SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000757-159

DATE : MARCH 13, 2017

PRESIDED BY: THE HONOURABLE SILVANA CONTE, J.S.C.

JOHN BENIZRI
Plaintiff
v.

CANADA POST CORPORATION
Defendant

JUDGMENT

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[1] Mr. Benizri is seeking to authorize a class action on behalf of the following proposed class:

> All persons in Quebec who are directly inconvenienced by the installation of a Canada Post community mailbox on or adjacent to their property or within a radius of 10 meters of their property, following the implementation of Respondent's plan to replace door-to-door delivery of mail parcels with community mailboxes, which began on or around 2014.

FACTS

Community mailboxes

[2] Canada Post Corporation ("Canada Post") is a Canadian Crown Corporation governed by the *Canada Post Corporation Act, RSC 1985, c.C-10* (the "Act"). It acts as the primary purveyor and operator of postal services within Canada and between Canada and other destinations outside of Canada[1].

[3] On December 11, 2013, Canada Post announced its intention to cease its door to door delivery service to residences in urban centres across Canada and install community mailboxes[2].

[4] In March 2015, Canada Post implemented a Five Point Action Plan ("Plan") to proceed with the implementation of the community mailboxes in locations that would meet criteria for safety, accessibility and proximity to the addresses they serve[3].

[5] The purpose of the Plan was to meet the changing needs for postal services in Canada; reducing costs and creating efficiencies through a five-year period on a national scale[4].

[6] Community mailboxes have been in existence in Canada for over 25 years and represented in 2013, two thirds of the postal addresses served by Canada Post[5]. The Plan addresses the conversion of door to door mail delivery services for the remaining one third of the postal addresses served by Canada Post[6].

[7] Pursuant to the *Mail Receptacles Regulations* SOR 83-743 ("Regulations") implemented under the Act, Canada Post may install, erect or relocate or cause to be installed, erected or relocated in any public place, including a public roadway, any receptacle or device to be used for the collection, delivery or storage of mail[7].

[8] As part of the Plan, Canada Post representatives met with customers prior to the final selection for the location of these mailboxes[8]. In May 2015, after representatives of Canada Post advised Mr. Benizri about the proposed installation of the community mailboxes adjacent to his property, Canada Post installed a community mailbox on the eastern side of his fenced property in the City of Dollard-des-Ormeaux ("Property")[9].

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1 Section 5 of the Act.
2 Exhibit P-2; paragraph 2.4 of the application to authorize a class action.
3 Exhibit P-3; paragraph 2.14 of the application to authorize a class action.
4 Exhibit P-3.
5 Sworn statement of Claude C. Robert dated February 11, 2016.
6 Exhibits P-3 and CR-2.
7 Section 3 of the Regulations.
8 Exhibit P-3 and paragraph 2.15 of the application to authorize a class action.
9 Exhibit P-4.

The community mailbox contain a total of 48 slots corresponding to 34 civic addresses in the vicinity, including that of Mr. Benizri[10].

[9] The facts concerning the visit from Canada Post in early 2015 are contested. For the purposes of the application, the Court considers only the uncontested facts, to which; a representative did visit Mr. Benizri; he was advised of the location selected for the installation of the community mailbox and he did not raise any objection or file a complaint until the filing of this application[11].

[10] Since 2015, a total of 7,846 community mailboxes have been installed by Canada Post[12].The implementation of the Plan was suspended in 2015 and is under review by the current Government[13].

Neighbourhood Annoyances

[11] Mr. Benizri complains about excessive noise, aesthetic displeasure, safety issues and loss of privacy and concludes that the culmination of these annoyances shall decrease the value of his property[14].

[12] The excessive noise is allegedly due to the increase in the circulation around Mr. Benizri's property. According to Mr. Benizri, his neighbours mostly retreive their mail by car, often at unreasonable hours, leaving their car engine running with the radio blaring loud music within earshot of his property[15].

[13] Moreover, not only does he consider the metal community mailbox visually displeasing but he complains that his neighbours often discard unwanted mail, parcels, flyers or local advertisements thereby littering on and around his property[16].

[14] Mr. Benizri also cites safety concerns due to the increased traffic. He claims that the community mailbox creates a risk of theft or other criminal activity regarding the contents of the mailbox and vandalism, and he asserts his concerns for his family's security[17].

[15] Finally, Mr. Benizri cites a loss of privacy. He claims that persons allegedly peer through his fence into his backyard during family gatherings[18].

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[10] Exhibit P-5; paragraph 75 of the sworn statement of Claude C. Robert dated February 11, 2016 and p. 66 of his examination out of court dated April 14, 2016.
[11] Examination out of court of Mr. Benizri dated March 17, 2016.
[12] Undertaking E-7 of Clause C. Robert further to his examination out of court dated April 14, 2016.
[13] Paragraph 31 of the sworn statement of Claude C. Robert dated February 11, 2016.
[14] Paragraph 2.25 of the application to authorize a class action.
[15] Paragraphs 2.26 to 2.33 of Mr. Benizri's application to authorize a class action.
[16] Paragraphs 2.34 to 2.41 of Mr. Benizri's application to authorize a class action.
[17] Paragraphs 2.42 to 2.46 of Mr. Benizri's application to authorize a class action.
[18] Paragraphs 2.47 to 2. 49 of Mr. Benizri's application to authorize a class action.

THE APPLICABLE LAW

[16] The Court authorizes a class action where, in its opinion, the application meets all of the criteria set out in article 575 CCP.

[17] The role of the Court, at this preliminary stage, is to filter frivolous claims. To paraphrase the Supreme Court of Canada, the trial judge does this by "weeding out untenable claims, sparing unnecessary procedures for the group, the representative, the defendant and the judicial system"[19].

[18] The threshold requirement is relatively low. Mr. Benizri must only demonstrate that he has an arguable case[20]. While the facts alleged in the application are deemed to be true for the purpose of that demonstration, opinion and argument are not[21]. Moreover, bare assertions that are not supported by some evidence, albeit limited, are insufficient to form an arguable case. In the *Infineon* case, the Supreme Court of Canada held as follows[22]:

> [127] The threshold requirement for art. 1003 is that the applicants present an arguable case that an injury was suffered. Although more than bare allegations are required, this threshold falls comfortably below the civil standard of proof on a balance of probabilities.
>
> [...]
>
> [134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants' alleged anti-competitive conduct is sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.

[19] In light of these principles, the Court will now examine each criterion in article 575 CCP.

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19 *Infineon Technologies AG* v. *Option consommateurs,* [2013] 3 S.C.R. 600 at para 11.
20 *Infineon, supra* note 19 at para 134.
21 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201; *Fortier* v. *Meubles Léon Ltée*, 2014 QCCA 195.
22 *Infineon, supra* note 19 at paras 127 and 134; see also *Charles* v. *Boiron Canada Inc.*, 2016 QCCA 1716 (CanLII) at para 43.

ANALYSIS

Article 575 (2) CCP-The facts alleged appear to justify the conclusions sought

[20] Mr. Benizri's proposed class action is based solely on article 976 of the *Civil Code of Quebec* ("CCQ") which states:

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

[21] In the leading case, *St. Lawrence Cement*[23], the Supreme Court determined that article 976 CCQ gives rise to a no fault liability regime and concluded as follows:

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

[22] The Supreme Court also confirmed that a liberal interpretation must be given to the legislature's choice of the word "neighbour" as opposed to "owner" in article 976 CCQ[24]. It is generally recognized that the term neighbour includes all holders of real rights as well as, those who exercise a right of enjoyment in the property. As author Pierre-Claude Lafond explains[25]:

> Certains ont sursauté face à la décision de la Cour d'admettre les locataires au rang des voisins pouvant se réclamer de l'article 976 C.c.Q.23, une disposition s'insérant dans un chapitre sur les règles particulières à la propriété immobilière. Pourtant, il était admis majoritairement en jurisprudence et en doctrine que les titulaires d'autres droits réels que le droit de propriété, de même que toute personne exerçant un droit de jouissance de l'immeuble peuvent se plaindre de troubles de voisinage.

[23] The excessive nature of the annoyance must be determined objectively, taking into consideration the geographic location and nature of the property, in this case, a

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23 *St.Lawrence Cement Inc. v. Barrette,* [2008] 3 SCR 392 at para 86.
24 *St.Lawrence Cement Inc.*, *supra* at para 96.
25 Pierre-Claude LAFOND, «*L'heureuse alliance des troubles de voisinage et du recours collectif: portée et effets de l'arrêt Ciment du Saint-Laurent*» La Revue du Barreau, 2009, v. 68 pp. 397-398.

property adjacent to a community mailbox[26]. In order to conclude that the annoyance is excessive, the Court also considers the seriousness of the annoyance and its repetitive nature[27].

[24] Finally, even in the absence of fault, Plaintiff must demonstrate the causal relationship between the excessive annoyances and the neighbour's exercise of its real rights or enjoyment of the property[28]. As Professor Pierre-Claude Lafond states[29]:

> Le trouble doit prendre sa source dans l'exercice abusif, excessif ou «maladroit» du droit de propriété. Il faut un lien avec le droit de propriété et les actes du propriétaire voisin. Par exemple, le fait de louer des logements à des étudiants ne constitue pas, en soi, un trouble de voisinage. Encore faut-il démontrer un exercice abusif, excessif ou déraisonnable, anormal ou antisocial du droit de propriété.

[25] Therefore, Mr. Benizri must demonstrate the following in support of his claim under article 976 CCQ:

1. Canada Post is a neighbour;
2. Mr. Benizri suffers excessive or abnormal annoyances; and
3. These excessive annoyances are caused by Canada Post's use or enjoyment of the adjoining public property.

[26] With regard to the first element of the claim under article 976 CCQ, the Court considers that Plaintiff has demonstrated that it is arguable that Canada Post is a neighbour within the broad interpretation of that term. In the exercise of its public mandate under the *Act*, Canada Post is authorized to install, maintain and use the community mailbox on public property[30]. In that respect, albeit limited, Canada Post is exercising a right of enjoyment to the public property.

[27] The Court must now determine whether Mr. Benizri's assertions objectively demonstrate an arguable case that the annoyances described in his application are excessive or abnormal for a property adjacent to a community mailbox. In addition, the Court must assess whether there is an arguable case that these excessive annoyances are caused by Canada Post's exercise of its right to install, maintain and use the community mailbox.

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26 *Entreprises Auberge du parc ltée* v. *Site historique du Banc-de-pêche de Paspébiac*, 2009 QCCA 257 (CanLII) at para 17.

27 Michel GAGNÉ, «Les recours pour troubles de voisinage : les véritables enjeux», dans Service de la formation continue, Barreau du Québec, vol. 214, *Développements récents en droit de l'environnement*, Cowansville, Éditions Yvon Blais, 2004, at p.65.

28 *Bergeron* v. *Yves Fontaine & Fils Inc*. 2014 QCCS 4266 (CanLII) at para 99.

29 *Supra* at note 25.

30 Section 3 of the Mail Receptacles Regulations, *supra* note 6.

[28] Mr. Benizri complains of the following annoyances: excessive noise, aesthetic displeasure; safety issues and loss of privacy.

Excessive Noise

[29] With regard to the complaint of excessive noise from cars, Mr. Benizri alleges the following:

> 2.28 In effect, the implementation of the community mailbox has turned Petitioner's Property into a noisy activity center;
>
> 2.29 That the majority of Neighbours arrive by vehicle to collect their mail at the community mailbox;
>
> 2.30 In fact, while retrieving their mail, Neighbours often leave their car engine running and music and or radio blaring within earshot of the Property and contiguous properties, often disturbing Petitioner peaceable enjoyment of the Property;
>
> 2.31 In fact, it has become routine for Petitioner to close the windows on his Property, during the peak times that mail is recuperated at the community mailbox;
>
> 2.32 Additionally, the community mailbox is accessible to Neighbours twenty-four (24) hours a day and Petitioner and his family are often disrupted at unreasonable hours;
>
> 2.33 Therefore, Petitioner and his family constantly endure an excessive amount of noise, resulting in unreasonable disturbances.

[30] Mr. Benizri's opinion that the noise from cars is excessive is not deemed to be true. The Court must assess whether it is arguable, from the facts alleged that the music and or radio from the cars is an annoyance that goes beyond that which should be tolerated by a neighbour in close proximity to a community mailbox.

[31] While expert evidence is not required at the authorization stage, there needs to be some evidence to support these general assertions that the noise from the cars exceeds the normal annoyance expected by a neighbour. In this case, Mr. Benizri's assertions are not supported by even the most basic objective evidence, such as: videos or recordings of the cars blaring music; newspaper articles about the abnormal level of noise from traffic or letters of complaints from Plaintiff or his neighbours regarding same.

[32] Therefore, the Court concludes that Mr. Benizri has not demonstrated that he has an arguable case that the noise from cars exceeds the normal level of tolerance expected of a neighbour in close proximity to a community mailbox.

[33] In any event, even if there were some evidence to support the bare assertion that the noise from cars is excessive and beyond that which should be tolerated by a neighbour, Mr. Benizri has not demonstrated that these annoyances are the direct and immediate result of the installation, use or maintenance of the community mailbox by Canada Post. Rather, it is evident from his complaints, that these annoyances are the direct and immediate consequence of the actions or conduct of Mr. Benizri's neighbours when retrieving their mail.

[34] The Court concludes that Plaintiff has not demonstrated an arguable case for excessive noise.

Aesthetic Annoyances

[35] As for the complaint that the community mailbox is an eyesore and results in letter left on his property, Mr. Benizri asserts the following:

> 2.34 In general, the community mailbox itself presents an unwanted aesthetic nuisance on account of the visual eyesore that is metal community mailbox with concrete base;
>
> [...]
>
> 2.37 That on account of the foregoing, Neighbours retrieving their mail at the community mailbox are constantly discarding unwanted mail and or parcels and other garbage astray, which end up on Petitioner's Property;
>
> 2.38 In effect, local advertisements and flyers received in the community mailboxes as well as affixed thereto from residents and non-residents alike are often left for litter on the ground and thus pollute the area surrounding the Property;

[36] Mr. Benizri's conclusion that the community mailbox is not visually pleasing is based on his personal opinion and is not deemed to be true. In any event, the community mailbox is located behind his fenced property adjacent to the street and does not interfere with the enjoyment of his property[31].

[37] As for the presence of garbage on his lawn, there is no objective evidence that would support an arguable case that this annoyance is excessive or abnormal for a property adjacent to a community mailbox. In fact, the only photograph filed in support of these assertions, contradicts this assertion as the community mailbox and surrounding land is clean and free of debris[32].

[38] In addition, even if the level of debris were demonstrably excessive, this annoyance is caused by neighbours discarding their flyers or other papers and is not a

[31] Exhibit P-4.
[32] Exhibit P-5.

direct and immediate consequence of the installation, maintenance and use of the community mailbox by Canada Post.

[39] The Court concludes that Plaintiff has not demonstrated an arguable case for aesthetic annoyances.

Safety Issues

[40] On the issue of safety, Mr. Benizri states the following:

> 2.42 That the traffic that builds up around the community mailbox is a safety hazard for Petitioner and his family and/or any person retrieving their mail;
>
> 2.43 Furthermore, community mailboxes are often targets of criminal activity such as theft of parcels, identity, credit and/or other personal information;
>
> 2.44 That in many cases, community mailboxes are the target of vandalism (a.k.a. graffiti) and/or are subject to being used as a message board or an advertisement center, the whole as more fully appears from a series of documents published in different newspapers, a copy of which is filed in support hereof as Exhibits P-6, en liasse;
>
> 2.45 That despite the documented occurrences of vandalism to community mailboxes, Respondent has shown little to no interest and or capacity to thwart or otherwise deter such activities;
>
> 2.46 Therefore, Petitioner is justified in being concerned about his own security as well as the privacy of his mail, particularly parcels which are deposited in a shared location of the community mailbox;

[41] Mr. Benizri's concerns that the community mailbox may possibly be a target for theft or criminal activity, are hypothetical and not deemed to be true. Indeed, Mr. Benizri admitted during his examination out of court that he is not aware of any incident of car accident, identity theft or criminal activity in his neighbourhood since the mailbox was installed and was raising a possible future concern[33].

[42] Therefore, in the absence of any facts to support the claim that he has suffered excessive annoyances due to theft or other safety issues, Mr. Benizri has failed to demonstrate an arguable case for safety issues.

Loss of Privacy

[43] Finally, on the complaint about the loss of privacy, Mr. Benizri states:

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[33] Examination out of court of Mr. Benizri dated March 17, 2016 at p.48.

2.48 That it is not uncommon for Petitioner to catch people looking at him and his family in their backyard during family gatherings for uncomfortably prolonged periods;

[44] Mr. Benizri's complaints about the loss of privacy from persons peering through his fence is a vague assertion that does not appear to have any connection to neighbours who are retrieving their mail. This bare assertion is insufficient to demonstrate this annoyance is excessive or caused by the installation, maintenance or use of the community mailbox.

[45] The Court will not deal with the legislative defense argument raised by Canada Post. This defence, while interesting, is one that is best left to the trial judge hearing the merits of a class action in the context of a complete record[34].

[46] For all of these reasons, the Court concludes that Mr. Benizri has not demonstrated an arguable case for excessive neighbourly annoyances caused by the installation, use or maintenance of the community mailbox by Canada Post under article 575(2) C.C.P.

Article 575 (1) CCP-The questions of fact and law are similar or identical

[47] As stated in the *Dutton* case[35], when examining the commonality requirement, "the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analyses. Thus, an issue is common where its resolution is necessary to the resolution of each class member's claim".

[48] Therefore, there need only be one common question of fact or law as long as that question significantly advances the outcome of the class action for all of its members[36].

[49] In the present case, even had Plaintiff demonstrated an arguable case for excessive annoyances caused by Canada Post, there is no common question of fact or law that would significantly resolve each of the class member's claims.

[50] The following are the proposed common questions in Plaintiff's application:

- Should Respondent be considered as a neighbour to the Class members who had a community mailbox installed adjacent to or on their property or within a radius of 10 meters of their property?

- If so, are the Annoyances suffered by the Class members beyond the limits of tolerance that neighbours owe to one another?

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34 *Carrier v. Québec (Procureur général)*, 2011 QCCA 1231 (CanLII) at paras 48-51.
35 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para 39.
36 *Vivendi Canada Inc*. v. *Dell'Aniello,* 2014 SCC 1, [2014] 1 S.C.R. 3 at para 58.

- Is the devaluation in property value attributable to the installation of community mailboxes?

- If the answers to any or all of the foregoing questions are "yes" is the Respondent liable for the loss of enjoyment, loss of privacy and loss of value of the Class members' properties?

- What is the amount of damages sustained by the Class, collectively, as a result of Respondent's installation of community mailboxes?

[51] The first question is the only question that is common to all members of the class. However, the affirmative answer to this question would play an insignificant role in advancing the claims of the proposed class members. The status of neighbour does not automatically give rise to Canada Post's liability under article 976 CCQ.

[52] The second question is hypothetical. Mr. Benizri admitted during his examination on discovery that he has not looked into whether the value of his property has decreased as a result of his annoyances despite the assertions to the contrary in the application[37].

[53] As for the third question, more than 7,846 community mailboxes have been installed by Canada Post since 2014[38]. As such, the Court would have to determine the nature of the annoyances in each neighbourhood where a community mailbox has been installed, whether they are excessive and are caused by the installation, maintenance or use of the community mailbox by Canada Post. The proposed class action would be overwhelmed by thousands of mini trials defeating the purpose of a class action which is to avoid duplication of fact-finding or legal analysis[39].

[54] As a result of the foregoing, the definition of the proposed class is necessarily circular in that it is dependent upon the outcome of the litigation[40].

[55] For these reasons, Mr. Benizri has not satisfied the criterion in article 575 (1) CCP.

<u>Article 575(3) CCP-The rules of mandate or joinder are difficult or impracticable</u>

[56] The criterion contained in article 575 (3) is not contested. The Court finds that the composition of the class, both in number and geographic locations, would make it difficult or impracticable to proceed by way of a mandate or joinder of actions.

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37 Examination out of court of Mr. Benizri dated March 17, 2016 at p.46.
38 See note 12.
39 *Vivendi*, *supra* note 36, at para 44.
40 *Western Canadian Shopping Centres Inc.*, *supra* note 35.

Article 575 (4) CCP- Adequateness of the Representative of the Proposed Class

[57] In the *Infineon* case, the Supreme Court of Canada confirmed that an adequate representation requires the consideration of three factors: interest in the suit; competence; and absence of conflict with the group members[41]. These factors must be interpreted liberally as no proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.

[58] The Court is mindful of the very low threshold set for the class representative, however, on the facts of this case, it concludes that Mr. Benizri is not an adequate representative. The Court has already concluded that he has not demonstrated a legal interest to sue Canada Post. Moreover, the transcript from his examination out of court illustrates that he lacks an understanding of his role as class representative and his relationship to his class counsel, his nephew, places him in an apparent conflict of interest with other members of the proposed class.

[59] On the issue of competency, Mr. Benizri admits that he is unaware of his role as class representative[42]:

> Q-.Okay. And do you understand what your role is as the proposed representative Mr. Benizri? A- I didn't understand your question, sorry.
>
> Q- So, you are acting as Petitioner...
>
> A- Yes.
>
> Q- ... as a proposed representative of...
>
> A- Of...
>
> Q- ... the Class?
>
> A- Okay, yes.
>
> Q- Do you understand what your role is in that regard?
>
> A- Just trying to represent the people that are unhappy, like me, and... and that's about it, as far as I know.
>
> Q- Was your responsibility as representative Mr. Benizri explained to you by your counsel?
>
> A- Yes.

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41 *Infineon, supra* note 19 at p.419.

42 Examination out of court of Mr. Benizri dated March 17, 2016 p. 10.

Q- What was... So, what is your understanding? Other than represent the Class, do you know what you're going to have to do as a representative Mr. Benizri?

A- No.

[60] Also, he did not actively look for or speak with any other potential class member in order to ascertain if there are other persons with similar grievances but rather was approached by neighbours to discuss a news item publicizing his decision to file the application [43]:

Q- How many of them did you speak to about the Class Action?

A- Four (4), five (5). Because they heard that there's going to be a Class Action. We were on the news, and on the radio, so they knew that something was going on.

Q- Okay, and what was the discussion about?

A- About the Class Action?

Q- Yes.

A- No, nothing... in general how's it going, what are we going to do, what could be done, who's doing it. So, I said that I am doing it, and I'm going to try...

[...]

A- I said that I was going to... I told them that I was going to... Yes, I'm doing it. Yes.

Q- So, you... So, these discussions with these four (4) people would have been since the Class Action was filed in August?

A- M'hm.

Q- Correct?

A- Yes.

[61] Moreover, what is truly disconcerting is the fact that Mr. Benizri did not participate in the drafting of or even read the application before it was filed. In his examination out of court held six months after the application was filed into court, he states[44]:

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43 Examination out of court of Mr. Benizri dated March 17, 2016 at pp. 25-26.
44 Examination out of court of Mr. Benizri dated March 17, 2016 at pp. 7-8.

Q- Do you have the Motion for Authorization in front of you? I'm showing you, Mr. Benizri, a Motion to Authorize the Bringing of a Class Action.

A- Yes.

Q- Have you seen this document before?

A- Yes. Yes... actually, I haven't seen it yet.

Q- Pardon?

A- I have...

Q- Okay.

A- I think it's the same thing. Yes.

Q- Have you read the Motion for Authorization before?

A- M'hC.

Q- When did you...

A- Oh, I'm sorry, yes.

Q- When did you see this document for the first time?

A- About a month ago.

Q- A month ago?

A- About, yes.

Q- So, I gather from your answer that you didn't participate in the drafting, you saw it after it was filed before the Court?

A- Yes.

[62] A competent class representative should, at a minimum, read the application before it is filed and ensure the accurateness of the assertions that are relied upon by the Court as true in order to assess whether Plaintiff has an arguable case. This fact combined with his lack of understanding of the role as class representative and the failure to speak with any potential members who may have similar complaints renders Mr. Benizri inadequate to represent the class.

[63] In addition, the Court finds that Plaintiff is in an apparent conflict of interest. In his examination, Mr. Benizri is candid about the fact that the filing of the application was proposed to him by his nephew, class counsel. He states[45]:

> Q- How did you become involved as a Petitioner in this case? So, did you contact Mr. Benizri, or did Mr. Benizri contact you? How did you...
>
> A- No, I contacted him.
>
> Q- When would that be?
>
> A- Well, they installed everything in... in... I think it was early summer, in May... during the summer. During the..
>
> Q- Two thousand...
>
> A- ... summer...
>
> Q- ... fifteen (2015)?
>
> A- Fifteen ('15), yes, last... this past summer. I can't remember the exact date when I contacted him, but, yes.
>
> Q- And did you contact him about filing a class action, or just filing your own claim, or both?
>
> A- Well, I contacted him, explaining to him my 'miscontent', and a lot of other neighbours' 'miscontent', and... and I asked, "Is there anything I can do? Who do I call? What do I say?" He says the only thing we could maybe do to have some sort of... some sort of proper procedure done, was to go legally and do something. So... so I approached him, and...like I told you, I approached him, and we went through the procedures together of what should be done, and we... and we started.

[64] In its role of weeding out frivolous claims, the Court cannot ignore the fact that this proposed class action was filed on the recommendation of Mr. Benizri's nephew and counsel, without Mr. Benizri first verifying the veracity of the assertions contained in the application or even the existence of any other potential class member.

[65] Mr. Benizri's objectivity and independence is therefore called into question by the delegation of his role as class representative to his nephew and counsel of record in the drafting of the application. This conduct gives the appearance of loyalty to his nephew and counsel that may conflict with the best interests of the class he is supposed to

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45 Examination out of court of Mr. Benizri dated March 17, 2016 at pp. 8-10.

represent[46]. The Court is not satisfied that Mr. Benizri has the competence or independence to “vigorously and capably prosecute the interests of the class”[47].

[66] Therefore, the Court considers that it would not be equitable or in the interests of the proposed class members to name Mr. Benizri as the class representative.

[67] In conclusion, for all of these reasons, the Court dismisses Mr. Benizri's application to institute a class action against Canada Post.

FOR THESE REASONS, THE COURT:

[68] **DISMISSES** the Plaintiff's application for authorization of a class action with costs.

Silvana Conte

SILVANA CONTE, J.C.S.

Me Jamie Benizri
LEGAL LOGIK INC.
Attorneys for Mr. Benizri

Me Sylvie Rodrigue
Me Marie-Ève Gingras
SOCIÉTÉ D'AVOCATS TORYS
Attorneys for Defendant

Date of hearing: November 28, 2016

[46] *Del Guidice v. Honda Canada Inc.*, 2007 QCCA 922.
[47] *Western Canadian Shopping Centres, supra* note 39 at para 41.