COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
QUÉBEC REGISTRY

Nos. 200-09-009270-163; 200-09-009273-167
(235-06-000001-148)

DATE: November 22, 2016

CORAM: THE HONOURABLE JACQUES CHAMBERLAND J.A.
BENOÎT MORIN J.A.
DOMINIQUE BÉLANGER J.A.

No. 200-09-009270-163

ÉNERGIE ÉOLIENNE DES MOULINS S.E.C.
INVENERGY DES MOULINS GP ULC
PLAINTIFFS – Respondents

v.

PIERRE LABRANCHE
EDNA STEWART
RESPONDENTS – Plaintiffs

and

HYDRO-QUÉBEC
INVENERGY DES MOULINS LP ULC
INVENERGY WIND CANADA LP HOLDINGS ULC
INVENERGY WIND CANADA GP HOLDINGS ULC
IMPLEADED PARTIES – Respondents

No. 200-09-009273-167

HYDRO-QUÉBEC
PLAINTIFF – Respondent

v.

PIERRE LABRANCHE
EDNA STEWART
RESPONDENTS – Plaintiffs

and

ÉNERGIE ÉOLIENNE DES MOULINS S.E.C.
INVENERGY DES MOULINS LP ULC
INVENERGY WIND CANADA LP HOLDINGS ULC
INVENERGY WIND CANADA GP HOLDINGS ULC
INVENERGY DES MOULINS GP ULC
IMPLEADED PARTIES – Respondents

JUDGMENT

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[1] The plaintiffs are seeking, in two separate cases, leave to appeal from a judgment of the Superior Court of Québec, District of Frontenac (the Honourable Lise Bergeron), rendered on March 31, 2016, authorizing a class action against them in connection with the presence and operation of wind turbines at the Parc éolien des Moulins Phase 1 wind farm;

[2] For the reasons of Chamberland J., to which Morin and Bélanger subscribe, **THE COURT**:

[3] **DISMISSES** the two motions, with legal costs against the plaintiffs in each case.

(s)
JACQUES CHAMBERLAND J.A.

(s)
BENOÎT MORIN J.A.

(s)
DOMINIQUE BÉLANGER J.A.

Mtre. Vincent de l'Étoile
Mtre. Michèle Bédard
Langlois avocats
For the plaintiffs Énergie Éolienne des Moulins s.e.c. and Invenergy Des Moulins GP ULC and the impleaded parties

Mtre. Jean-Olivier Tremblay
Cellucci, Fréchette
For the plaintiff Hydro-Québec

Mtre. Paule Lafontaine
Mtre. Robert Eidinger
Eidinger & Associés
For the respondents Pierre Labranche and Edna Stewart

Date of hearing: September 16, 2016

REASONS OF JUDGE CHAMBERLAND

[4] On March 31, 2016, the Superior Court of Québec (the Honourable Lise Bergeron) authorized a class action against the plaintiffs Énergie éolienne des Moulins s.e.c., Invenergy des Moulins GP ULC and Hydro-Québec in connection with the presence and operation of wind turbines at the Parc éolien des Moulins Phase 1 wind farm.

[5] Today the Court is seized of two motions for leave to appeal the judgment, presented respectively by Énergie éolienne des Moulins s.e.c. and Invenergy des Moulins GP ULC (200-09-009270-163), and Hydro-Québec (200-09-009273-167).

[6] Those two motions were heard in concert with four other motions. Three were further to a judgment rendered on February 24, 2016 authorizing a class action in relation to an outbreak of legionellosis in the region of Québec between July and October 2012 (the Allen case) (200-09-009238-160, 200-09-009241-164 and 200-09-009247-161). One motion was further to a judgment rendered on April 12, 2016 authorizing a class action in relation to DuProprio's advertising and comments on the services offered by real estate brokers and the costs associated with those services (500-09-026070-169).

[7] All of these motions raise the same two issues:

(a) the formulation of the test applicable to the right to appeal a judgment authorizing a class action, as provided for in article 578 of the new *Code of Civil Procedure*;

(b) the outcome of the motions for leave to appeal.

Test applicable to the right to appeal

[8] Further to the Court's decision in the Allen case, the test is the following: the appeal judge grants leave to appeal from a judgment authorizing a class action when that judgment appears, *on its very face*, to contain a determinative error in the interpretation of the conditions for the exercise of the class action or the assessment of the facts relating to those conditions, or again, if it is clearly a case of the Superior Court's incompetence.

[9] We must now examine each of the motions for leave to appeal and determine their outcome in light of the test adopted and the circumstances specific to each of the plaintiffs.

Leave to appeal

Énergie éolienne des Moulins s.e.c. and Invenergy des Moulins GP ULC

[10] The class action instituted by the respondents is a recourse for civil liability and neighbourhood disturbances resulting from the construction and operation of the Parc éolien des Moulins wind farm, which has 59 wind turbines located on approximately 2442 hectares in the territory of the municipalities of Thetford Mines, Kinnear's Mills and Saint-Jean-de-Brébeuf.

[11] Énergie éolienne des Moulins is a limited partnership, which the judge in first instance qualified as the "principal" respondent (at para. 67).

[12] Invenergy des Moulins GP ULC is its general partner.

[13] The judge in first instance first set aside the possibility of a class action against Invenergy des Moulins LP ULC (the special partner), Invenergy Wind Canada GP Holdings ULC (shareholder of the general partner) and Invenergy Wind Canada LP Holdings ULC (shareholder of the special partner). That aspect of the judgment is not challenged in the two motions of which the Court is seized.

[14] The judge concluded that the criterion of article 575(1) of the new C.C.P. ("the claims of the members of the class raise identical, similar or related issues of law or fact") had been met. Although the alleged neighbourhood disturbances were attributable to 59 wind turbines instead of only one, the judge did not believe that that fact was an obstacle preventing the exercise of a class action; however, by all accounts, it made the exercise more complex. The common issue remained to determine whether the respondents caused neighbourhood disturbances to the class members.

[15] The judge also concluded that the criterion of article 575(2) of the new C.C.P. ("the facts alleged appear to justify the conclusions sought") had been met in respect of Énergie éolienne des Moulins s.e.c. and its general partner, Invenergy des Moulins GP ULC. The allegations in the application, the various references to noise level measurements, the references to existing studies on the same subject conducted elsewhere and to the BAPE report on the project (R-6, the January 2010 investigation report) led the judge to conclude that the applicants had established an [TRANSLATION] "arguable case" to be heard as regards the neighbourhood disturbances that they allege (stroboscopic effects, vibrations, noise, dust, . . .).

[16] The plaintiffs argue that the judge made determinative errors in the application of the criterion of article 575(1) of the new C.C.P. They allege she erred in the legal characterization and burden relating to this criterion. She erroneously concluded the existence of identical, similar or related issues of law or fact, with no consideration for the causes of action raised (civil liability and neighbourhood disturbances) or the underlying circumstances of the proposed class action. Last, the judge was alleged to

have prejudiced the outcome of the proposed common issues and exceeded her jurisdiction at the authorization stage for a class action, thus interfering with the plaintiffs' right to a full and complete defense.

[17] With respect for the contrary opinion, I do not find that the decision of the judge in first instance regarding the criterion provided for in para. 1 of article 575 of the new C.C.P. contains *on its very face* a determinative error in the interpretation of that condition for the exercise of the class action or the assessment of the facts relating to that condition.

[18] The judge explained that, although there were numerous sources of neighbourhood disturbances (59 wind turbines set up on a vast territory) instead of only one, that fact was not a fatal obstacle to the exercise of a class action. According to her, that reality was not incompatible with the common issues of the class members, that is, whether or not there were neighbourhood disturbances resulting from the fault of the plaintiffs (article 1457, C.C.Q.) or that exceeded the normal limits of tolerance between neighbours (article 976, C.C.Q.). The plaintiffs have not demonstrated how that conclusion, at the authorization stage for a class action, was a determinative error.

[19] Nor have the plaintiffs shown how the judge in first instance may have prejudiced the outcome of the proposed common issues, exceeded her jurisdiction at the authorization stage for a class action or interfered with their right to a full and complete defense.

Hydro-Québec

[20] The applicants essentially criticize Hydro-Québec for acting unreasonably by moving forward with the Énergie éolienne des Moulins project, modifying the wind turbine corridor and establishing the project near a large hydro-electric substation, thereby making Hydro-Québec jointly and solidarily liable for the damages the plaintiffs claim they suffer because of the alleged neighbourhood disturbances.

[21] The judge in first instance believed that the allegations in the motion and the evidence in the record met the low evidentiary threshold required at that stage of the proceedings, allowing the conclusion that Hydro-Québec may be liable in part for the alleged prejudice or for abusing certain of its rights. The judge added that, obviously, she was not ruling on the merits of the case at the authorization stage.

[22] Hydro-Québec argues that the judge erred in her assessment of each of the three conditions provided for in paragraphs 1, 2 and 3 of article 575 of the new C.C.P.

[23] I will not go over what I wrote above concerning the condition in paragraph 1 of article 575. Hydro-Québec contends that its situation is different, because liability is sought for abuse of law, whereas liability of the other defendants is sought for neighbourhood disturbances. The argument does not convince me. It is true that the

causes of action are different, but it is just as true that the two are interrelated because they both originate in neighbourhood disturbances of which the applicants complain.

[24] As for the condition stated in paragraph 2 of article 575 of the new C.C.P., I will simply say that Hydro-Québec has not shown how the analysis of the judge in first instance would appear to be a determinative error of law, or how her conclusion seems to result from a clearly wrong assessment of the facts related to that condition. The judge explained why the allegations in the application appeared sufficient to justify the applicants' having an [TRANSLATION] "arguable case" against Hydro-Québec. I do not see the appearance of an error that justifies granting the requested leave to appeal.

[25] As for the condition in paragraph 3 of article 575 of the new C.C.P., ("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"), there is little to say. The judge stressed that the size of the wind farm and the wind turbines spread over the territory are indicators of a "potentially large class" (paras. 118 and 131).

[26] The applicants raise the possibility of 2000 class members, given the distance of 4.8280 km, that is, the distance of the furthest wind turbine from the residence of plaintiff Pierre Labranche. The judge questioned that distance of 4.8280 km, as well as the amounts of the individual claims ($10 000 - $50 000, plus a certain amount to compensate for the loss of property values), in the context of individual actions.

[27] She pointed out that the distance adopted was based on a study by the Ontario Ministry of Environment, before concluding that it was illusory to consider the possibility of individual proceedings (over 2000 owners or occupants, over a vast territory), or consolidation of proceedings. According to her, the substantial value of the individual claims was not sufficient to rule out the possibility of a class action and justify individual proceedings in the circumstances.

[28] In my opinion, Hydro-Québec mistakenly raised that issue again. It did not show how the judge was mistaken in her interpretation of the condition in paragraph 3 of article 575 of the new C.C.P. Nor did Hydro-Québec show in what way the conclusion of the judge in first instance concerning that condition was the result of a clearly wrong assessment of the relevant evidence.

[29] For these reasons, I propose that the two motions for leave to appeal be dismissed, with legal costs against the plaintiffs.

(s)
JACQUES CHAMBERLAND J.A.