹⁴ Exhibits PGQ-1, PGQ-2, and R-3.

¹⁵ Admission noted in Judgment authorizing the production of Exhibits.

¹⁶ The Court uses the word “Project” to include all and any work related to the demolition and rebuilding of the Turcot Interchange.

¹⁷ 5457 Saint-Jacques Street, Montreal.

¹⁸ 919 Girouard Avenue, Montreal.

¹⁹ Exhibits R-2 and PGQ-4, PGQ-5.

²⁰ Exhibits R-1, R-3, R-6, P-11, P-12, P-13, P-14, PGQ-11 and PGQ 12.

4. **ANALYSIS**

[41] Articles 571, 574 and 575 of the *Code of Civil Procedure ("C.C.P.")* state:

571. A class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class.

In addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with judicial personality may be members of the class.

A legal person established for a private interest, a partnership or an association or another group not endowed with juridical personality may, even without being a member of a class, ask to represent the class if the director, partner or member designated by that entity is a member of the class on behalf of which the entity is seeking to institute a class action, and the designee's interest is related to the purposes for which the entity was constituted.

574. Prior authorization of the court is required for a person to institute a class action.

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 whose behalf the person intends to act. It must be served on the person against whom the person intends to institute the class action, with at least 30 days' notice of the presentation date.

An application for authorization may only be contested orally, and the court may allow relevant evidence to be submitted.

575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

- (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
- (2) the facts alleged appear to justify the conclusions sought;
- (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
- (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

4.1 The role of the Authorizing Judge

[42] The Supreme Court of Canada and the Court of Appeal of Quebec have clearly stated and reminded us, in many decisions, that the applicant's burden at the

authorization stage is one of demonstration only.²¹ The threshold imposed on the applicant is low. The Judge must refrain from reviewing the merits of the matter, his/her role being limited to that “of a filter” to bar frivolous motions.²²

[43] The authorizing Judge must assume the facts alleged in the applicant’s proceeding to be true, and should read between the lines where the real meaning is clear, even if the allegations are not perfect,²³ and this, with the purposeful intent to achieve “*the twin goals of deterrence and victim compensation*” when possible.²⁴

[44] The role of the authorizing Judge is not to review the merits of the case, but only to ensure that the applicant has an arguable case, and that the legal syllogism being put forward is sustainable.²⁵

[45] The burden at this stage is one of logic and not of evidence, and while the authorizing Judge must consider the evidence put forward, he or she must resist the temptation to go through the evidence in a manner that should be left to the Judge on the merits, assuming the class action is authorized.²⁶

[46] For an authorization to be granted, the Court must be satisfied that the four conditions of Article 575 C.C.P. have been met.

[47] The Court will begin its analysis with the criteria set out at Articles 574 and 575(3) C.C.P..

4.2 Has the existence of a class been shown, and does the composition of the class make it difficult to apply the rule for mandates as provided at Article 575(3) C.C.P.?

[48] The existence of a class is a precondition to a class action.²⁷

[49] In the case *Western Canadian Shopping Centres Inc. v. Dutton*,²⁸ the Supreme Court of Canada has laid out the criteria to be applied when assessing the appropriateness of a class description:

38. While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear

²¹ *Infineon Technologies AG v. Option consommateurs*, 2013 R.C.S. 600; *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437.

²² *Infineon Technologies AG v. Option consommateurs*, 2013 R.C.S. 600.

²³ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 32.

²⁴ *Infineon Technologies AG v. Option consommateurs*, 2013 3 R.C.S. 600, par. 60.

²⁵ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 32-36.

²⁶ *Id.*, par. 40 and following; and *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299.

²⁷ *Lambert (Gestion Peggy) c. Écolait Itée*, 2016 QCCA 659, par. 53.

²⁸ 2001 SCC 46, par. 38.

definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[Emphasis added – References omitted]

[50] In order to assess a putative class member's membership, the Court must ensure that "*the class is defined sufficiently narrowly [...]*".²⁹

20. [...] It falls to the putative representative to show that the class is defined sufficiently narrowly.

21. The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad—that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should disallow certification or allow certification on condition that the definition of the class be amended.

[Emphasis added – References omitted]

[51] The Quebec Court of Appeal, in the matter of *George v. Québec (Procureur général)*,³⁰ confirms these principles in the following manner :

[40] De ces arrêts se dégagent les enseignements applicables à la définition du groupe dans le cadre d'une demande d'autorisation pour exercer un recours collectif :

1. La définition du groupe doit être fondée sur des critères objectifs;
2. Les critères doivent s'appuyer sur un fondement rationnel;
3. La définition du groupe ne doit être ni circulaire ni imprécise;
4. La définition du groupe ne doit pas s'appuyer sur un ou des critères qui dépendent de l'issue du recours collectif au fond.

²⁹ *Hollick v. Toronto (City)*, 2001 SCC 68.

³⁰ 2006 QCCA 1204, par. 40; similarly *Lallier v. Volkswagen Canada Inc.*, 2007 QCCA 920; and *Del Guidice v. Honda Canada Inc.*, 2007 QCCA 922.

[52] It is the Applicant who must provide a class definition that is sufficiently clear and narrow so as to enable putative class members to know if they are included or not.³¹

[53] However, the Court can contribute to providing certain clarification and modifying certain elements in a class description, and it should do so where possible in order to achieve the objectives sought by class action proceedings.

4.3 Does a class exist?

4.3.1 The reference to the Turcot Project in the class definition

[54] The Final Class Description refers to the “Turcot Project” as the starting point of the geographical determination of the residents that are included as putative class members.

[55] The term “Turcot Project” is generally defined as follows in the Application:

7. This rebuilding, known as the “Turcot Project”, includes the reconstruction of the Angrignon, De La Vérendrye and the Montreal-West interchanges, as well as adjacent sections of highways 15, 20 and 720;

[Emphasis added]

[56] The expressions “Projet Turcot” or “Projet de reconstruction du complexe Turcot” are generally used by the Government in certain documents and refer, in a broad manner, to the work required in the context of rebuilding the Turcot Interchange and related structures.³²

[57] It is clear that the scope of the work included in the expression “Turcot Project” traverses three cities,³³ over many kilometers, but it lacks a precise definition, scope and perimeter.

[58] In fact, the scope of the work included in the expression “Turcot Project” evolves and varies over time as the “Turcot Project” progresses. The Exhibits filed by the Applicants³⁴ refer to structures being demolished, built or relocated, lanes kept opened and later abandoned and replaced with new lanes, highways being temporary closed, and reopened when appropriate.³⁵ The footprint of the Turcot Project is fluid and evolutive.

³¹ *Citizens for a Quality of Life v. Aéroports de Montréal*, 2007 QCCA 1274.

³² Exhibits P-1, P-2, P-3, PGQ-1 as examples.

³³ Cities of Montreal, Montreal West and Westmount.

³⁴ Exhibits P-1 and P-2.

³⁵ Exhibits P-2 and P-3.

[59] In the documents filed by the AGQ or KPH, they refer to the scope of the work in more or less detail, and at specific dates. For example:

- List of contracts of the Turcot Project as of July 31, 2017;³⁶
- Projet Turcot état d'avancement des travaux-volet 1 mode traditionnel as of July 3, 2017;³⁷
- Zones des travaux des lots préparatoires du secteur centre pour les années 2014 à 2016.³⁸

[60] The reference to the Turcot Project in the Final Class Description is not specific enough and does not allow for the identification of the members, given the lack of an identifiable geographical perimeter, scope of work, and the evolutive footprint of what is referred to as the "Turcot Project".

[61] As such, the Court finds the reference to Turcot Project in the class definition not to be sufficiently precise.

4.3.2 Is the class sufficiently narrow?

[62] As mentioned above, the Project is massive.³⁹

[63] The Applicants are located within a single block in the City of Montreal, borough of NDG, bordered by Saint-Jacques Street, Addington Street, Upper-Lachine Road and Girouard Avenue.⁴⁰

[64] One of the consequences of the failure to align the allegations of the Application to the Final Class Description is that those pertaining to the composition of the class refer to the number of vehicles that use the Turcot Interchange,⁴¹ and the tens of thousands of people who are members of the class, but not to the relevant items of the Final Class Description such as the residents within the 350 meters of the Project, or part thereof.

[65] In fact, in an effort to identify other class members, the Applicants relied on inferences.⁴²

³⁶ PGQ-1.

³⁷ PGQ-2.

³⁸ Exhibit R-1.

³⁹ Exhibit PGQ-1.

⁴⁰ Exhibit R-2.

⁴¹ Re-Amended Application, par. 37 to 43.

⁴² Re-Amended Application, par. 50.

[66] The issues raised by the Applicants relate to the annoyances suffered by residents as a result of the Project due to excessive noise, dust, and other inconveniences.

[67] The inconveniences suffered by the Applicants result from the Saint-Jacques overpass work, which is in proximity to the areas where Mr. Paquin resides and Galuchat's business operates. It is a small part of the overall Project, and is limited in scope.

[68] Although the residents who live in proximity to the Saint-Jacques overpass may qualify as a class, there are no allegations or evidence to support that the class should include more than those residents.

[69] The class description is unnecessarily broad and it should be narrowed to include only residents living in proximity to the Saint-Jacques overpass work.

4.3.3 Is 350 meters a justifiable distance?

[70] There are no allegations in the Application, or in any other document, showing the basis and rationale behind the choice of opting for a distance of 350 meters from the Turcot Project, within which the persons of the proposed class must reside.

[71] Furthermore, the reference to a "circumference" is confusing and of little use. Nothing alleged or even argued fixes a center point from which a circumference can be drawn.

[72] The AGQ argued that Applicants' counsel simply copied the class description used in *Krantz v. Quebec (Procureur general)*'s⁴³ decision without any adjustment. This may be true, but at least in the Krantz' decision, the starting point of the perimeter was clear and objective, and not vague and fluid as in this case.

[73] That being said, given the low threshold that Applicants must meet at the authorization stage, and the objective of class proceedings, the Court will accept the 350 meters as the distance from the St-Jacques overpass work within which the putative class members must reside.

4.3.4 Should the Court redefine the class?

[74] Given the general and not always relevant allegations of the Application, it is challenging to proceed with the redefinition of the Final Class Description. The Court has nonetheless made the effort to redefine the class as it considers that the class action should be authorized and it would be contrary to the objectives sought by class action proceedings not to do so in the present case.

⁴³ 2006 QCCS 2143.

[75] For the reasons set forth above, the Court will redefine the description of the class as follows:

All residents, who at any time since March 21, 2015, resided within 350 meters of that section of Saint-Jacques Street, (including the Saint-Jacques overpass), which runs West to East, intersecting the West perimeter of Girouard Avenue in the City of Montreal, Borough of Notre-Dame-de-Grâce, and the East perimeter of Decarie Boulevard in the same Borough.

[“Court Redefined Class”]

4.4 Whether the facts alleged appear to justify the conclusions sought - Article 575(2) C.C.P.

4.4.1 Applicants’ Cause of Action

➤ **Applicant Mr. Berdah**

[76] Mr. Berdah is a natural person who does not reside in proximity to the Project.⁴⁴

[77] Notwithstanding the sound barrier, Mr. Berdah claims he suffers from the noise caused by the Turcot Project when he attends Galuchat’s premises.

[78] He also asserts that because of the Turcot Project, he must park several blocks from his work at Galuchat, and must go through a virtual maze to get to it.⁴⁵

[79] He does not qualify as a potential member under the class nor is he a neighbour, as he is not a resident within 350 meters of the Saint-Jacques overpass work.

[80] The Court wonders if it is by oversight that he remains a named Applicant, simply due to the failure to adjust the allegations of the Application upon the significant modification to the class description.

➤ **Applicant Galuchat**

[81] Since January 2015, Galuchat operates a furniture upholstery store in premises it leases “in the heart of the Turcot Project reconstruction”.⁴⁶

[82] With the objective of reducing the negative impact of the Turcot Project on neighbouring properties, a noise barrier wall was erected near Galuchat’s business, along Saint-Jacques Street, which essentially enclosed and isolated Galuchat’s

⁴⁴ Re-Amended Application, par. 14 to 28.

⁴⁵ Exhibits P-7, P-8, P-9, P-10, P-15, and P-16: Global report.

⁴⁶ Re-Amended Application, par. 13.

premises, making access thereto challenging,⁴⁷ and vehicular access nearly impossible.⁴⁸

[83] Galuchat, who is a “neighbour”, claims that the difficult access to its premises has caused its revenues and business value to drop significantly,⁴⁹ obliging it to lay off employees.⁵⁰

[84] Also, since the erection of the sound barrier wall, the City of Montreal no longer picks up garbage around Galuchat’s premises nor does it clear the snow.

[85] There are no allegations that any other businesses or residents suffer from such issues.

[86] In fact, Galuchat’s issues seem to be specific to Galuchat, and while it may possibly have an individual claim against the Defendant or others, which the Court is not to determine at this stage, its case does not justify the conclusions sought as they are not common to those of the class.

➤ **Applicant Mr. Paquin**

[87] As for Mr. Paquin, the cause of action is based on the fact that he is a tenant living in the surrounding area of the Project site, and more particularly the Saint-Jacques overpass work area, and is suffering from abnormal neighbourhood disturbances due to the construction work taking place.

[88] He alleges that he must endure constant banging and loud noises, bright lights emanating from the work, and the circulation of trucks at all hours of the day and night, all of which cause him to be deprived of sleep and make his furniture shake.⁵¹

[89] He also alleges a water and electricity shortage due to the work.⁵²

28.5 On Friday, February 10th, 2017, Paquin and his neighbours suffered a complete loss of water (as a result of a water main burst) beginning around 6:00 a.m., which lasted until Sunday, February 12th, 2017;

28.6 The electricity and water in Paquin’s apartment constantly shuts off for several hours and days at a time;

⁴⁷ Exhibits P-8 and P-9.

⁴⁸ Exhibit P-8.

⁴⁹ Re-Amended Application, par. 20 and 21.

⁵⁰ Re-Amended Application, par. 22.

⁵¹ Re-Amended Application and Exhibit P-12.

⁵² Re-Amended Application, par. 28.5 to 28.9.

28.7 Paquin is often unable to cook due to the fact that he is without water and electricity, and is thus forced to incur costs of paying for outside, less healthy food;

28.8 On February 10, 2017, Paquin sent an email to his borough explaining some of the above;

28.9 Within 7 minutes of Paquin's email, Peter McQueen, City Councillor for the Notre-Dame-de-Grâce district, immediately responded by recognizing and admitting the following [...] :

*Thank you for notifying us about this and I am forwarding your message to the highest levels of our borough management for their solution if (sic) this problem asap please. I agree that you residents of that corner have suffered enough disruption from Transport Québec work there....*⁵³

[90] The municipal councillor's comments regarding the AGQ as cited cannot constitute an admission by the latter.

[91] The Court will review the various claims in order to assess the cause of action. One arguable cause would be sufficient to satisfy the applicable requirements.

4.4.2 Abnormal Neighbourhood Disturbances

[92] Article 976 C.C.Q. provides for the duties that neighbours owe each other:

976. Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage.

[93] In the leading case, *St. Lawrence Cement*,⁵⁴ the Supreme Court determined that article 976 C.C.Q. gives rise to a no-fault liability regime and concluded as follows:

[86] Even though it appears to be absolute, the right of ownership has limits. Article 976 C.C.Q. establishes one such limit in prohibiting owners of land from forcing their neighbours to suffer abnormal or excessive annoyances. This limit relates to the *result* of the owner's act rather than to the owner's *conduct*. It can therefore be said that in Quebec civil law, there is, in respect of neighborhood disturbances, a no-fault liability regime based on art. 976 C.C.Q., which does not require recourse to the concept of abuse of rights or to the general rules of civil liability. With this form of liability, a fair balance is struck between the rights of owners or occupants of neighbouring lands.

⁵³ Exhibits P-13 and P-14.

⁵⁴ *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, par. 86.

[94] The Supreme Court also confirmed that a liberal interpretation must be given to the legislature's choice of the word "neighbour" as opposed to "owner" in article 976 C.C.Q.⁵⁵ It is generally recognized that the term "neighbour" includes all holders of real rights, as well as those who exercise a right of enjoyment in the property. As author Pierre-Claude Lafond explains⁵⁶:

Certains ont sursauté face à la décision de la Cour d'admettre les locataires au rang des voisins pouvant se réclamer de l'article 976 C.c.Q., une disposition s'insérant dans un chapitre sur les règles particulières à la *propriété* immobilière. Pourtant, il était admis majoritairement en jurisprudence et en doctrine que les titulaires d'autres droits réels que le droit de propriété, de même que toute personne exerçant un droit de jouissance de l'immeuble peuvent se plaindre de troubles de voisinage.

[References omitted]

[95] The excessive nature of the annoyance must be determined objectively, taking into consideration the geographic location and nature of the property.

[96] In the Court's view, Mr. Berdah is not a neighbour, his company is. He personally has no cause of action under this cause.

4.4.3 The excessive noise

[97] Although there is no allegation that the AGQ is the owner of the structures involved in the Turcot Project⁵⁷, thus a potential neighbour, the Court infers, at this stage of the proceedings, that the allegations of the Application and the Exhibits filed⁵⁸ show, *prima facie*, that the AGQ is the owner of important structures, including the Saint-Jacques overpass, and is a neighbour to Galuchat and Mr. Paquin.

[98] Under the provisions of the no-fault liability regime, it is not necessary to allege a fault on the part of the AGQ, but only to demonstrate that a neighbour, or a class of neighbours, suffered abnormal neighbourhood annoyances according to the nature or location of its land or local usage.

[99] The facts and exhibits, when held as truthful, demonstrate that there are inconveniences such as loud noises during the day and at night in proximity to Mr. Paquin's premises, involving banging sounds, or the noise of trucks circulating, and that it is disturbing.

⁵⁵ *Id.*, par. 96.

⁵⁶ Pierre-Claude LAFOND, «*L'heureuse alliance des troubles de voisinage et du recours collectif: portée et effets de l'arrêt Ciment du Saint-Laurent*», (2009) 68 R du B. 385, p. 397-398.

⁵⁷ *Act Respecting Roads*, RLRQ c. V-9.

⁵⁸ Exhibits P-2, P-3, P-4, PG-1, PG-2, PG 8, PG-9, and Sections 6 and 7 of the *Act Respecting Roads*, préc. Note 60.

[100] The Court concludes, from the allegations and the exhibits filed, that Mr. Paquin has made an arguable case and has met the relatively low standard to demonstrate that he has suffered abnormal neighbourhood annoyances as a result of the noise caused by the Saint-Jacques overpass work.

[101] The residential nature of Mr. Paquin's premises, which are in proximity to the Saint-Jacques overpass work, renders the described noises and other inconveniences, *prima facie*, an abnormal neighbourhood disturbance.

[102] As to Galuchat, its cause of action is not based on the excessive noise or other inconvenience caused by the work on the Saint-Jacques overpass, but rather on the presence of the sound barrier wall and its effect on its furniture upholstery business.

4.4.4 **Loss of business value and revenues, obligation to lay off employees and other inconveniences due to the sound barrier wall**

[103] The allegations in the Application and the Exhibits, and more particularly, a news report by TVA named "*Un commerçant pris en otage*", demonstrates the isolation of Galuchat's premises as a result of the sound barrier wall.

[104] To access the store, pedestrians must go through a virtual maze, and for vehicles, it is near to impossible.

[105] The consequences suffered by Galuchat itself as a result of the sound barrier wall appear to be unique to Galuchat, and as mentioned above there is no allegation of any other commerce suffering the same alleged inconvenience.

[106] Galuchat's case does not justify the conclusion sought in the class action.

4.4.5 **Excessive dust or foul odor**

[107] In the allegations setting out each Applicant's cause of action, there are no specific allegations describing episodes during which the Applicants would have had to endure dust or foul odor as a result of the Saint-Jacques overpass work.

[108] While it is true that the allegations referring to dust and foul odor are general in nature, the Court is of the view that when taken with the other allegations and Exhibits, an inference may be made that Mr. Paquin arguably suffers from neighbourly inconveniences due to dust and foul odor, and the Applicants meet the very low threshold they have at this stage of the proceedings.

[109] The Court is satisfied that the Applicants have demonstrated a *prima facie* case, that they have suffered abnormal neighbourhood disturbances due to excessive dust or foul odor.

4.4.6 Limited access to water and Electricity

[110] Applicant Mr. Paquin alleges the following:

[...]

28.5 On Friday, February 10th, 2017, Paquin and “his neighbours” suffered a complete loss of water (as a result of a water main burst) beginning around 6:00 a.m., which lasted until Sunday, February 12th, 2017;

28.6 The electricity and water in Paquin’s apartment constantly shuts off for several hours and days at a time;

28.7 Paquin is often unable to cook due to the fact that he is without water and electricity, and is thus forced to incur costs of paying for outside, less healthy food;

28.8 On February 10th, 2017, Paquin sent an email to his borough explaining some of the above;

[111] Although there are no specific allegations indicating that the water and electrical issues Mr. Paquin and his neighbours have already experienced are due to the work on the Saint-Jacques overpass, given the low threshold, the Court infers that this is what was intended by the Application, and is satisfied that the Applicants have demonstrated a *prima facie* case, that they may have suffered abnormal neighbouring disturbance due to their limited access to water and electricity at a given time.

4.5 Liability under Article 1457 CCQ

[112] It is not clear to the Court whether the Applicants are seeking liability of the AGQ under article 1457 CCQ, or if that cause of action was reserved exclusively for KPH.

[113] For a cause of action to be tenable under article 1457 C.C.Q., Applicants must allege a fault, damages and a causal link.

[114] In the Application, the only allegation pertaining to a fault reads as follows:

33. All of the damages to the Class members are a direct and proximate result of the Defendants’ misconduct and willful blindness with respect to its obligations;

[115] The AGQ argues that there are no allegations describing in what way the AGQ misbehaved or was willfully blind, other than in relation to the neighbourhood annoyances.

[116] It is also true that the Exhibits reveal that the AGQ obtained the required Certificates of Authorization under Article 22 of the *Environment Quality Act*,⁵⁹ and consulted concerned persons and kept them informed regarding the relevant information or measures being taken in the context of the Turcot Project.⁶⁰

[117] That being said, given the low threshold the Applicants have at this stage of the proceedings, and the Court's intention to authorize the class action, the Court considers it preferable, at this stage, to refer the question to the merits for the Judge to decide.

4.6 Claim for damages as a result of the deprivation of the Applicants' Charter's right to the peaceful enjoyment of their property and to live in a healthy environment

[118] Articles 6, 46.1 and 49 of the Quebec *Charter of Human Rights and Freedoms*⁶¹ read as follows:

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

46.1. Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[119] In its decision *Aubry v. Éditions Vice-Versa*,⁶² the Supreme Court of Canada has confirmed that the infringement of a right guaranteed by the *Charter of Human Rights and Freedoms*⁶³ will give rise to an action in damages only if a fault, damage and causal connection are established. The relevant passage reads as follows:

49. The case at bar raises a problem of civil law and it is in light of that law that it must be resolved. The infringement of a right guaranteed by the (*Charter of Human Rights and Freedoms*) (hereinafter the "Quebec Charter") gives rise, under s. 49 para.1, to an action for moral and material prejudice. Such an action is subject to the civil law principles of recovery. As a result, the traditional elements of liability, namely fault, damage and causal connection, must be established.

⁵⁹ CQLR c. Q-2; Exhibits PGQ-8 and PGQ-9.

⁶⁰ Exhibits PGQ-10, PGQ-11.

⁶¹ CQLR, c. C-12.

⁶² [1998] 1 SCR 591.

⁶³ CQLR, c. C-12.

[References omitted]

[120] As stated above, given the general allegations, the low threshold the Applicants must meet at this stage of the proceedings, and that the class action will be authorized, the Court considers it preferable to refer this issue to the Judge on the merits.

4.7 Injunction relief in order to oblige the AGQ to reduce the noise level to acceptable levels

[121] Class counsel rightly asserts that injunctive relief conclusions have been authorized in the context of a class action.⁶⁴

[122] To meet their burden of demonstration, allegations demonstrating, at least some colour of a right to injunctive relief must be found in the Application or Exhibits.

[123] The injunctive order sought in the proposed conclusions reads as follows:

ORDER the Defendants to take the necessary measures to reduce the noise generated by the Turcot Project, to acceptable levels, both qualitatively and quantitatively, based on the evidence that will be submitted to the Court.

[124] Applicants rely on the general rules pertaining to injunctions and the *Environment Quality Act* (the “**Act**”)⁶⁵ to support their conclusion. The questions set forth in the Application, which relate to same, read as follows:

b) Do Defendants contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?;

c) Do Defendants contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the Note d'instruction 98-01 under section 94 of said Act? and

k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the *Environment Quality Act*, aimed at reducing the noise emitted by the Turcot Project, so that it is reduced to acceptable levels both qualitatively and quantitatively?

[125] The *Act*⁶⁶ specifically recognizes the right of a natural person to seek injunctive relief if a right provided thereunder was interfered with, and certain circumstances are met.

⁶⁴ *Abicidan c. Bell Canada*, 2017 QCCS 1198, par. 63; *Kennedy c. Colacem Canada inc.*, 2015 QCCS 222, par. 154.

⁶⁵ CQLR, c. Q-2.

⁶⁶ CQLR, c. Q-2, Sections 19.2 and 19.3.

[126] The AGQ argues that this right to an injunction is impossible if the Project was authorized as required by the Act,⁶⁷ except for acts contrary to the authorization document.

[127] Even if true, this is a mixed issue of fact and law to be decided on the merits, and the Court finds that the Applicants, given the low threshold, have met their burden of demonstration insofar as this issue is concerned.⁶⁸

4.8 Compensatory damages

[128] Given the above, a *prima facie* cause of action has been demonstrated to justify compensatory damages as a result of the allegations of abnormal neighbourhood disturbances relating to the Saint-Jacques overpass work.

[129] As the situation is still ongoing, the damages alleged need not be quantified at this stage.⁶⁹

4.9 Do the claims of the members of the class raise identical, similar or related issues of law or fact – Article 575(1) C.C.P.

[130] The Court Redefined Class description reads as follows:

All residents, who at any time since March 21, 2015, resided within 350 meters of that section of Saint-Jacques Street, (including the Saint-Jacques overpass), which runs West to East, intersecting the West perimeter of Girouard Avenue in the City of Montreal, Borough of Notre-Dame-de-Grâce, and the East perimeter of Decarie Boulevard in the same Borough.

[131] In *Vivendi Canada Inc. c. Dell'Aniello*⁷⁰ the Supreme Court of Canada sets out the analysis that the authorizing Judge must do to determine whether the criteria of Article 575(1) C.C.P. have been met. :

[41] Dans l'arrêt *Dutton*, notre Cour a formulé certains principes pertinents pour décider si un recours collectif soulève une ou plusieurs questions communes aux réclamations de l'ensemble des membres du groupe. La juge en chef McLachlin s'est exprimée ainsi au nom de la Cour :

Les critères de communauté ont toujours été une source de confusion pour les tribunaux. Il faut aborder le sujet de la communauté en fonction de l'objet. La question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition de l'appréciation des faits ou de l'analyse

⁶⁷ *Id.*, on the basis of Section 19.7 of the Act; Exhibit PGQ-8.

⁶⁸ Exhibit PGQ-8: Certificate of Authorizations.

⁶⁹ *Abicidan c. Bell Canada*, 2017 QCCS 1198, par. 60 and 69.

⁷⁰ [2014] 1 R.C.S. 3, par. 41, 42 and 58.

juridique. Une question ne sera donc « commune » que lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. Il n'est pas essentiel que les membres du groupe soient dans une situation identique par rapport à la partie adverse. Il n'est pas nécessaire non plus que les questions communes prédominent sur les questions non communes ni que leur résolution règle les demandes de chaque membre du groupe. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Pour décider si des questions communes motivent un recours collectif, le tribunal peut avoir à évaluer l'importance des questions communes par rapport aux questions individuelles. Dans ce cas, le tribunal doit se rappeler qu'il n'est pas toujours possible pour le représentant de plaider les demandes de chaque membre du groupe avec un degré de spécificité équivalant à ce qui est exigé dans une poursuite individuelle.

[42] Bien que l'affaire *Dutton* repose sur le droit procédural de l'Alberta, les principes énoncés par notre Cour sur le critère de la communauté de questions ont été invoqués par la Cour d'appel du Québec à maintes reprises. [...]

[...]

[58] [...] le requérant doit démontrer qu'un aspect important du litige se prête à une décision collective et qu'une fois cet aspect décidé, les parties auront réglé une part non négligeable du litige. [...] Ainsi, la seule présence d'une question de droit ou de fait identique, connexe ou similaire suffit pour satisfaire au critère de l'article 1003 a) C.p.c. sauf si cette question ne joue qu'un rôle négligeable quant au sort du recours.»

[Emphasis added]

[132] The Applicants submit that the members of the proposed group share an interest in the following common questions⁷¹:

- a) Does Defendant infringe on Class members' rights to peaceful enjoyment of their property (article 6) and their right to a healthy environment (article 46.1) as set out in Quebec's *Charter of Human Rights and Freedoms*?
- b) Does Defendant contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?
- c) Does Defendant contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the Note d'instruction 98-01 under section 94 of said Act?

⁷¹ The Court has adjusted the questions to refer to "Defendant" rather than "Defendants", given the discontinuance against KPH, has deleted the one relating to solidarity between Defendants and other references to "solidarity" for the same reason, and has adjusted certain questions to the singular mode when required.

- d) Does Defendant contravene the municipal noise by-laws for the cities impacted by the Saint-Jacques overpass work?
 - e) Has Defendant caused Class members abnormal and intolerable inconveniences, thereby failing in their obligation of good neighbourly conduct?
 - f) Did Defendant err in the design, construction, installation, maintenance and operations of equipment with respect to the Turcot Project?
 - g) Was Defendant negligent of the well-being of the Class members, their tranquility and their right to peaceful enjoyment of their property?
 - h) Are Class members entitled to moral damages?
 - i) Are Class members entitled to compensatory damages for trouble and inconvenience, Defendant's violation of their rights, and/or for the loss of value of their property?
- [...]
- k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the *Environment Quality Act*, aimed at reducing the noise emitted by the Turcot Project, so that it is reduced to acceptable levels both qualitatively and quantitatively?
 - l) Does Defendant violate article 976 of the Civil Code of Quebec?
 - m) Does Defendant violate article 1457 of the Civil Code of Quebec?
 - n) Is it necessary to issue an injunction against the Defendant?

[133] Although the class members need not all to be in the same situation vis-à-vis the AGQ, or that a common issue predominates over the non-common issues, one common question is required, which must relate to an important part of the issue and its answer must resolve the situation for the class members in a significant manner.

[134] Based on the allegations of the Applications, the Court concludes that there are sufficient common questions to meet the conditions of Article 575(1) *C.C.P.*

[135] That being said, there are no relevant allegations relating to the loss of value of property or that the AGQ erred in the “design, construction, installation, maintenance and operation of equipment with respect to the Turcot Project”. Thus the Court finds that questions “f” and part of question “i” are not common questions.

4.10 Whether the representative Applicants are adequate (Article 575(4) C.C.P.)

[136] In the *Infineon*⁷² case, the Supreme Court of Canada confirmed that an adequate representation requires the consideration of three factors: interest in the suit, competence and absence of conflict with the group members. These factors must be interpreted liberally as no proposed representative should be excluded, unless his or her interest or competence is such that the case could not possibly proceed fairly.

➤ **Mr. Berdah**

[137] Mr. Berdah personally has no legal interest in the case, as he does not reside within the set perimeter of the St-Jacques Street nor of the Turcot Project, and is not a putative class member.

➤ **Galuchat**

[138] Galuchat is in a unique situation. It is completely isolated as a result of the erection of a sound barrier wall.

[139] There is no allegation that Galuchat's situation is shared by other businesses or even a group.

[140] In fact, Mr. Berdah's interview on TVA,⁷³ and an e-mail he wrote to "Turcot-commentaires" confirms that Galuchat's situation is in fact unique, and it is the only business with two complete windows that face the Turcot Project and the sound barrier.⁷⁴

[141] During oral arguments, Applicants' counsel pointed out that the name of another business, Mazda Gabriel, appears on a road sign at the entrance of the virtual maze pedestrians must go through to get to Galuchat's.

[142] Nothing demonstrates where Mazda Gabriel is located or whether it is in the same situation as Galuchat.

➤ **Mr. Paquin**

[143] Mr. Paquin meets the required conditions to act as a representative to the putative class.

⁷² *Infineon Technologies AG c. Option consommateurs*, [2013] 3 R.C.S. 600

⁷³ Exhibit P-16.

⁷⁴ Exhibit P-10.

WHEREFORE, THE COURT:

[144] **GRANTS** the Re-Application to authorize the bringing of a class action and to appoint the status of representative;

[145] **APPOINTS** Giovanni Paquin as representative of the persons included in the class described as:

All residents, who at any time since March 21, 2015, resided within 350 meters of that section of the Saint-Jacques Street, (including the Saint-Jacques overpass), which runs West to East, intersecting the West perimeter of Girouard Avenue in the City of Montreal, Borough of Notre-Dame-de-Grâce, and the East perimeter of Decarie Boulevard in the same Borough.

[146] **IDENTIFIES** the issues to be dealt with collectively as follows:

- a) Did Defendant infringe on Class members' rights to peaceful enjoyment of their property (article 6) and their right to a healthy environment (article 46.1) as set out in Quebec's *Charter of Human Rights and Freedoms*?
- b) Did Defendant contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?
- c) Did Defendant contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the Note d'instruction 98-01 under section 94 of said Act?
- d) Did Defendant contravene the municipal noise by-laws for the cities impacted by the Saint-Jacques overpass work?
- e) Has Defendant caused Class members abnormal and intolerable inconveniences, thereby failing in their obligation of good neighbourly conduct?
- f) (...)
- g) Was Defendant negligent of the well-being of the Class members, their tranquility and their right to peaceful enjoyment of their property?
- h) Are Class members entitled to moral damages?
- i) Are Class members entitled to compensatory damages for trouble and inconvenience and or Defendant's violation of their rights?
- j) (...)

- k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the Environment Quality Act, aimed at reducing the noise emitted in the context of the Work on the St-Jacques Overpass, so that it is reduced to acceptable levels both qualitatively and quantitatively?
- l) Does Defendant violate article 976 of the Civil Code of Quebec?
- m) Does Defendant violate article 1457 of the Civil Code of Quebec?
- n) Is it necessary to issue an injunction against the Defendant?

[147] **AUTHORIZES** the class action Application to seek the following conclusion:

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

- 148.1. **GRANTS** Applicant's action against Defendant on behalf of all the Class members;
- 148.2. **DECLARES** the Defendant liable for the damages suffered by the Applicant and each of the class members;
- 148.3. **ORDERS** the Defendant to take the necessary measures to reduce the noise generated by the Saint-Jacques overpass work, to acceptable levels, both qualitatively and quantitatively, based on the evidence that will be submitted to the Court;
- 148.4. **CONDEMNS** the Defendant to pay the designated Applicant and each of the class members an annual amount, to be determined, as of March 21, 2015, and until such time that sufficient noise mitigation measures have been implemented;
- 148.5. **CONDEMNS** the Defendant to pay to each class member a sum to be determined in compensation for any other damages which the Court may determine;
- 148.6. **CONDEMNS** the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;
- 148.7. **ORDERS** that the claims of individual class members be the object of collective recovery if the proof permits and alternately, by individual recovery;
- 148.8. **ORDERS** the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

148.9. **CONDEMNS** the Defendant to bear the costs of the present action, including class counsel's professional fees and disbursements, the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

[149] **DECLARES** that all members of the class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

[150] **ORDERS** the publication of a notice to the members of the Class in accordance with article 579 C.C.P., pursuant to a further order of the Court approving the content of the notice and **ORDERS** Defendant to pay for said publication costs;

[151] **DIRECTS** counsel of the parties to submit to the Court the proposed notice and distribution plan no later than 45 days from the present judgment, or at any other date that may be authorized by the Court, as the case may be, upon request of counsel;

[152] **FIXES** the delay for a class member to opt out of the class at sixty (60) days from the date of the publication of the notice to the members and **DECLARES** that all members of the class who have not requested their exclusion from the class in the prescribed delay will be bound by any judgment to be rendered on the class action to be instituted;

[153] **WITH LEGAL FEES** against Defendant, including the costs related to the publication of the notices to class members.

KAREN M. ROGERS, J.S.C.

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