SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF FRONTENAC

No. 235-06-000001-148

DATE: March 31, 2016

PRESENT: THE HONOURABLE LISE BERGERON J.S.C.

PIERRE LABRANCHE
and
EDNA STEWART
Plaintiffs

v.

ÉNERGIE ÉOLIENNE DES MOULINS S.E.C.
and
INVENERGY DES MOULINS LP ULC
and
INVENERGY DES MOULINS GP ULC
and
INVENERGY WIND CANADA LP HOLDINGS ULC
and
INVENERGY WIND CANADA GP HOLDINGS ULC
and
HYDRO-QUÉBEC
Respondents

JUDGMENT
on application for authorization to institute a class action

JB4420

[1] The plaintiffs are seeking authorization to bring a class action against the respondents, Énergie Éolienne Des Moulins and five other corporations,[1] including Hydro-Québec.

[2] The proposed class action is based on alleged neighbourhood disturbances endured by the residents and occupants of immovables covered by the class action as a result of the construction and operation of 59 wind turbines spread across the territory of three municipalities.[2]

[3] The plaintiffs contend that they suffer annoyances that exceed the limit of normal neighbourhood annoyances, caused in particular by 28 wind turbines installed less than 928 metres from his residence, in the case of Pierre Labranche, and 11 wind turbines less than 1.3 kilometres from her residence, in the case of Edna Stewart.

[4] These neighbourhood disturbances are primarily in the form of noise day and night, vibrations and stroboscopic effects (flickering), blinking red lights visible from their homes, the visual impact on the rural landscape they chose to live in, and moving shadows.

[5] In addition, heavy truck traffic during construction, dust, pollution, road degradation and a decline in wild animal numbers are alleged sources of damage.

[6] The plaintiffs also allege vermin infestation, mental and physical health problems and fraying of the social fabric, not to mention the potential loss in property value.

[7] Furthermore, the plaintiffs criticize Hydro-Québec for acting unreasonably by selecting the Énergie Éolienne Des Moulins project knowing its proximity to a large power transmission substation, which amplifies the humming noise, and by authorizing changes to the corridor, number, size and capacity of the wind turbines, thereby making it solidarily liable for damages.

[8] In addition to damages for neighbourhood disturbances, the plaintiffs are claiming punitive damages, alleging intentional interference with their rights, including their right of ownership, and are seeking a court order to dismantle the wind turbines located less than three kilometres from their properties.

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[1] For brevity's sake, the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy des Moulins LP ULC, Invenergy des Moulins GP ULC, Invenergy Wind Canada LP Holdings ULC and Invenergy Wind Canada GP Holdings ULC henceforth will be collectively referred to as "Énergie Éolienne Des Moulins," except where it is necessary for the Court to make a distinction.

[2] Thetford Mines, Kinnear's Mills and St-Jean-de-Brébeuf.

CONTEXT

[9] As part of the Québec Energy Strategy, and following the adoption of an order in council respecting the second block of wind energy,[3] Hydro-Québec issued a tender solicitation (call for bids) for wind-generated electricity supply on October 31, 2005.[4] It received 67 bids from 22 different bidders.

[10] The tender solicitation procedure, including approval of criteria for selecting bids by decision of the Régie de l'énergie, allowed Hydro-Québec to award 15 contracts to wind-power producers.[5]

[11] The Des Moulins wind farm project[6] was among the 15 projects selected.

[12] This project originally entailed the construction of 78 wind turbines with a capacity of 2.0 MW and a height of 98 metres (139 metres including the blades),[7] and their installation along a corridor running through the city of Thetford Mines and the municipalities of Kinnear's Mills and Saint-Jean-de-Brébeuf (Des Moulins wind farm).

[13] In accordance with the *Act respecting the Régie de l'énergie*,[8] a report on the findings of the implementation of the tender solicitation procedure was submitted on July 18, 2008.

[14] Concurrently with the Régie de l'énergie's approval process, applications for a certificate of authorization were made in accordance with the *Regulation respecting environmental impact assessment and review*.[9] After holding public consultations, the BAPE submitted its report of inquiry in January 2010.[10]

[15] It was in this context that Hydro-Québec signed an electricity-supply contract with 3CI Énergie inc. on June 19, 2008 and the Régie de l'énergie approved the contract on October 17, 2008.

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[3] Exhibit I-HQ-2.
[4] Exhibit I-1 and affidavit 1-HQ-13 at para. 9.
[5] Exhibit I-HQ-13 at paras. 12 and 13.
[6] Originally a project of the company 3CI Énergie inc.
[7] Descriptions taken from the BAPE report, Exhibit R-6 at 4.
[8] See *Act respecting the Régie de l'énergie*, CQLR, chapter R-6.01, and Exhibit I-HQ-11.
[9] *Regulation respecting environmental impact assessment and review*, CQLR, chapter Q-2, r. 23.
[10] Exhibit R-6.

[16] On April 7, 2010, after receiving the required authorizations, 3CI Énergie assigned its contract to Énergie Éolienne Des Moulins S.E.C.[11] On December 15, 2013, Hydro-Québec agreed to modify the corridor, the number of wind turbines being reduced from 78 to 59 and their unit capacity raised from 2.0 MW to 2.3 MW.[12]

[17] Construction and installation of the 59 wind turbines truly got under way in July 2011 and commercial operation of the Des Moulins wind farm began on September 8, 2013.

APPLICATION FOR AUTHORIZATION

[18] The plaintiffs filed their application for authorization on February 7, 2014.

[19] The first amendment, the primary purpose of which was to clarify the application, was authorized on July 16, 2014.

[20] On February 10, 2015, the undersigned judge authorized Énergie Éolienne Des Moulins and Hydro-Québec to each submit appropriate evidence.

[21] Following the authorization, the plaintiffs filed a re-amended application for authorization on May 11, 2015.

[22] The plaintiffs are seeking authorization to bring the following action:

> [TRANSLATION]
>
> A civil liability action for damages and neighbourhood disturbances, claiming monetary compensation for the annoyances and damages suffered as a result of the construction, permanent presence and operation of the wind turbines, as well as punitive damages, and requesting an order to dismantle all wind turbines built less than 3 km from a residence.

[23] They are requesting that Pierre Labranche and Edna Stewart be appointed as the representative plaintiffs to act on behalf of the following class of persons:

> [TRANSLATION]
>
> All natural persons having resided and/or occupied an immovable since April 1, 2010 in the territories of the municipalities affected by

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[11] Exhibit I-HQ-1, amendment of May 19, 2011.
[12] Exhibits 1-9 and I-HQ-1, amendment of December 5, 2013.

> Phase 1 of the Des Moulins wind farm project, including the municipalities of Thetford-Mines, Kinnear's Mills, Saint-Adrien d'Irlande, Inverness, Pontbriand, Saint-Pierre de Broughton, Saint-Jean-de-Brébeuf, Irlande and Saint-Jacques de Leeds, and whose properties are located within a radius of 3 miles or 4.8280 kilometres from the project area (wind turbine corridor in Exhibit R-9 of January 31, 2012), who have not received compensation and have not signed an option and/or superficies and/or servitude agreement with the authorities concerned.

[24] The principal issues of law and fact as identified by the plaintiffs are as follows:

> [TRANSLATION]
>
> (a) Did the respondents commit faults and cause neighbourhood disturbances to the plaintiffs and members of the class?
>
> (b) Can the permanent presence of the wind turbines installed in the context of this project constitute a neighbourhood disturbance that exceeds the limit of normal neighbourhood annoyances?
>
> (c) Did the respondents commit faults and an abuse of right through the implementation, construction, operation and management of the Des Moulins wind farm?
>
> (d) Are the members entitled to obtain an order to dismantle the wind turbines installed within a radius of 3 km, saving the right to make up any deficiency in that distance, from their homes?
>
> (e) If the answer to any of the above questions is "yes", can all of the respondents be held liable, jointly and solidarily, and are the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins LP ULC and Invenergy Des Moulins GP Limited, Invenergy Wind Canada LP Holdings ULC and Invenergy Wind Canada LP Holdings ULC alter egos?
>
> (f) Did the plaintiffs and members suffer damages?
>
> (g) If so, what are those damages, the heads of damages and the damage amounts?

[25] The conclusions sought by this class action are as follows:

> [TRANSLATION]
>
> (a) **GRANT** the plaintiffs' motion to institute proceedings;
>
> (b) **CONDEMN** the respondents, solidarily, to pay to the plaintiffs damages according to the heads of claim and the submitted proof

of computation of the indemnities, including interest and the additional indemnity;

(c) **CONDEMN** the respondents, solidarily, to pay to each class member damages according to the heads of claim and the submitted proof of computation of the indemnities, including interest and the additional indemnity;

(d) **ORDER** the dismantling of all wind turbines built within a distance of 3 kilometres from a residence;

(e) **ORDER** that the aforementioned damages be the object of individual claims in accordance with articles 1037 to 1040 of the *Code of Civil Procedure*, subject to certain heads of claim that may give rise to a collective recovery;

(f) **CONDEMN** the respondents to any further relief the Court deems just and proper;

THE WHOLE WITH COSTS, including the costs of all exhibits, expertise, expert witnesses and their testimonies and publication of notices.

PARTIES' POSITION ON THE MOTION FOR AUTHORIZATION

[26] The plaintiffs contend that construction and operation of the wind turbines are and were sources of neighbourhood disturbances.

[27] Consequently, they hold Énergie Éolienne Des Moulins S.E.C. liable, solidarily with general partner Invenergy des Moulins GP ULC, special partner Invenergy des Moulins LP ULC and the shareholders of Invenergy Wind Canada LP Holdings ULC and Invernergy Wind Canada GP Holdings ULC and claim damages from them, contending that they are alter egos and that this is a [TRANSLATION] "corporate" or organizational structure that deliberately creates a confusion of names, all of these entities being controlled by the same shareholder with the aim of avoiding the legal ramifications of their actions as well as lawsuits.

[28] The plaintiffs hold that they satisfy the requirements of article 575 C.C.P. and, consequently, the action must be authorized.

[29] Since Énergie Éolienne Des Moulins does not contest the criterion in article 575(4) C.C.P., it presented no arguments regarding whether Pierre Labranche and Edna Stewart are in a position to properly represent the class members, leaving it up to the Court to decide this matter.

[30] Énergie Éolienne Des Moulins contends that the present application does not meet the criteria in subparagraphs 1, 2 and 3 of article 575 C.C.P.,

stating that it is the sole owner of the wind farm, thereby referring to the co-respondents whose involvement in the present application it does not understand.

[31] As for Hydro-Québec, whereas it generally agreed with the arguments submitted by Énergie Éolienne Des Moulins and whereas, during the hearing, the plaintiffs no longer invoked "neighbourhood disturbances" in its regard, it denies having committed any fault whatsoever in selecting the Des Moulins wind farm project, going on to say that the tender solicitation, bid review and contract awarding procedure is subject to a regulatory process and numerous authorizations by the Régie de l'énergie. Hydro-Québec contends that the allegations made in the motion are insufficient to seek its extracontractual liability.

APPLICABLE LAW AT THE AUTHORIZATION STAGE AND PRINCIPLES OF JURISPRUDENCE

[32] The Court must authorize a class action where the four conditions set out in article 575 C.C.P. (formerly article 1003) are met:

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

[33] In the 2014 decision *Charest* c. *Dessau inc.*,[13] Lacoursière J.S.C, explained the requisite approach to examining and applying the criteria in article 575 C.C.P. He wrote:

> [TRANSLATION]
>
> [25] Two broad principles underpin the application of article 1003 C.C.P.

[13] *Charest* c. *Dessau inc.*, 2014 QCCS 1891.

> [26] First, the criteria must be examined in the spirit of the 2002 amendments, that is, by preventing the authorization procedure from becoming a pre-trial on the merits of the case.
>
> [27] Second, the conditions of article 1003 C.C.P. must not be interpreted so narrowly as to prevent achievement of the social objective of class action, that is, to enable parties with limited resources (and often modest claims) to obtain reparation. Furthermore, too liberal an interpretation could lead to improper action.

[34] Moreover, in two recent decisions, Justices Lebel and Wagner, writing on behalf of the Supreme Court, discussed the state of the law, the principles that must guide a court and the role of a judge hearing an application for authorization to institute a class action.[14]

[35] In the 2013 judgment on *Infineon Technologies AG* v. *Option consommateurs*,[15] Lebel and Wagner JJ., writing on behalf of the Supreme Court, explained that:

> [59] At the authorization stage, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in art. 1003 of the *C.C.P.*, bearing in mind that the threshold provided for in that article is a low one. The authorizing court's decision is procedural in nature, as it must decide whether the class action may proceed.
>
> [60] As this Court pointed out in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 22, the requirements for authorization of a class action have on a consistent basis been interpreted and applied broadly both by it and by the Quebec Court of Appeal. As was noted in that case, the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation (see also *Nault v. Canadian Consumer Co. Ltd.*, [1981] 1 S.C.R. 553; *Comité régional des usagers des transports en commun de Québec v. Quebec Urban Community Transit Commission*, [1981] 1 S.C.R. 424; *Comité d'environnement de La Baie Inc. v. Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A.); *Château v. Placements Germarich Inc.*, [1990] R.D.J. 625 (C.A.); *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.)). The Court of Appeal astutely summarized this as follows in *Nadon v. Ville d'Anjou*, [1994] R.J.Q. 1823, at pp. 1827-28:
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> > [TRANSLATION] . . . the courts have generally held that the conditions of article 1003 must be interpreted broadly, that

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[14] *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 SCR 600; *Vivendi Canada Inc.* v. *Dell'Aniello*, [2014] 1 SCR 3.

[15] *Ibid.*

> they leave a court little discretion when they are met, and that the court is not to rule on the legal merits of the conclusions in light of the alleged facts.

[61] At this stage, the court's role is merely to filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of art. 1003. The objective is not to impose an onerous burden on the applicant, but merely to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims. The Court of Appeal described the threshold requirement as follows: "*le fardeau en est un de démonstration et non de preuve*" or, in English, [TRANSLATION] "the burden is one of demonstration and not of proof" (*Pharmascience Inc. v. Option Consommateurs*, 2005 QCCA 437 (CanLII), at para. 25; see also *Martin v. Telus Communications Co.*, 2010 QCCA 2376 (CanLII), at para. 32).

[62] More specifically, in the context of the application of art. 1003(*b*), this Court and the Court of Appeal have used varying vocabulary, both in English and in French, to describe and characterize the filtering function of a court hearing a motion for authorization to institute a class action. In 1981, Chouinard J. wrote that, at the authorization stage, the issue is "whether . . . the allegations support the conclusions *prima facie* or disclose a colour of right" (*Comité régional des usagers*, at p. 426). In his opinion, the court is "to reject entirely any frivolous or manifestly improper action, and authorize only those in which the facts alleged disclose a good colour of right" (p. 429).

[63] In a later case, Gonthier J. explained that an applicant at the authorization stage must establish "a good colour of right", "a *prima facie* right" or, in French, "*une apparence sérieuse de droit*", "*un droit prima facie*" (*Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at paras. 9-11). He pointed out that the Court of Appeal had been using the same expressions, requiring that the applicant establish a [TRANSLATION] "good colour of right" or "*prima facie* right" (*Berdah v. Nolisair International Inc.*, [1991] R.D.J. 417 (C.A.), at pp. 420-21, *per* Brossard J.A.), or a "serious colour of right" (*Comité d'environnement de La Baie*, at p. 661, *per* Rothman J.A.).

. . .

[65] . . . Also, the requirement that the applicant demonstrate a "good colour of right", an "*apparence sérieuse de droit*", or a "*prima facie* case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.

[66] A review of legislative intent also confirms this low threshold. It is clear from successive amendments to the *C.C.P.* that Quebec's legislature intended to facilitate class actions. For example, art. 1002

> of the *C.C.P.* formerly required that the applicant file affidavit evidence in support of the motion for authorization, which meant that he or she had to submit to examination as a deponent at the authorization stage under art. 93. The fact that the requirement of filing an affidavit was eliminated and examinations were strictly limited at the authorization stage in the latest reform of the class action provisions (S.Q. 2002, c. 7, s. 150) sends a strong signal that it would be unreasonable to require an applicant to establish anything more than an arguable case.
>
> [67] At the authorization stage, the facts alleged in the applicant's motion are assumed to be true. The applicant's burden at this stage is to establish an arguable case, although the factual allegations cannot be [TRANSLATION] "vague, general [or] imprecise" (see *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380 (CanLII), at para. 44).
>
> [Emphasis added.]

[36] Similarly, in the 2014 decision *Vivendi Canada Inc.* v. *Dell'Aniello*,[16] Lebel and Wagner JJ., again writing on behalf of the Supreme Court, provided further clarifications regarding the filtering, or screening, function of motions for authorization:

> [37] The judge's function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits: *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at paras. 59 and 61. However, the law does not impose an onerous burden on the applicant at this stage, as he or she need only establish a "*prima facie* case", or an "arguable case": *Infineon*, at paras. 61-67; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 23. Thus, all the judge must do is decide whether the applicant has shown that the four criteria of art. 1003 *C.C.P.* are met. If the answer is yes, the class action will be authorized. The Superior Court will then consider the merits of the case. In considering whether the criteria of art. 1003 are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted: *Infineon*, at para. 68; *Marcotte*, at para. 22.
>
> [Emphasis added.]

[37] In *Toure* c. *Brault & Martineau inc.*,[17] the Court of Appeal stated the broad principles to be considered:

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[16] *Vivendi Canada Inc.* v. *Dell'Aniello*, *supra* note 14.
[17] *Toure* c. *Brault & Martineau inc.*, 2014 QCCA 1577.

[TRANSLATION]

[35] In its recent judgment in *Infineon Technologies AG*, the Supreme Court took that appeal as an opportunity to reiterate that, at the authorization stage, the court must ensure that the criteria of article 1003 *C.C.P.* are met, bearing in mind the low evidentiary threshold required by this provision.

[36] Broad application of the conditions for authorization addresses a desire to facilitate access to class action as a vehicle for achieving the twin goals of deterrence and victim compensation.

[37] Thus, the authorization procedure is not said to be a trial on the merits, but rather a filtering mechanism that serves merely to set aside frivolous claims to spare parties from having to defend against untenable claims.

[38] At this stage, the facts alleged are assumed to be true, but it is imperative that they appear to justify the conclusions sought, which means that the allegations must be sufficiently specific to effectively support the recognition of the right claimed.

[39] In this regard, my colleague Jacques Dufresne, J.A., pointed out that:

> [TRANSLATION]
>
> While it is true that the authorizing judge must adopt a flexible analytical approach, the allegations of the motion must offer more than mere generalizations. Indeed, the vaguer an allegation, the less apparent the facts and the greater the risk it runs of expressing not much more than opinion. In short, allegations of fact must be sufficiently specific to effectively support the recognition of the right claimed, thereby allowing the authorizing judge to determine their sufficiency.

[40] The rest of the evidence on record, including the exhibits, sworn statements and examinations, must also be taken into account by the judge hearing the motion for authorization.

[41] The petitioner therefore has the onus of showing rather than proving. The petitioner does not have to establish that the claim will likely succeed; he or she only has to establish "an arguable case in light of the facts and the applicable law".

[42] In *Trudel* c. *Toronto-Dominion Bank*, however, this Court concluded that a judge dealing with a pure question of statutory interpretation must rule at the authorization stage:

> [TRANSLATION]
>
> [2] If an ordinary action is inadmissible because unfounded in law even when the facts alleged are assumed to be true, then so is a class action. This is all the more so since the costs incurred for such actions are greater than those usually incurred.
>
> [3] This case concerns a pure question of statutory interpretation. The trial judge assumed the facts to be true and found that the legislative provisions could not support the interpretation submitted by the plaintiff, that is, that the banks must assume preparation and registration fees when publishing discharges for loans that are secured by a hypothecary charge. Because the facts were assumed to be true, the judge not only could interpret the law in the exercise of her discretionary power, it was her duty to do so.

> [43] In short, at the authorization stage, the review consists in ensuring that the motion and the evidence on record establish an arguable case. . . .
>
> [Emphasis added.]

[38] My analysis of this application for authorization will thus be guided by the following principles of law:

- This is a filtering process for the purpose of rendering a verification decision.
- The burden on the plaintiff is one of demonstration and not of proof.
- The judge must be satisfied with a low evidentiary threshold.
- The Court's decision is procedural in nature.
- The conditions for authorization must be interpreted and applied broadly.
- The Court must ensure that the four conditions set out in article 575 C.C.P. are met without dealing with the merits of the case.
- The purpose of this operation is to filter out applications that are frivolous or do not meet the low evidentiary threshold requirement of article 575 C.C.P.

- The Court must authorize applications in which the facts alleged disclose "a good colour of right," an arguable case.

- At the authorization stage, the facts alleged are assumed to be true.

- However, the Court must be satisfied that the factual allegations are not vague, general or imprecise, that they appear to justify the conclusions sought.

ANALYSIS

1. Criterion of article 575(1) C.C.P.

Article 575(1) C.C.P. stipulates that the claims of the members of the class must raise identical, similar or related issues of law or fact.

[39] In its 2011 judgment on *Collectif de défense des droits de la Montérégie (CDDM)* c. *Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît,*[18] a case in which one of the grounds for appeal was an absence of common issues among the members of the proposed class, the Court of Appeal stated that a single common, related or similar issue of law suffices to meet the criterion of article 575(1) C.C.P.

[40] In 2014, in *Vivendi Canada Inc.* v. *Dell'Aniello,*[19] the Supreme Court, referring to that same Court of Appeal judgment, wrote:

> [58] . . . All that is needed in order to meet the requirement of art. 1003(*a*) *C.C.P.* is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action.
>
> . . .

[41] The Court went on to say that common questions do not have to lead to common answers to meet the criterion of article 575(1):[20]

> [59] . . . As a result, the criterion of art. 1003(*a*) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

[42] The plaintiffs claim that the issues raised are identical for all of the class members, but that the following issue should be clarified:

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[18] *Collectif de défense des droits de la Montérégie (CDDM)* c. *Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826.
[19] *Vivendi Canada Inc.* v. *Dell'Aniello*, *supra* note 14.
[20] *Ibid.*

(e) If the answer to any of the above questions is "yes", can all of the respondents be held liable, jointly and solidarily, and are the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins LP ULC and Invenergy Des Moulins GP Limited, Invenergy Wind Canada LP Holdings ULC and Invenergy Wind Canada LP Holdings ULC alter egos?

by specifying that the solidary liability conclusion does not apply to the payment of punitive damages.

[43] Énergie Éolienne Des Moulins contends that the existence of a common issue implies that it can be addressed in an identical and uniform manner to ensure a successful outcome for every class member.

[44] It further contends that this matter must be distinguished from decisions on a single contamination point: in the case at bar, it is not a matter of a single infringement to varying degrees, be it dust dispersion, noise emission or something else, but rather varying infringements for each class members and, therefore, action for neighbourhood disturbance must be based on an objective test taking into account the individual reality of the "neighbour" in "his or her" environment.

[45] It is important to remember that, at this stage, the Court will not examine the varying impacts according to wind, angle of the sun, temperature, distance, proximity of an urban landscape, etc. for each member, nor whether the members suffer varying degrees of physical or psychological effects as a result of the wind farm's construction and operation.

[46] The purpose at this stage is to evaluate the noise level, vibrations and stroboscopic effects of a wind turbine in order to assess the impacts contended by the plaintiffs, as the case may be.

[47] In the Court's opinion, the fact that the noise and stroboscopic effects are generated by 59 wind turbines spread across the territory in question does not change the fact that an objective or common standard can be established and applied to each turbine or set of turbines so that groups, zones and subgroups can be created in order to measure the degree of injury caused to each member.

[48] Under the circumstances, the Court does not believe that this will be an easy task, but the complexity of implementation is not a criterion of article 575 C.C.P.

[49] As Claudine Roy J. pointed out in *Association des résidents de Mont-Tremblant pour la qualité de vie* c. *Courses automobiles Mont-Tremblant*

inc.,[21] the injury can differ for each member without meaning an absence of common issues.

[50] In *Krantz* c. *Québec (Procureur général)*,[22] a class action for damages arising from noise and dust caused by reconstruction of the Ville-Marie expressway in Montréal, Jean-Pierre Sénécal J. wrote:

> [TRANSLATION]
>
> [168] . . . Even if the issue of damages suffered by each member individually might reveal significant differences, and even if certain grounds of defence might not apply to all of the members, the action can proceed if, for example, the basis for liability is the same for all of the claims and a situation has a common basis.

[51] The Court does not make the distinction suggested by Énergie Éolienne Des Moulins.

[52] Indeed, at the authorization stage of the class action, the Court finds the issue of determining whether the respondents cause neighbourhood disturbances to the members to be a common issue without the need to go into an analysis of that issue.

[53] Like in *Kennedy* c. *Colacem*[23] and *Carrier* c. *Québec (Procureur général)*,[24] the Court believes that, just as we evaluate the level of noise from an expressway, we will evaluate the level of noise from the wind turbines, the stroboscopic effects, the shadows and the effects of the blinking lights and vibrations.[25]

[54] In discussing the common issue criterion of article 575(1) C.C.P. in the judgment authorizing class action in *Kennedy*,[26] which was also based on neighbourhood disturbances, except in that case the cause was the operation of a cement plant, our colleague Bisson J. wrote:

> [TRANSLATION]
>
> [178] In other words, Colacem argued that demonstrating an objective standard is imperative in establishing a colour of right in neighbourhood disturbance claims, but argues here that assessing neighbourhood disturbance is highly subjective in terms of common issues.

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[21] *Association des résidents de Mont-Tremblant pour la qualité de vie* c. *Courses automobiles Mont- Tremblant inc.*, 2013 QCCS 5308.
[22] *Krantz* c. *Québec (Procureur général)*, 2006 QCCS 2143.
[23] *Kennedy* c. *Colacem Canada inc.*, 2015 QCCS 222.
[24] *Carrier* c. *Québec (Procureur général)*, 2011 QCCA 1231.
[25] See paras. 66-96 of the application for authorization.
[26] *Kennedy* c. *Colacem Canada inc.*, *supra* note 23.

> [179] Colacem cites the Court of Appeal in *Harmegnies* c. *Toyota Canada Inc.* as the authority for supporting the principle that a class action based on multiple subjective factors cannot be authorized, even if there is a common issue, which she holds is the case here: ...
>
> [References omitted.]

[55] Whereas the respondent Colacem was referring to specific decisions, Bisson J. wrote:[27]

> [TRANSLATION]
>
> [183] However, all of these decisions came before the *CDDM*, *Infineon*, *Vivendi* and *Carrier* judgments. The current state of the jurisprudence on issues of neighbourhood disturbance and extracontractual fault in environmental lawsuits is that established by the Court of Appeal in *Carrier* c. *Québec (Procureur général)*:
>
> > [71] The respondent argues that the proposed class action does not raise any questions that could be considered as being common to all the group members.
> >
> > [72] It seems to me that the trial judge's answer to this argument applies to this particular case:
> >
> > > [29] ..., subject to the possibility for the court to restrict the group with regard to the evidence or to divide it into subgroups, the questions of fact and of law will clearly be the same for all the members on whose behalf the petitioners intend to act. Essentially, in fact, it will be a matter of first assessing the level of noise from Highway 73, about which study R-12 already provides rather detailed information, and then of determining if this constitutes an abnormal annoyance that exceeds the limit of tolerance between neighbours, according to the nature or location of their land or local custom (976 C.C.Q.). And from that point, a decision will have to be made regarding whether the Ministry should be required to reduce the noise level to below a given ceiling and to indemnify those who were exposed to an excessive level of nuisance during the period covered by the application.
> >
> > [73] I do not see any error in principle in the preceding statement that would justify the Court's intervention. Group members may have experienced

[27] *Ibid.*

> nuisance levels at varying degrees. Care must be taken, however, not to put the authorization of a class action suit and its final enforcement on the same footing. It will be up to the trial judge to distinguish between the individual questions arising from the class action. In this regard, the trial judge has sufficient discretion to modify the group while it is before the court so as to take into account certain characteristics revealed by the evidence and thus be in a better position to handle the diversity of the individual claims before the court. The definitive description of the group will also be one of the considerations of the final judgment, not to mention that the law provides special terms and conditions for analyzing individual claims when the judgment acquires the authority of *res judicata* (articles 1037 et seq. *C.C.P.*).
>
> [74] In summary, I am of the opinion that the motion for authorization raises questions that are essentially common to the group members. In any case, if specificities related to certain members emerged to a significant degree following an analysis of the evidence, this difficulty could be easily resolved according to the foregoing.
>
> [Emphasis added.]

[56] Applying that to the present case means that, based on the evidence, an objective standard should be established.

[57] In fact, the Court does not make a distinction here, when there are 59 wind turbines but nevertheless a common standard because the standard would apply to each turbine.

[58] The same holds true for the stroboscopic effects, vibrations, dust emissions, noise from the road and other disturbances.

[59] The same as in *Kennedy*,[28] the arguments made by Énergie Éolienne Des Moulins refer to judgments that came before *Vivendi*,[29] *Infineon*[30] and *Carrier*.[31]

[60] The Court can identify no situation or context in the present case that would dictate not following the lead of the *Carrier* judgment.[32]

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[28] *Kennedy* c. *Colacem Canada inc.*, *supra* note 23.
[29] *Vivendi Canada Inc.* v. *Dell'Aniello*, *supra* note 14.
[30] *Infineon Technologies AG* v. *Option consommateurs*, *supra* note 14.
[31] *Carrier* c. *Québec (Procureur général)*, *supra* note 24.
[32] *Ibid.*

[61] Based on this common standard, the Court must determine the threshold, ceiling, degree or other benchmark above which the annoyance exceeds the limit of tolerance between neighbours, according to the nature or location of their land or local custom (976 C.C.Q.) and, from there, decide, if necessary, who was exposed to excessive levels and should be indemnified.

[62] Thus, from the point of view of the filtering function of this application, it is the Court's opinion that the criterion of article 575(1) C.C.P. is met.

2. Criterion of article 575(2) C.C.P.

Article 575(2) C.C.P. stipulates that the facts alleged must appear to justify the conclusions sought

[63] It is important to remember that the plaintiffs must demonstrate "a good colour of right", "an arguable case".

[64] However, at this stage, the analysis must be repeated owing to the number of respondents in this case.

[65] Indeed, considering that the plaintiffs are suing several respondents, and knowing that Énergie Éolienne Des Moulins is a limited partnership and that the general partner, the special partner, the shareholder of the general partner and the shareholder of the special partner are respondents, there is reason to apply the "test" in article 575(2) C.C.P. to each respondent individually.

[66] It is not a matter here of ruling in advance on the merits of the motion, nor on the merits of the solidary liability invoked in the conclusions identified in the application.

[67] The Court does not think that because there are several respondents, the respondents can be treated differently from the one that can be seen as the principal respondent, that is, Énergie Éolienne Des Moulins.

[68] Thus, whether it be Hydro-Québec, the special partner or the controlling shareholder of the holdings of the general partner or the special partner, "a good colour of right," that the facts alleged appear to justify the conclusions sought, must be established for each respondent.

[69] In that regard, Dalphond J., in *Meese* c. *Corp. financière Globex*,[33] stated that in cases with more than one defendant, a good colour of right must be established for each one of them:

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[33] *Meese* c. *Corp. financière Globex*, AZ-00021 066 (C.S.) at 23.

[TRANSLATION]

> The exercise becomes more complicated when there is more than one defendant, because the court must ensure that the class dimension applies to each of them. Indeed, the fact that this dimension exists for one defendant does not lead to an authorization covering every other defendant.

[70] In *Bayard* c. *St-Gabriel (Ville de)*,[34] Riordan J. wrote:

[TRANSLATION]

> [8] At the outset, it is our opinion that amendment of the Motion to Institute a Class Action for the purpose of adding a defendant following authorization is subject to the conditions set out in articles 1002 and 1003 C.C.P. . . .
>
> . . .
>
> [11] Also, in his judgment on *Meese* c. *Corporation financière Globex*, then Superior Court Justice Dalphond pointed out that a good colour of right must be demonstrated in respect of each defendant when the class action is initially authorized. We believe that the same principle applies in respect of each defendant the applicant wishes to add subsequent to authorization. Moreover, the legislator hints at this by requiring that such amendments be submitted to the approval of the court under article 1016 C.C.Q.
>
> [References omitted.]

[71] In *Association des citoyens et citoyennes pour un environnement sain de Fatima inc.* c. *Bois et placages généraux ltée*,[35] Gilles Mercure J. wrote:

[TRANSLATION]

> [20] In authorizing the class action, the Court has already decided that the facts alleged, which are assumed to be true, appear to justify the conclusions sought against BPG. In summary, the Court concluded that, at this stage of demonstration, and while in no way ruling on the merits of the case, the applicant had demonstrated to its satisfaction a colour of right between the class members and BPG, a legal syllogism satisfying the basis for its action.

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[34] *Bayard* c. *St-Gabriel (Ville de)*, 2006 QCCS 2695.

[35] *Association des citoyens et citoyennes pour un environnement sain de Fatima inc.* c. *Bois et placages généraux ltée*, 2008 QCCS 3192.

> This exercise pertained to BPG only. If, at the outset, the applicant had wanted to institute class action against both BPG and Stérost, it would have been necessary to determine whether the criterion of article 1003(b) was also met for Stérost. Now that the applicant wants to add Stérost as a co-defendant, the Court must determine whether the amendment sought meets the criterion of article 1003(b), that is, a colour of right. To conclude otherwise would be to say that the representative, after being authorized to bring a class action against a defendant, could, by way of an amendment, add co-defendants without having to show the slightest colour of right in respect of those co-defendants. It is not obvious that that was the legislator's intent in providing that an amendment must be submitted for prior approval by the Court.
>
> [References omitted.]
> [Emphasis added.]

[72] Similarly, in a recent ruling dated March 2014, Éva Petras J.S.C. had to decide whether to authorize an amendment to add two companies as solidary defendants to a previously authorized class action because they had allegedly invoked the juridical personality of an entity in violation of article 317 C.C.Q. She wrote:[36]

> [TRANSLATION]
>
> [85] In the context of this amendment application, with the common issues, class and applicant's status having been approved already by the authorization judgment, the only criterion to be met is that of article 1003(*b*) C.C.P., namely a good colour of right. The allegations must be serious and sufficiently specific to establish a good colour of right and, at this stage, they appear *prima facie* to be well founded.
>
> . . .
>
> [87] In the context of this amendment application, it must be established that the applicant's new application for authorization to include Xstrata plc and Xstrata Canada Corporation in the class action meets the "good colour of right" criterion of article 1003(*b*) C.C.P. for each of the potential defendants.
>
> [References omitted.]

[73] Thus, the same should apply to each of the respondents here, including Hydro-Québec, with one exception.

[74] Indeed, the exercise is slightly more complicated for the Court in that the respondents include the general partner and the special partner.

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[36] *Deraspe* c. *Zinc électrolytique du Canada ltée*, 2014 QCCS 1182.

[75] Énergie Éolienne Des Moulins is a limited partnership. Articles 2238, 2249 and 2221 C.C.Q. stipulate that:

> **2238.** General partners have the powers, rights and obligations of the partners of a general partnership but they are bound to render an account of their administration to the special partners.
>
> The general partners are bound by the same obligations towards the special partners as those binding an administrator charged with full administration of the property of others towards the beneficiary of the administration.
>
> Clauses restricting the powers of the general partners may not be set up against third persons in good faith.
>
> **2249.** In all other respects, the rules governing general partnerships, adapted as required, apply to limited partnerships.
>
> **2221.** With respect to third persons, the partners are jointly liable for the obligations contracted by the partnership but they are solidarily liable if the obligations have been contracted for the service or operation of an enterprise of the partnership.
>
> The creditors may bring an action against a partner for payment only after they have discussed the property of the partnership; even then, the property of the partner is applied to the payment of the creditors of the partnership only after his own creditors have been paid.

[76] Thus, since the limited partnership is not a legal person,[37] no distinction need be made between the limited partnership and its general partner. In *9171-3990 Québec inc.* c. *9086-4752 Québec inc.*,[38] Chief Justice Duval Hesler wrote:

> [TRANSLATION]
>
> [15] Even though a general partnership or limited partnership does not possess juridical personality under the C.C.Q., it holds a patrimony of its own, distinct from that of its partners. As explained by Rochon J. in *Ferme CGR. enr., s.e.n.c. (Syndic de)*:
>
> > [66] . . . The legislator chose to incorporate the objective patrimony doctrine. While providing that every person is the holder of a patrimony, it recognized the existence of

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[37] Read *Québec (Ville de)* c. *Compagnie d'immeubles Allard ltée*, [1996] RJQ 1566; *Laval (Ville de)* c. *Polyclinique médicale Fabreville, S.E.C.*, 2007 QCCA 426; *Corp. des maîtres électriciens du Québec* c. *Clément Jodoin Électrique inc.*, AZ-00021261 (C.S.); read paras. 65-68 of *Ferme CGR enr., s.e.n.c. (Syndic de)*, 2010 QCCA 719.

[38] *9171-3990 Québec inc.* c. *9086-4752 Québec inc.*, 2013 QCCA 2115.

> autonomous patrimonies (articles 2 and 915 C.C.Q.). Moreover, it granted "s.e.n.c." legal attributes that give it a greater degree of autonomy than under the *Civil Code of Lower Canada.*
>
> . . .
>
> [68] The property of the partnership thus constitutes an autonomous patrimony that is distinct from the patrimony of the partners and consists of the contribution of each partner. The patrimony will increase or decrease based on the partnership's activities. . . .

[29] Distinguishing between the juridical personality of the limited partnership and that of its general partners is especially obvious considering that once the property of the partners has been discussed, the judgment against the limited partnership is directly enforceable against the general partner.

[30] The respondents argued that the appellants would suffer no injury, since any judgment pronounced against the limited partnership can be enforced against them after the property of the limited partnerships has been discussed. That is true. But if we conclude that the general partner does not have the necessary interest in the suit for a forced intervention within the meaning of article 165(3) C.C.P., then, by the same logic, there is a chance it may not be able to intervene voluntarily.

[31] However, it is imperative that a general partner who is potentially liable for partnership debts be able to protect his or her interests.

[References omitted.]

[77] Thus, a general partner can be sued at the same time as the partnership.

[78] As the Paul Martel pointed out in an article published in the *Revue du Barreau*:[39]

> [TRANSLATION]
>
> The *Civil Code of Québec* (C.C.Q.) provides that, in a limited partnership, only the general partner(s) are solidarily liable for the debts of the partnership; a special partner is liable for the debts up to the agreed amount of his contribution only.

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[39] Paul Martel, "Société en commandite : l'immixtion des commanditaires dans la gestion est-elle vraiment une source de responsabilité ?" (2006) Barreau du Québec, R. du B. at 247.

[79] Article 2246 C.C.Q. reads as follows:

> **2246.** Where the property of the partnership is insufficient, the general partners are solidarily liable to third persons for the debts of the partnership; a special partner is liable for the debts up to the agreed amount of his contribution, notwithstanding any transfer of his share in the common stock.
>
> Any stipulation whereby a special partner is bound to be surety for or assume the debts of the partnership beyond the agreed amount of his contribution is without effect.

[80] In the absence of a juridical personality and given the provisions of the *Civil Code of Québec*, there is no reason to distinguish between the situation of the limited partnership Énergie Éolienne Des Moulins and that of its general partner (articles 2238, 2246, 2249 and 2221 C.C.Q.).

[81] The exception ends there. Besides the general partner, the plaintiffs must show that each respondent meets the criterion of article 575(2) C.C.P., that is, that the facts alleged appear to justify the conclusions sought.

[82] Here, however, the Court identifies no allegations in the application for authorization that support the conclusions in respect of the respondents, whether it be the special partner Invernegy des Moulins LP ULC or the partnerships that control the general partner Invernegy Wind Canada GP Holdings ULC or the special partner, Invenergy Wind Canada LP Holdings ULC.

[83] The sole argument invoked in support of the proposed action against the special partner and the controlling partners is that the general partner and the special partner are controlled by the same parent company and the complex corporate structure makes it difficult for an ordinary citizen to determine who does business and under what name.

[84] A complex corporate structure is not a sufficient argument to meet the criterion of subparagraph 2.

[85] Article 575(2) C.C.P. requires that the allegations be sufficiently specific to effectively support recognition of the right claimed.

[86] It is difficult to establish the link and evaluate in what way the special partner can be held potentially liable under article 2246 C.C.Q. when its contribution to the limited partnership is neither known nor asserted, or even if it is involved in the management of the general partner.

[87] As for the shareholders of the general partner and the special partner, no allegation raises fraud, abuse, tactics (article 317 C.C.Q.) or any

matter that would suggest the need to pierce the corporate veil and look beyond the "operating" entity.

[88] The only paragraphs in the application for authorization relating to the respondents' organization chart are paragraphs 30 to 36.

[89] Even though the facts must be assumed to be true, the aforementioned paragraphs do not enable the establishment of "facts" in respect of the special partner, Invernegy des Moulins LP ULC, Invernegy Wind Canada GP Holdings ULC and Invenergy Wind Canada LP Holdings ULC that justify seeking liability against them.

[90] Paragraph 36 of the application for authorization reads as follows:

> [TRANSLATION]
>
> The "game" of setting up multiple corporate entities, multiple partnerships, often for the purpose of avoiding lawsuits and civil liabilities, must not have the effect of depriving the plaintiffs of their rights and recourses and/or making a judgment difficult to enforce, it being within the plaintiffs' right to ask that the corporate veil between the parent company and its associated companies, all of which are alter egos, be pierced if necessary;

[91] The plaintiffs are making assumptions here with no factual basis showing the existence of a strategy, fraud or screen of such kind for the purpose of shirking responsibilities.

[92] In the judgment on *Deraspe* c. *Zinc électrolytique du Canada ltée*,[40] rendered on March 28, 2014, Éva Petras J. neatly summed up the factors to be considered in establishing a good colour of right when she was deciding whether to authorize an application to add co-defendants on the basis of an organizational corporate structure.

[93] Petras J. wrote:

> [TRANSLATION]
>
> [92] Only in exceptional circumstances, and in just one of the three cases provided for in article 317 C.C.Q., is it possible to "pierce the corporate veil" in order to make a shareholder liable for the obligations of the corporation.
>
> . . .

[40] *Deraspe* c. *Zinc électrolytique du Canada ltée*, 2014 QCCS 1182.

[94] Consequently, even the fact that companies are deemed alter egos—when the necessary circumstances exist—does not justify piercing the corporate veil between those companies:

> . . . article 317 allows a court to "pierce the corporate veil" where a company is the alter ego of its shareholder or of another company and is used to commit fraud, an abuse of right or a contravention of a rule of public order, either at the instigation or for the benefit of the shareholder or other company. Absent one of these three acts, the fact that the company is an alter ego will not result in non-compliance with its corporate identity, or shareholder immunity.
>
> In and of itself, there is nothing wrong with a company being an alter ego. It is only if the company is used for the nefarious purposes set out in article 317 that the "corporate veil" may be pierced. The case law indicates that in the absence of fraud, the corporate identity of a company, even an alter ego, will be respected.

[95] Furthermore, it is acknowledged that the mere fact that companies are part of a group does not justify piercing the corporate veil between them in order to create a right of any kind in favour of a third party.

[96] In *Option Consommateurs* c. *Fédération des caisses Desjardins du Québec*, the Court of Appeal teaches us that:

> [TRANSLATION]
>
> [23] The appellants responded to this argument by contending that the Fédération [des caisses Desjardins du Québec] is, in a way, the alter ego of all the member caisses, one of which is the respondent Caisse.
>
> [24] The appellants infer from these provisions that an action brought against the Fédération can be equivalent to an action brought against all of its member caisses. In the same vein, they plead that the penalty paid to the Caisse by Ms. Collins would, to some extent, enure to the benefit of the Fédération....
>
> . . .
>
> [27] Regardless, on the merits, it is my opinion that the means must fail simply because the Fédération and each of the caisses are separate and distinct legal persons. . . .
>
> . . .
>
> [29] The fact that caisses and the Fédération of which they are members can constitute a network within the meaning of the Act

> does not change the basic rule that every legal person has its own legal identity. Here, I am referring in particular to articles 301, 5, 303 and 305 C.C.Q.
>
> [30] In my view, the judge was therefore right in saying:
>
> > [35] It is the Court's opinion that to authorize class action against all caisses in Québec, when they are not being sued, would be a violation of a basic rule of law, that is, the other party's right to be heard (*audi alteram partem*). . . .
>
> [31] In addition, there is nothing to support the blanket statement according to which a payment made to a caisse is actually a payment made to the Fédération of which the caisse is a member. Therefore, the judge rightfully found that:
>
> > [43] The evidence clearly shows that the Caisse and the Fédération are separate and distinct legal entities and that Ms. Collins never had a contractual relationship with the Fédération with regard to the granting, management and repayment of her hypothec with the Caisse. In the present case, there is no legal relationship between Judith Collins and the Fédération.
>
> [32] To conclude, the action against the Fédération must fail because, as decided by the Superior Court judge, Ms. Collins does not have a legal relationship with it. . . .
>
> [Emphasis added.]

[97] The fact of a complex corporate structure between a parent company and its directly or indirectly held subsidiaries does not justify piercing the corporate veil.

[98] Even though some authors and legal experts may criticize the concepts of separate personality and limited liability of corporations, the law and the jurisprudence have not changed.

> §2.64 The concepts of limited liability and separate personality have come in for most criticism in the case of parent and subsidiary corporations. More generally, it is sometimes suggested that the commercial realities of corporate group structure necessitates a re-examination of existing corporate liability and entitlement rules. Where a group of corporations with interlocking ownership carry on what is in effect a single combined and integrated economic enterprise, the question arises as to whether the law should disregard the separate corporate vehicles conducting each aspect of the combined enterprise, and treat the group as a single entity. The traditional view with respect to such corporate groups has been summarized as follows:

> ... [E]ach company in a group of companies (a relatively modern concept) is a separate legal entity, possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body.
>
> Group enterprise, involving the combined operations of several distinct corporate entities, all of which ultimately are wholly owned by one single shareholder, is a widespread feature of modern commerce.
>
> [Emphasis added.]

[94] Those legal conclusions apply only to corporations with a separate personality, to legal persons.

[95] This is the case for the shareholders of the general partner and special partner.

[96] As specifically regards the special partner, its liability, as the case may be, could be directly sought under article 2244 C.C.Q. instead.

[97] However, an allegation that it acted as mandatary would have been necessary and the motion makes no such claim.[41]

[98] Thus, the Court finds that the criterion of article 575(2) C.C.P. is not met for the following respondents:

- Invernegy des Moulins LP ULC (special partner);
- Invernergy Wind Canada GP Holdings ULC (shareholder of the general partner);
- Invenergy Wind Canada LP Holdings ULC (shareholder of the special partner).

[99] In the Court's view, the criterion of article 575(2) C.C.P. is met for Énergie Éolienne Des Moulins S.E.C. and its general partner, Invenergy des Moulins GP ULC, as well as for the respondent Hydro-Québec. Here is why.

[100] It is important to remember that, at this stage, the Court must be able to establish a good colour of right and find that, even if the application may

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[41] Paul Martel, *supra* note 39 at 259.

be dismissed on the merits, the class action should be authorized because the plaintiffs have an arguable case.

[101] In support of those elements, the plaintiffs submitted photographs of the sites, the BAPE report, the results of noise tests at their homes and various other spots in the area covered by the class action, the written submission presented by the Montérégie public health branch during the BAPE hearings on the Montérégie wind farm, which discussed, in particular, the human impact of the moving shadows and noise caused by wind turbines, as well as plans of the preliminary wind turbine corridor taken from an Ontario study of the impact of wind turbines and wind farms on the value of properties located at varying distances from turbines or farms.

[102] They also filed as evidence various complaints about road and ditch deterioration lodged in the municipality of St-Jean-de-Brébeuf in 2013.[42]

[103] Paragraphs 47 to 65 of the application provide a general description of the annoyances caused by the work, including the anomalous consequences of constant heavy traffic, noise, dust and pollution, the degradation of roads and motor vehicles, and blasting.

[104] The plaintiffs allege the following neighbourhood disturbances in particular:

- heavy-machinery traffic day and night since the work began;
- obstruction of traffic when the road was blocked;
- dangerous driving, particularly three overturned cement trucks;
- around-the-clock noise during certain operations, and noise from idling trucks waiting in line;
- abnormal dust emissions caused by the high daily truck traffic, making maintenance harder;
- deterioration of roads because of this damage;
- human exposure to the asbestos dust that is characteristic of the roads in this area but is made worse by the high heavy-truck traffic.

[42] Read R-32 and R-5 (noise guidance notes 98-01); read R-6 at 41ff. for stroboscopic effects; read R-7 for noise measurement, R-24 (MDDEP missive on noise measurement) and R-25 (property value impact study).

[105] The annoyances caused by operation of the wind farm are described in paragraphs 66 to 96 of the application, particularly in the following manner:

- stroboscopic effects;
- farmland degradation;
- problems with infestation;
- noise and vibrations;
- visual, physical and noise pollution;
- visual impairment caused by blinking lights;
- physical and mental health effects;
- fraying of the social fabric;
- loss of property value.

[106] Remember, at the authorization stage, the plaintiffs are not required to show the full merits of their application by submitting, in particular, proof by expert.

[107] However, the allegations contained in the application, the various references to noise surveys or measurements made by the plaintiffs, the references to studies on the same issue conducted elsewhere and the inferences made to the BAPE report on this project are deemed sufficient to meet the low evidentiary threshold at this stage of the proceedings, showing that the plaintiffs have an arguable case with regard to the alleged neighbourhood disturbances.

[108] The Court reaches the same conclusion with respect to Hydro-Québec, where the issue is not neighbourhood disturbances, the plaintiffs having abandoned this liability claim against Hydro-Québec, but rather abuse of right, fault and liability, the plaintiffs criticizing Hydro-Québec for modifying the wind turbine corridor, selecting the Des Moulins wind farm project, primarily because the site is located near a large hydroelectric substation (Appalaches substation), increasing the noise levels now concentrated in this sector, and changing the type of turbine (size, motor power voltage, blade height and speed).

[109] Even if Hydro-Québec followed a standard process regulated by the Régie de l'Énergie, it does not mean that it cannot be held liable or did not abuse some its rights.

[110] At the authorization stage, the Court does not rule on the merits of the case.

[111] The facts alleged in the application, which are assumed to be true, seem to be sufficient, particularly given that in paragraph 37.3 of the application for authorization, the plaintiffs claim that Hydro-Québec selected the Des Moulins wind farm project even though it was in possession of ambient-noise studies on the Appalaches substation.

[112] The allegation is therefore that Hydro-Québec holds knowledge that could inform the assessment of its decision to implement or support the implementation of a project such as a wind farm in a given site.

[113] Once again, considering the low threshold to be met at this stage, the Court deems there is an arguable case allowing the action to proceed even though the merits of the case require a more thorough examination.

[114] Thus, the Court believes that the plaintiffs meet the criterion of article 575(2) C.C.P. with regard to the alleged neighbourhood disturbances during construction and operation, for the respondents Énergie Éolienne Des Moulins S.E.C. and Invenergy des Moulins GP ULC, the general partner.

[115] The plaintiffs also meet the criterion of article 575(2) C.C.P. with regard to the potential liability of Hydro-Québec in selecting the Des Moulins wind farm project in light of what it knew.

3. Criterion of article 575(3) C.C.P.

Article 575(3) C.C.P. stipulates that the composition of the class must make 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.

[116] Despite the change in terms and wording in subparagraph 3 of article 575 C.C.P. compared to subparagraph (*c*) of article 1003 of the former C.C.P., the criterion is still the same.

[117] Here, the allegations contained in the motion make it easy to believe the large number of owners and occupants that could potentially be involved in this class action.

[118] The size of the wind farm itself and the fact that the turbines are spread across the territory, like branches of a tree sprouting leaves (the turbines), are enough to define a potentially large class.

[119] The application for authorization claims the suit covers nearly 2000 class members over a distance of three miles, the distance between Pierre Labranche's house and the farthest wind turbine.

[120] The Court questions the distance.

[121] At the hearing, when the only thing required at this stage is proof by expert of a measurement for delimiting the area encompassing the immovables affected by the alleged damages, the plaintiffs supported their claim primarily with the Ontario *Noise Guidelines for Wind Farms*, which provides instructions for assessing and measuring noise from wind turbines.[43]

[122] The guidelines were published by the Ontario Ministry of the Environment in 2008. It was on the basis of a statement in the guidelines to the effect that the noise impact prediction method must include contributions from sources located as far away as 5 km[44] that the plaintiffs defined the class as all owners and occupants of immovables within a 3-mile (4.8-km) radius of the wind farm.

[123] Thus, based on the 4.8-km radius for measuring noise levels, coupled with the distance of 3 miles between Pierre Labranche's house and the farthest wind turbine, the plaintiffs defined the class as follows:

> All natural persons having resided and/or occupied an immovable since April 1, 2010 in the territories of the municipalities affected by Phase 1 of the Des Moulins wind farm project, including the municipalities of Thetford-Mines, Kinnear's Mills, Saint-Adrien d'Irlande, Inverness, Pontbriand, Saint-Pierre de Broughton, Saint-Jean-de-Brébeuf, Irlande and Saint-Jacques de Leeds, and whose properties are located within a radius of 3 miles or 4.8280 kilometres from the project area (wind turbine corridor in Exhibit R-9 of January 31, 2012), who have not received compensation and have not signed an option and/or superficies and/or servitude agreement with the authorities concerned.

[124] In his treatise on class action lawsuits, Yves Lauzon wrote:[45]

> [TRADUCTION]

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[43] See tab No. 18 of the plaintiffs' authorities.
[44] *Ibid* at 14/18.
[45] Yves Lauzon, *Le recours collectif* (Cowansville: Éditions Yvon Blais, 2001) at 38-42.

For that purpose, the need to consider the very nature of a class action, which enables the representative to act without a mandate from the other members, as well as the nature of the mandate proceedings and the joinder of parties, has been acknowledged.

Consequently, the courts have deemed the following aspects and factors relevant in examining the causal link between the "composition of the class" and the fact that application of articles 59 and 67 C.C.P. to the petitioner's proposed class action is difficult or impracticable:

- the likely number of class members;
- the geographical location of the members;
- the members' physical or mental condition;
- the nature of the class action undertaken;
- the financial aspects of the action, including the various costs involved, the amount at stake for each member, the risks relating to costs in the event the action is unsuccessful, and the financial assistance available;
- the practical and legal constraints inherent in the use of a mandate and the joinder of parties compared with class action.

The number of class members is obviously an important factor, but is not a determining, or even sufficient, factor on its own. Thus, where the number of class members is relatively low, the presence of other factors, such as the diversity of their geographical location or their physical or mental condition, will make class action the most effective legal proceeding. However, as the number of members increases, this factor will become predominant or sufficient on its own to meet this authorization criterion.

. . .

The second stipulation in the first line of article 1003(*c*) C.C.P. reads as follows:

" . . . makes the application . . . difficult or impracticable . . . . "

It is clear from the ordinary meaning of the words that it there is no question of it being impossible to proceed by mandate or joinder of parties. The only onus on the plaintiff is to demonstrate *prima facie* that such an option is difficult or impracticable, even if it is evident that it is possible. This is the interpretation in the consistent and unanimous case law.

> In keeping with the aforementioned interpretation principle, the courts have dismissed numerous arguments put forward over the years when debating this authorization criterion. The following arguments are therefore not a bar to the condition set out in article 1003(*c*) C.C.P.:
>
> - The members described in the motion are identified or easily identifiable, making application of articles 59 or 67 C.C.P. possible in theory. However, this does not mean that it would be easy or practical, considering all of the circumstances in the case.
>
> - The petitioner has not identified or attempted to identify the members of the group not known; no such obligation exists by law.
>
> - The information needed to identify the members is available from the respondent party. This fact must not be taken into consideration because it would be putting the petitioner at the respondent's mercy, which is unacceptable.
>
> [References omitted.]
> [Emphasis added.]

[125] Article 575(3) C.C.P. requires that the plaintiffs show in what way an individual action or a joinder of action would be impracticable or difficult to apply.

[126] In their handbook of civil procedure, lawyer Denis Ferland and Justice Benoît Émery write:[46]

> [TRANSLATION]
>
> 2-1653 – A class cannot be composed of a category of individuals covered by legislation, such as taxpayers, because a judgment relating to such classes can be obtained, with fewer procedural and administrative complications and at less cost, through a normal application, an application mandating a representative (s. 91) or a joint application (s. 143, para. 2) on behalf of all members of the group.
>
> 2-1654 – The courts have pointed out that applications mandating a representative (art. 91) and joint applications (s. 143, para. 2) are not prohibited by law. The legislation does not require that class action be exclusively limited to a group all of whose members cannot be found. The Court even goes so far as to assert that the condition set out in

[46] Denis Ferland and Benoît Émery, *Précis de procédure civile du Québec*, vol. 2, 5th ed. (Cowansville: Éditions Yvon Blais, 2015) at 642-645.

> the article is met when a class action would be more appropriate or more effective.
>
> 2-1655 - Article 575(3) does not stipulate the number of people allowed in a class and there is no indication in the case law of the threshold at which applications mandating a representative and joint applications are difficult or impracticable.
>
> 2-1656 - Where a class action covers hundreds or thousands of people, the courts obviously find that an application mandating one of them to represent the entire class or a joint application would not be feasible. While the number of people in the class is not the only consideration, it is an important one.
>
> . . .
>
> 2-1659 – Under the criterion of article 575(3), the applicant must attempt to contact a certain number of people in the same position as him or her and provide their names and addresses; if that is not possible, the applicant must explain why.
>
> 2-1660 – In addition to the number of people in the class, the court must take into consideration the cost of individual legal proceedings in comparison to the amount of the claim for each member, which may weigh in favour of a class action.
>
> 2-1661 – The purpose of class action is not to circumvent the requirements of articles 91 and 143, para. 2, where one of these two provisions could be applicable.
>
> 2-1662 - Lastly, where there is doubt as to the application of this criterion (art. 575, subpara. 3), the doubt may work in favour of the party seeking authorization.
>
> [References omitted.]

[127] In objection to these criteria, the respondents argue that the nature of class action is to facilitate access to justice for claimants of relatively small amounts of money that do not justify individual action.

[128] They contend that in the present case, the alleged claims vary between $10 000 and $50 000, plus an amount for loss in property value.

[129] Therefore, the value of their claim is not disproportionate to the cost of individual proceedings.

[130] As pointed out by the professor and attorney Denis Ferland, "while the number of people in the class is not the only consideration, it is an important one."[47]

[131] The plaintiffs' motion contends that more than 2000 owners and occupants may be involved, which is not hard to believe considering the vast area concerned.

[132] In light of that figure, it is also easy to believe that individual proceedings would not be a practical option. Moreover, this is often the case with environmental lawsuits.[48]

[133] In the recent case *Kennedy* c. *Colacem*,[49] Bisson J. wrote:

> [TRANSLATION]
>
> [198] Since the class has several hundred members unknown to the plaintiff and spread over a 5-km area around the cement plant, it is difficult or impracticable for the plaintiff to proceed by means of an *ad litem mandate* or a joinder of parties. Class action is entirely appropriate in this case.
>
> [199] Furthermore, since the period covered by the class action began June 8, 2008, it is difficult, if not impossible, to find all of the class members who may have moved since then and potentially have a claim.
>
> [200] It is the Court's opinion that the criterion of article 1003(*c*) CCP is met.

[134] As for the number of class members, the Court states that it is satisfied that the logistics and organization to locate and contact over 2000 owners or occupants spread across the area in question make individual proceedings or a consolidation of proceedings illusory.

[135] Under these circumstances, class action is entirely appropriate.

[136] Therefore, the Court does not think it necessary to spend a lot of time discussing the potential value of individual claims, which, even if they could reach $10 000 or $50 000, according to the respondents, are not deemed to establish a sufficient relationship to justify individual proceedings.

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[47] *Ibid.*
[48] *Filteau* c. *Aviation Roger Forgues inc.*, J.E. 97-514 (C.S.); *Kennedy* c. *Colacem Canada inc.*, *supra* note 23; *Carrier* c. *Québec (Procureur général)*, *supra* note 24.
[49] *Kennedy* c. *Colacem Canada inc.*, *supra* note 23.

[137] I will say again, if followed through to the end, this case will necessitate several levels of expertise to measure noise levels, dust, vibrations and health impacts.

[138] Proving these claims will be a demanding undertaking that would be better served by a class action where the efforts and costs inherent in the required analyses will serve the greatest number of people and, given the cost one can imagine is involved, would be a barrier for a single owner wishing to assert his or her rights.

[139] For those reasons, I believe that the criterion of article 575(3) C.C.P. is met.

4. Criterion of article 575(4) C.C.P.

Article 575(4) C.C.P. stipulates that the class member appointed as representative plaintiff must be in a position to properly represent the class members

[140] The respondents do not contest this criterion.

[141] However, even if the criterion is not contested, the Court must still satisfy itself that Mr. Labranche and Ms. Stewart meet the criteria for being appointed as representative plaintiffs for the class.

[142] In *Infineon Technologies*,[50] Lebel and Wagner JJ., writing on behalf of the Supreme Court, stated the following with respect to article 575(4) C.C.P.:

> [149] Article 1003(*d*) of the *C.C.P.* provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [TRANSLATION] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(*d*), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.
>
> [150] Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorization. As Lafond states, at p. 423, [TRANSLATION] "[i]n the

[50] *Infineon Technologies AG* v. *Option consommateurs*, supra note 14.

> event of a conflict, denying authorization is in our opinion an overly radical step that would harm the absent members, especially given that the judge sitting at the stage of the motion for authorization has the power to ascribe the status of representative to a member other than the applicant or the proposed member." Given that the purpose of the authorization stage is merely to screen out frivolous claims, it follows that the purpose of art. 1003(*d*) cannot be to deny authorization if there is only a possibility of conflict. This position is supported by the case law, as authorization appears to have been denied under art. 1003(*d*) on the basis of a conflict of interests only where prospective representative plaintiffs had failed to disclose material facts or were undertaking the legal proceedings purely for personal gain. (See *Croteau v. Air Transat A.T. inc.*, 2007 QCCA 737, [2007] R.J.Q. 1175; *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Black v. Place Bonaventure inc.* (2004), 41 C.C.P.B. 181 (Que. C.A.); *Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446 (CanLII); *Bourgoin v. Bell Canada inc.*, 2007 QCCS 6087 (CanLII); and *Rosso v. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61.)

[143] In the case at bar, the motion describes in detail the specific annoyances suffered by Pierre Labranche and Edna Stewart: paragraphs 97 to 122 of the motion, plus supporting documents, in the case of Mr. Labranche, and paragraphs 123 to 137, in the case of Ms. Stewart,.

[144] Both members illustrated the different annoyances, neighbourhood disturbances and damages, as the case may be, alleged in the application for authorization.

[145] The plaintiffs submit that:

- They are both affected by the wind turbines installed less than 1 kilometre from his property in the case of Pierre Labranche.
- They both followed the wind farm project.
- Mr. Labranche took part in the BAPE hearings and lodged complaints.
- They organized public meetings.
- They are willing to devote time to represent the class members.

[146] Furthermore, a thorough examination of the representative plaintiffs' ability to represent the class members is not necessary at the authorization stage.[51]

[147] Absent contestation, given the allegations in the motion and the documentary evidence, coupled with the aforementioned case law, it is the Court's opinion that the criterion of article 575(4) C.C.P. is met for both representative plaintiffs.

PROPOSED COMMON ISSUES

[148] In light of the conclusion to dismiss the action against the special partner and the two shareholder companies of the general partner and special partner, there is reason to reword issues (c) and (e) in the following manner:

> (c) Did Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec commit faults and an abuse of right through the implementation, construction, operation and management of the Des Moulins wind farm?
>
> (e) If the answer to any of the above questions is "yes", can Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec be held liable, jointly and solidarily, and are the respondents Énergie Éolienne Des Moulins S.E.C. and Invenergy Des Moulins GP ULC alter egos?

[149] Furthermore, whereas the plaintiffs are no longer claiming damages from the respondent Hydro-Québec for neighbourhood disturbances, the Court is rewording this issue in the following manner:

> (a) Did Énergie Éolienne Des Moulins S.E.C. and Invenergy Des Moulins GP ULC commit faults and cause neighbourhood disturbances to the plaintiffs and members of the class?
>
> (a.1) Did Hydro-Québec commit faults against the plaintiffs and members of the class?

THEREFORE, THE COURT:

[150] **ALLOWS** the application for authorization to institute a class action against the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy des Moulins GP ULC and Hydro-Québec;

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[51] Denis Ferland and Benoît Émery, *supra* note 46 at para. 2-1667.

[151] **AUTHORIZES** the class action hereinafter described:

> A civil liability action for damages and neighbourhood disturbances, claiming monetary compensation for the annoyances and damages suffered as a result of the construction, permanent presence and operation of the wind turbines, as well as punitive damages, and requesting an order to dismantle all wind turbines built less than 3 km from a residence.

[152] **APPOINTS** Pierre Labranche and Edna Steward as the representative plaintiffs for the proposed class action to act on behalf of the class of persons hereinafter described:

> All natural persons having resided and/or occupied an immovable since April 1, 2010 in the territories of the municipalities affected by Phase 1 of the Des Moulins wind farm project, including the municipalities of Thetford-Mines, Kinnear's Mills, Saint-Adrien d'Irlande, Inverness, Pontbriand, Saint-Pierre de Broughton, Saint-Jean-de-Brébeuf, Irlande and Saint-Jacques de Leeds, and whose properties are located within a radius of 3 miles or 4.8280 kilometres from the project area (wind turbine corridor in Exhibit R-9 of January 31, 2012), who have not received compensation and have not signed an option and/or superficies and/or servitude agreement with the authorities concerned.

[153] **IDENTIFIES** the principal issues of law and fact to be dealt with collectively as follows:

(a) Did Énergie Éolienne Des Moulins S.E.C. and Invenergy Des Moulins GP ULC commit faults and cause neighbourhood disturbances to the plaintiffs and members of the class?

(a.1) Did Hydro-Québec commit faults against the plaintiffs and members of the class?

(b) Can the permanent presence of the wind turbines installed in the context of this project constitute a neighbourhood disturbance that exceeds the limit of normal neighbourhood annoyances?

(c) Did Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec commit faults and an abuse of right through the implementation, construction, operation and management of the Des Moulins wind farm?

(d) Are the petitioners entitled to obtain an order to dismantle the wind turbines installed within a radius of 3 km, saving the right to make up any deficiency in that distance, from their homes?

(e) If the answer to any of the above questions is "yes", can Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec be held liable, jointly and solidarily, and are the respondents Énergie Éolienne Des Moulins S.E.C. and Invenergy Des Moulins GP ULC alter egos?

(f) Did the plaintiffs and members suffer damages?

(g) If so, what are those damages, the heads of damages and the damage amounts?

[154] **IDENTIFIES** the conclusions sought in relation to those issues as follows:

(a) **GRANT** the plaintiffs' motion to institute proceedings;

(b) **CONDEMN** the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec, solidarily, to pay to the plaintiffs damages according to the heads of claim and the submitted proof of computation of the indemnities, including interest and the additional indemnity;

(c) **CONDEMN** the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec, solidarily, to pay to each class member damages according to the heads of claim and the submitted proof of computation of the indemnities, including interest and the additional indemnity;

(d) **ORDER** the dismantling of all wind turbines built within a distance of 3 kilometres from a residence;

(e) **ORDER** that the aforementioned damages be the object of individual claims in accordance with articles 599 to 601 of the *Code of Civil Procedure* (articles 1037 to 1040 of the former C.C.P), subject to certain heads of claim that may give rise to a collective recovery;

(f) **CONDEMN** the respondents Énergie Éolienne Des Moulins S.E.C., Invenergy Des Moulins GP ULC and Hydro-Québec to any further relief the Court deems just and proper;

(g) **THE WHOLE**, with legal costs.

[155] **DECLARES** that, barring opting out, the members will be bound by any judgment on the class action;

[156] **SETS** the time limit for opting out at 30 days following the date of publication of the notice to members, upon the expiry of which members who have not opted out will be bound by any judgment rendered;

[157] **ORDERS** that a notice to members be published under the terms and by the means to be submitted to the Court during representations made following the authorization judgment;

[158] **DENIES** authorization to bring a class action against the respondents Invenergy des Moulins LP ULC (special partner), Invenergy Wind Canada LP Holdings ULC and Invenergy Wind Canada GP Holdings ULC;

[159] **REFERS** the case to the chief justice to determine the district in which the class action will be instituted and designate the judge who will hear the case;

[160] **THE WHOLE**, with legal costs.

(s)
LISE BERGERON J.S.C.

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