

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class Action)
SUPERIOR COURT

No: 500-06-001006-192

JASON LEMIEUX and JOANNA
SABATELLA

and

KRISTA URBAN

and

DONALD SMYTH

and

ROBERT IDSINGA

Applicants

-vs-

NORMAND MARINACCI, Mayor of the
Borough of L'Île-Bizard–Sainte-Geneviève (City
of Montréal)

and

THE ATTORNEY GENERAL OF QUEBEC

and

BOROUGH OF L'ÎLE-BIZARD–SAINTE-
GENEVIÈVE (City of Montréal)

Defendants

**AMENDED APPLICATION FOR AUTHORIZATION TO INSTITUTE
A CLASS ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE**
(Article 574 ff., C.C.P.)

**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT OF
QUÉBEC, SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, THE
APPLICANTS STATE THE FOLLOWING:**

INTRODUCTION

1. Applicants Jason Lemieux, Joanna Sabatella, Krista Urban, Donald Smyth, and Robert Idsinga, wish to institute a class action on behalf of the natural persons forming part of the class hereinafter described, of which the Applicants are members:

*All Quebec residents of Ile Bizard – Saint Geneviève, Quebec in the area bounded by the shoreline running south-west from starting point 45°29'17.6"N 73°52'09.0"W (Jacques Bizard Bridge) all the way clockwise to 45°30'26.9"N+73°54'17.3"W (end of Croissant Barabe) between the shoreline and the streets of rue Cherrier - Montee Wilson - Chemin du Bord-du-lac and isle Mercier and the area of Saint-Geneviève from Jacques Bizard bridge west to rue Saint Saint Paul between the shoreline and Blvd Gouin Ouest who in 2017 and/or 2019 were flooded as well as those who wish to invoke the Public Trust Doctrine on their own behalf, in the public interest and/or for the benefit of flora and fauna affected by that flooding as shown in the map attached as **Exhibit R-6.1**;*

2. The class described in paragraph 1, above, is comprised of the following sub-groups:
 - A. Persons who experienced flooding and suffered damages in the spring of 2017;
 - B. Persons who experienced flooding and suffered damages in the spring of 2019;
 - C. Persons who experienced flooding and suffered damages in both the spring of 2017 and the spring of 2019;
 - D. Persons who experienced flooding in the spring of either 2017 or 2019 and who suffered damages at homes located on the shores of Ile Bizard from the street of Croissant Barabe west along the shore and then south along the shore to the modular home community and from there east to Jacques Bizard boulevard, on the Lac des Deux

Montagnes near where it flows into the Rivière des Prairies, as appears from the ZIS flood map, as well as an annotated and highlighted version of same produced by applicants as **Exhibit R-6**, en liasse.

E. Flora, Fauna and pets in the Ile Bizard nature park, in or on the foreshore, and on public highways and roadways who experienced flooding and suffered (*Geer v. Connecticut* 161 U.S.at 529, 535, *Friends of Van Cortland Park v. City of N.Y.*, 750 N.E. 2d 1050, 1054-55 (N.Y. 2001), *Owsichek v. Guide Licensing & Control Board*, *Owsichek v. Guide Licensing & Control Bd.*, 763 P.2d 488, 495 (Alaska 1988)).

F. All residents of the Modular home community who's drinking and bathing water was contaminated by flooding and suffered damages.

G. The syllogisms invoked by the class are:

Re Quebec

1. Quebec is liable for two things under its control, namely (1) Water, (2) Banks to the high water line (art. 919 C.C.Q.);
2. It is liable for the failure to maintain berms under its control built on the high water line which constitutes fault;
3. Neighborhood annoyance pursuant to article 976 C.C.Q. in that recurring flooding by contaminated water is excessive and unreasonable;
4. Failure to address the Modular home community's long-term water pollution problems despite knowledge of them for at least seven (7) years;
5. Breach of and failure to protect the Public Trust;

Re Montreal (Borough of Ile Bizard – Saint Geneviève):

1. Insufficient and improperly maintained infrastructure (but for the Community) i.e. a thing under its control (Art 1465 C.C.Q.);
2. Neighborhood annoyance pursuant to article 976 C.C.Q. in that recurring flooding by contaminated water is excessive and unreasonable;
3. Failure to address the Modular home community's long-term water pollution problems despite knowledge of them for at least seven (7) years;
4. Breach of and failure to protect the Public Trust;

Re Mayor Marinacci:

1. Insufficient and improperly maintained infrastructure (but for the Community) i.e. a thing under his control;
2. Bad faith and intentionally negligent mitigation during the flooding;
3. As concerns the Community, and other victims, refusal to allow setback/ditching/berm building;
4. Failure to address the Community's long-term water pollution problems despite knowledge of them for at least seven (7) years;
5. Breach of and failure to protect the Public Trust;

FACTS GIVING RISE TO INDIVIDUAL ACTIONS BY THE APPLICANTS

3. The facts on which all of the Applicants' personal claims against the Defendants are based are summarized below:
 - A. Beginning in the spring of 2017 and again on or about **April 16, 2019**, the Borough of L'Île-Bizard–Sainte-Geneviève (“Borough”), located at the western edge of the Island of Montréal between the Lac des Deux Montagnes and the Rivière des Prairies and primarily situated on the island named Île Bizard, began to experience rain conditions that created an increasing risk of serious flooding in the Borough;
 - B. The same rain conditions also created similar flood risks in the neighboring Borough of Pierrefonds-Roxboro as well as various other parts of southern Québec;
 - C. Prior to the spring of 2019, both the Borough of L'Île-Bizard–Sainte-Geneviève and the neighboring Borough of Pierrefonds-Roxboro had suffered extensive flood damage from extreme flood conditions as recently as the spring of 2017;
 - D. On or about April 19, 2019, the water levels in both the Lac des Deux Montagnes and the Rivière des Prairies rose to levels that resulted in flood conditions as water began to overtop parts of the banks of both the northern and southern edges of Île-Bizard in the Borough;
 - E. Severe and substantial flooding occurred on Île Bizard, particularly on the streets and in the neighborhoods of weakest economic means, and this result occurred due to a lack of preparation and care by the Mayor and the Borough in relation to those areas;
 - F. Specifically, the Mayor announced that there would not be enough sandbags for all residents in the Borough and that it was up to residents to protect their own dwellings. This left vulnerable persons such as the elderly, handicapped, and those with health and mobility issues at a grave disadvantage, and some of the Applicants and/or their family members are vulnerable persons. With no assistance offered to them in order to protect their homes, they had nothing to do but watch as floodwaters rose around them;
 - G. It should be noted that during the spring flooding of 2017, very few sandbags were provided to help Île Bizard residents protect their homes and there were no substantial or effective deliveries of sandbags made to affected neighborhoods;
 - H. The Mayor made decisions that effectively resulted in a deprivation of effective assistance to people in the lower-income neighborhoods and vulnerable residents, including some of the Applicants, that would have otherwise been provided by both the Canadian Forces, who had arrived in the area to provide emergency assistance, and by civilian volunteers;

I. As a direct result of the lack of preparation and proper emergency response, certain neighborhoods on Île Bizard, including a modular home community, and many vulnerable persons, including some of the Applicants, suffered extensive flooding damage and had little assistance;

J. On the south side of Île Bizard, and in the area of the modular home Community, the flood waters were severely contaminated and oil slicks, human waste and garbage were present in the flood waters, which led to a declaration, herewith produced by Applicants as **Exhibit R-5**, that the water was non-potable even if boiled. *The community's water has been under a boil water advisory since 2013.* Meanwhile, clean water distribution to residents, including the Applicants, was haphazard and poorly organized, again putting the most vulnerable people at risk;

K. On Rue Joly the military was initially allowed into the area *but* were not given permission to continue when initial work proved insufficient and there was also an interaction with volunteers from Pierrefonds-Roxboro where they were threatened to be arrested if they didn't cease operations;

L. The modular home community was allowed to flood. Some members of the military indicated to the Applicants that they wanted to do sand bagging there but the Mayor would not make the request. As a result, some sand-bagging was done but then abandoned. *As a result of this decision many residents were unable to prevent flooding from contaminated waters and no justification was ever provided by the Mayor;*

M. Aid offered from the neighbouring Borough of Pierrefonds-Roxboro was turned away by the Mayor and the Borough of Île Bizard-Sainte-Geneviève;

N. Assistance offered by volunteers during the initial days of the flooding was poorly and irresponsibly managed by the Mayor and the Borough in that volunteers were not directed to places with the most urgent need, such as the modular home community, and some volunteers were simply told to figure it out for themselves;

O. Residents of Île Bizard, especially vulnerable residents such as the elderly and infirm, which again include some of the Applicants, suffered numerous health and safety risks as a result of the decisions taken by the Mayor and the Borough;

P. Risks to wildlife, pets and other flora and fauna on Île Bizard also occurred or were presumed to occur given the high level of water contamination in flood waters contaminated with fecal coliform and feces, as is evident from the expert report titled "Water Quality Report 19-5079 Investigation of Bacteriological Contamination – Île Bizard" prepared by D&G Enviro-Group Inc. and produced herewith as **Exhibit R-5**. Flora and fauna including pets, for example, were becoming ill from drinking the flood waters;

Q. Residents of Île Bizard affected by flooding, including the Applicants, were often unable to notify officials of problems or request help because their calls to the municipal “311” helpline went unanswered;

R. Furthermore, it was not possible to reach the 311 helpline using a mobile phone, and those who tried heard a message indicating that the “call cannot be completed as dialed”. This problem caused serious inconvenience to many persons seeking help: many people no longer have landlines and rely on their mobile phones for their phone service. While apparently, there is another, local number, 514-872-0311, that may be called to connect to the same services as the 311 service, this alternate number – critical for those with mobile phone service only – was not included in the flood prevention brochure made available by the Borough;

S. The lack of backflow preventers on the main storm drains along the shores of Île Bizard contributed to flooding experienced by certain waterfront communities on Île Bizard, including those communities in which the Applicants reside, as further described below; furthermore Robert Idsinga was made aware in a discussion with Leslie-Alan Hughes on December 11, 2019 that the municipality is currently installing 11 back flow preventers in Ile Bizard the timing of which is peculiar given the water level seasonally at this time of year is significantly higher than mid summer;

T. Persons residing in homes on foundations, including some of the Applicants suffered damages from flooding that could have been prevented but for the Mayor and Borough and the Province of Quebec’s faulty decisions, actions and omissions not to install backflow preventers on homes near the waterfront on Île Bizard. The installation of backflow preventers is a reasonable measure to rectify the fact that French drains around foundations, which would normally drain into the sump, are instead negligently and illegally connected to the storm sewer system, causing floodwaters to “back up” in the sewer system and/or storm drains and produce unnecessary flooding around the foundations of homes in the waterfront communities;

U. At least one neighbouring municipality, the Borough of Pierrefonds-Roxboro, has been aware of the flood risk problems associated with the absence of backflow preventers and has taken concrete steps to address the problem. A quote of cost for purchase of a backflow preventer that was sought by and provided to the Borough of Pierrefonds-Roxboro, as evidence of one step taken to mitigate the problem, are produced herewith as **Exhibit R-7**;

*U.1. The Defendant City and Mayor knew or ought to have known of this flooding risk as the agglomeration of Montreal produced the “Climate Change Adaptation Plan For the Agglomeration of Montreal 2015-2020” in which includes a chapter (page 28 Vulnerability to River Floods) where they produce a map showing Ile Bizard has a high to major vulnerability to flooding produced, herewith as **Exhibit R-13**;*

U.2. Eroded berms at the high-water line are an artificially raised part of the riverbank, which the province has failed to maintain. That failure to maintain has caused recurring flooding events. Acknowledgement of this problem by the agglomeration of Montreal is stated in Exhibit R-13 page 27 chapter "Impacts" with the statement "Floods provoke the premature erosion and destabilization of riverbanks." Defendant Quebec is liable for damages resulting from not maintaining those berms and riverbanks which are under its control;

V. Additionally, it must be noted that in both 2017 and 2019, the nearby municipalities of Pincourt and Île Perrot provided their residence with flood preparation and guidance and materials (e.g. sandbags) many weeks in advance of the spring floods;

W. During the summer of 2020 Daniel Soucy at 64 rue Lucien installed a berm to prevent future flooding events and was forced by the city to remove. Had it been left in place it would have impeded the flooding of contaminated water.

4. The facts on which Applicants Jason Lemieux and Joanna Sabatella's personal claims against the Defendants are based are, in addition to those in sub-paragraphs 3.A to 3.W, the following:

A. Applicant Jason Lemieux and Joanna Sabatella, who are married to each other, rent property on the waterfront of Île Bizard, where the Lac des Deux Montagnes meets the northern shore of Ile Bizard, and both were very seriously prejudiced by Defendants' actions and omissions during the spring flood of 2019;

B. Applicant Jason Lemieux is a self-employed construction worker, who has been entirely unable to work for several weeks and then only able to work part-time for two weeks following that period, and lost income as a result, due to the need to protect their rented home and belongings from further damage and keep their home livable by, among other things, erecting and maintaining a temporary protective barrier composed of sandbags and by attending to the operation of the pumps;

C. Applicant Jason Lemieux suffered physical injuries to his hip, back and foot, and psychological stress during the flood and appeared to have suffered the onset of symptoms of Post-Traumatic Stress Disorder (PTSD) immediately following the flooding incident, which he continues to experience on a daily basis;

D. Applicant Joanna Sabatella suffers from an unrelated physical injury, a knee fracture and torn ligaments, and during the flooding in spring 2019 was completely unable to leave the property for her prescribed physiotherapy and follow-up care, which thus aggravated her physical condition as a direct result of Defendants' actions and omissions. At the time of the flooding, she was on crutches and therefore unable to cross through the water or mud to reach her vehicle in order to go to her scheduled appointments;

E. Applicants Jason Lemieux and Joanna Sabatella had no road access for over one month nor were able leave their property, in contravention of their fundamental rights to freedom, peaceful enjoyment of their property and security of the person under sections 1 and 6 of Quebec’s Charter of Human Rights and Freedoms, RSQ c. C-12 (“Quebec Charter” and under section 7 of the Canadian Charter of Rights and Freedoms (“Canadian Charter”). More specifically, their portion of the street Croissant Barabé was inaccessible to all vehicles, including police, ambulance and garbage pick-up, for over one month;

F. As they had to “man the pumps” they have only had about on hour of sleep per night for over one month, further breaching their rights to security of the person and a healthy environment;

G. Applicants Lemieux and Sabatella have two dogs that are treasured family pets, and one dog became ill shortly after the flooding, likely from drinking some of the flood waters as indicated by Exhibit R-5 and/or stress caused by the flooding of the family home;

H. Both Applicants Jason Lemieux and Joanna Sabatella have suffered extensive and unreasonable stress and psychological damage;

I. Both Applicants Jason Lemieux and Joanna Sabatella claim punitive damages for intentional breaches of their most fundamental rights and claim as well on behalf of local flora and fauna which are also protected by the Quebec Charter and the Civil Code of Quebec;

J. As the Mayor denied public pumps for their street, the fact they were essentially forced to live in an open sewer for over a month is a direct result of Defendants’ omissions;

K. When sand bag pallets were delivered to their neighbourhood on Crescent Barabé by the Borough on April 19, 2019, they were simply left in a pile on the street;

L. By April 21, 2019, the floodwaters were rapidly approaching the home of Applicants Lemieux and Sabatella and they worked quickly to build the first tier of a protective barrier. They quickly realized, however, that the number of sand bags provided by the Borough was clearly going to be insufficient to prevent flooding of their residence and tried to request more using the “311” emergency helpline but phone lines were busy and it was impossible to reach anyone;

M. On November 17, 2019 the Mayor’s daughter Celia Marinacci, sent the following private facebook message to Joanna Lemieux “Really immature comments for a woman your age. Woman who’s renting a house on Barabe..not even yours.” Exhibit R-1 en liasse. Joanna Lemiux was extremely upset and afraid of this threat in particular in reference was made to her home address.

5. The facts on which Applicant Krista Urban's personal claims against the Defendants are based are, in addition to those in sub-paragraphs 3.A to 3.W, the following:
- A. Applicant Urban owns a home across the street from the waterfront where the Lac des Deux Montagnes meets the northern shore of Ile Bizard, and was very seriously prejudiced by Defendants' actions and omissions during both the spring flood of 2019 as well as the spring flood of 2017. *The erosion of a berm, either man made or natural, which is at the high-water line, along the shoreline coupled with the inadequate infrastructure in the form of a missing backflow preventer on the storm drain for her street has allowed unreasonable flooding of her property;*
- B. Applicant Urban has suffered severe flood damage to her real and personal property as a result of the flooding in both 2017 and 2019 due to inadequate, negligent flood prevention due to operational decisions, including inaction by Defendants;
- C. In 2017, Applicant Urban's flood damages included the complete loss of a brand-new finished basement and furnishing, which were flooded beyond repair;
- D. In 2019, when the Borough delivered sand bags to her street, Crescent Barabé on April 20, 2019, they were simply left in a pile on the street, making it extremely difficult and time-consuming for Applicant Urban, who is a single mother in her 60's, to carry them to her property in order to construct a flood-prevention barrier;
- E. Applicant Urban suffered extreme pain in her legs and arms from carrying the sandbags, and some pain continued for months after the 2019 flood event;
- F. In 2019, Applicant Urban had to expend a great amount of her own money and time and effort in order to procure a rented gas-powered generator to run the pumps needed to mitigate the flooding as soon as it became apparent that the floodwaters were rising near her home, along with heavy-duty extension cords, plastic sheeting and hip waders for her and her daughter;
- G. Applicant Urban suffered unacceptable conditions during both the 2017 and 2019 floods when, in order to try to mitigate flooding at her home and also save personal belongings, she had to endure many days of lost sleep and not being able to eat properly, because the urgent nature of the flooding made it impossible to leave the premises for anything other than extremely short periods of time;
- H. In 2019, during the initial days of the flooding a local emergency assistance organization, known as "On Rock" provided much needed food and other types of assistance to Applicant Urban and others affected by the flood;
- I. Approximately one week after the flooding began, the On Rock volunteers had to shut down their operations and stop providing assistance because the Mayor of the

Borough had told them their services were no longer needed;

J. Applicant Urban was told by volunteers working with On Rock that the Mayor had told them, “We don’t need your help anymore”;

K. This was extremely inconvenient and disturbing to Applicant Urban who, like many others affected by the flooding, had been relying on these services for food and other assistance and who was left without any replacement assistance when On Rock was told to cease its flood assistance efforts;

L. When Applicant Urban was able to reach the Borough through the 311 helpline and ask for volunteers, she was told that she had to go physically to the new office at City Hall and sign up as a person in need. At great inconvenience, she managed to do this but never received any help, because apparently no one appeared to volunteer;

M. Applicant Urban, who normally provides protection and security to her handicapped daughter, as well as her daughter also suffered breaches of their rights to security of the person under sections 1 and 6 of the *Quebec Charter* and, where applicable, under section 7 of the *Canadian Charter* because Applicant Urban was unable to provide proper assistance and security to her handicapped daughter during the time she had to spend time responding to the flooding emergency, including but not limited to extensive hours trying to prevent her home from flooding and extensive hours cleaning up during and after the flood;

N. A sense of routine and the normalcy of day-to-day life is essential to the well-being of Applicant Urban’s handicapped daughter. Being surrounded by three (3) feet of water presents extreme stress for her daughter on both physical and emotional levels;

O. In 2017, Applicant Urban and her daughter were not allowed to return to their house for seven (7) weeks;

P. In 2019, after doing what she could to mitigate the worst of the flooding in her home, Applicant Urban and her daughter had to spend many weeks away from her residence and they were not fully able to move back into their home until June 20;

Q. Following the 2019 flooding event, several homes near Applicant Urban’s home were demolished, but the remaining lots were not maintained by the Borough and insects and pest animals soon followed;

R. Applicant Urban also had to seek counselling for emotional distress following the 2019 flooding, brought about in part by the abrupt removal of the homes mentioned above;

S. The stress experienced by Applicant Urban during both the 2017 and 2019 spring flood events was greatly exacerbated by the fact that her friend living in nearby Pincourt

– a town also prone to spring flooding – was provided with a notice that sandbags were available one month prior to the flood season;

6. The facts on which Applicant Donald Smyth’s personal claims against the Defendants are based are, in addition to those in sub-paragraphs 3.A to 3.S, the following:

A. Applicant Smyth lives with his wife in a modular home that he owns in a Modular home community on Ile Bizard (described in the sub-group description) that they have owned since 2013 as appears in **Exhibit R-12 en liasse** located on the waterfront on the Lac des Deux Montagnes near the point at which it flows into the Rivière des Prairies, and was very seriously prejudiced by Defendants’ actions and omissions during both the spring flood of 2019 as well as the spring flood of 2017;

B. Applicant Smyth suffered physical problems that have continued since the 2017 and 2019 floods, including open sores on parts of his skin, which his family doctor informed him was likely due to bathing in water that has been contaminated; Though residents avoid drinking the well water they have no option but to use it for bathing. As appears in photographs and video attached here as **Exhibit R-9**.

B.1. Don Smyth and other community members have been exposed to highly contaminated drinking and bathing water which has been under boil water advisories since 2013. All Defendants are liable for their inaction in failing to address a serious health issue affecting the community whose membership is particularly vulnerable given its age and economic status. This failure to enforce environmental norms and protect their health, well being and Charter rights constitutes gross negligence for which all defendants are liable;

C. Applicant Smyth and his wife suffered great inconvenience when, as a result of the flooding in 2019, the provincial energy provider, Hydro-Québec, cut the electricity supply to the modular home community in which he lives for a period of two (2) weeks;

D. During and after the spring floods in both 2017 and 2019, Applicant Smyth had great difficulty getting any assistance through the “311” help line that residents were told to use in order to report problems. Often, his calls simply went unanswered;

E. Applicant Smyth has suffered extreme psychological distress, and appears to have suffered symptoms of PTSD, as a result of the recurring flooding, particularly in light of the fact that – like many older persons and retirees living in the modular home community – he and his wife would simply like to live out their lives in their current home, which they enjoy. The modular home community is very close-knit and supportive and it would be exceptionally disruptive for them both physically and emotionally to leave this community;

F. Applicant Smyth has noticed that approximately 21 out of the 100 residents of the modular home community have, for all intents and purposes, “disappeared” since the

April 2019 flood in that their homes have remained empty and dark since then and there has been no sign of them. While the specific circumstances of their departures from the community are unknown, the timing suggests that it is related to the flooding impacts on their homes and lots, and it should be noted that most if not all of these people were elderly or infirm. Applicant Smyth has surveyed the community and noticed that many resident have left as indicated in **Exhibit R-8** ;

G. Applicant Smyth has suffered substantial stress, as a result of witnessing these departures and other impacts, physical, emotional and economic, on his neighbours in the modular home community as a result of the spring floods in both 2017 and 2019, and is fearful for the future of the community, which provides security and a sense of belonging to its members;

H. Furthermore, since – like many others in his modular home community – Applicant Smyth’s primary asset is his modular home, which would be difficult to resell after having experienced two large flood events (spring of 2017 and 2019). As such, relocating would cause them grave economic harm;

I. As a result of the flooding in both 2017 and 2019, Applicant Smyth was forced to take down some of his storage sheds on his lot, and make a wide variety of costly repairs to his modular home;

J. Despite the fact that the city continues to claim that water serviced to the Modular home community is drinkable and meets all relevant drinking water standards, applicant Smyth has learned that the Modular home community water is unfit for use. Furthermore when Smyth raised this issue with defendant Marinacci at a semi public meeting on date (November 3, 2019 at 13:00h) at Pavillion Vincent Lecavalier, au 488, montee de l’Eglise, l’Ile-Bizard, as appears from **Exhibit R-10** the Mayor categorically denied that there was any problem with that communities water quality. The meeting is referred to as “semi-public” in that exclusively Francophones were invited. When Smyth then asked for a show of hands as to who does not drink their water all of the approximately 35 individually invited attendees raised their hands. As such defendants have breached Applicants’ public trust doctrine right to potable drinking water resources (*Clifton v. Passaic Valley Water Comm’n*, 539 A.2d 790, 765 (N.J. Super. Ct. Law Div. 1987));

K. Applicant Smyth has learned that the water quality problem, in particular during flooding, in the Modular home community is a result of the method used to originally raise the ground level. The landfill for the community comes from the construction of the Louis de Hippolyte de Lafontaine tunnel a source of “popcorn” rock. This porous rock allows contaminated flood waters to flow into the ground water. It is this ground water which feeds the community’s well, their only source of potable drinking and bathing water and for which actions and omissions defendants are liable *in solidum* (*Mono Lake, Robinson*, 658 P.2d at 310-11, *In re Water Use Permit Applications*, 9P.3d

at 447, *Envtl. Law Found. V. State Water Res. Control Bd., No. 34-2010-80000583, at *7, *10.*

L. Applicant Smyth has surveyed the community and says that of the residents of 100 homes in the community all but two of the families can be described as either elderly or infirm such that the flooding constitutes a breach of sections 4, 6, 7, 10, 10.1, 15 of the Quebec Charter;

7. The facts on which Applicant Robert Idsinga’s personal claims against the Defendants are based are the following (presented below in sub-paragraphs A through MM). Facts in quotation marks are presented in Applicant Idsinga’s own words, and all references to “the petition” refer to a petition to institute a class action against the Mayor and the Borough circulated by Applicant Robert Idsinga Exhibit R-4 in mid-May 2019;

A. As a result of living in the adjacent borough, and having heard of the flooding crisis on Ile Bizard, and having acquaintances and being familiar with the neighbourhoods there, Applicant Idsinga immediately assisted Ile Bizard residents during and after the flooding;

B. Applicant Idsinga states: “Given my past job experience and familiarity with refugee situations, what I viewed in terms of official response to flood victims during this flood seems sorely lacking. I have limited professional experience in disaster response, but I am a medical professional, EMT-W (Emergency Medical Technician - Wilderness) and I also use to work for the military as a member of F.E.D. Platoon at military base CFB Farnham (Québec), training soldiers to deal with refugee issues in other countries”;

C. “It should be noted that the number of signatures for the amount of time spent is relatively small because almost every single person I encounter feels the need to share their story and tell me how they have been suffering. For some of the older people, I needed to spend sometimes an hour or more to comfort them. On top of that, there are many empty homes due to the areas being unhealthy to live in. This makes for a very slow process in collecting signatures”;

D. “My first trip into the flood zone on Île Bizard was to the trailer park located at the west end of the island on the Lac des Deux Montagnes, on **May 13, 2019**. This area was the hardest hit region on the island, and consists mostly of fairly low-income people living in mobile homes”;

E. “The modular home community includes approximately 75 homes, and is situated on the following streets: Rue Lucien, Rue Roger, Rue Fernand, Rue Daniel, Rue Harris, Rue Michel, Rue Jacques and Rue Marc. On my first day I visited 35 homes. The water was deep and highly contaminated”;

- F. “I received 15 signatures on the petition from residents of the Modular home community, and two people declined”;
- G. “Most of the trailer homes were empty. For every five homes there was only one inhabited, indicating that some residents had perhaps been able to evacuate”;
- H. “I witnessed that many of those left behind were elderly”;
- I. “Some people were exhibiting breathing problems possibly due to exposure to problems connected to the flooding”;
- J. “I witnessed that two of the people I encountered were mentally handicapped”;
- K. “I witnessed that some people I encountered had physical handicaps”;
- L. “Most people I encountered expressed that they felt abandoned by the Borough”;
- M. “This area was declared contaminated as the drinking water being undrinkable even if boiled, so people were advised to not drink it at all”;
- N. “Some of the people told me that they were drinking the water anyway, because they were physically unable to go out and get bottled water. I tried to get a local aid group, ‘On Rock’, to deliver water to them”;
- O. “On my second visit to the flooded area, **May 15, 2019**, I requested that Julie Zaphira, join me. We returned to the Modular home community. The first time I visited the flooded area, I had noticed that some elderly people which I observed from a distance through their windows would not answer the door. They seemed afraid. I reasoned that they might be more comfortable if it was a man and woman visiting them”;
- P. “I observed that a low-income situation seems the norm for the people living in the modular home community”;
- Q. “I visited roughly 28 homes and received 11 signatures on the petition and three people declined. Some of the people who declined said they might join the action later if they see enough others participate”;
- R. “I noticed two people infirm and needing bottled water”;
- S. “The foul smell of the contaminated water was increasing as it became more stagnant. I learned that sewage from the local septic systems is leaking into the water”;
- T. “On **May 16, 2019**, I went to the nearby Holiday Inn & Suites in Pointe-Claire to talk to people who had departed the flood zone to stay at free lodging being offered

there”;

U. “I met with one disabled person who was unable to walk in the flood waters due to a broken foot which happened during the flooding”;

V. “I then went back to the Modular home community and met Raymond Hogue, a stroke victim who was living in one of the worst parts of the affected area. He is partially disabled and walks with a cane. He expressed feelings of being abandoned”;

W. “I then went to visit Rue Barabé, officially called “Croissant Barabé” and located on the north bank of Île Bizard, on the edge of the Lac des Deux Montagnes, which was badly affected. One disabled person there and one highly stressed and suffering possible mental health problems due to lack of sleep from monitoring pumps”;

X. “I also noted one individual, the owner of a home on that street, was exhibiting signs of possible mental illness problems due to lack of sleep. He was one of a number of the volunteers trying to build dikes to protect homes”;

Y. “In total, I encountered five people on Rue Barabé and all of them signed the petition”;

Z. “On **May 17, 2019**, I visited Rue Jean-Yves. I only visited two homes but got 11 signatures. None refused. Many people came to me on the street in order to sign the petition”;

AA. “Rue Jean-Yves is in a middle-income area with some elderly. Individual homes of value estimated as \$350,000 or less. Many have no savings, only investment in their home, and spoke of concerns that their homes are probably worth a lot less due to flooding”;

BB. “People I encountered on Rue Jean-Yves expressed extreme anger at the Mayor of the Borough over his ineffective preparation and response to the flooding”;

CC. “On **May 18, 2019**, I visited Rue Jean-Yves again. Eight people signed the petition. None refused”;

DD. “One man expressed how the business he runs from his home hasn't been able to function for about a month, and complained of a big loss of income”;

EE. “People at one address on Rue Jean-Yves said they needed food. There was one diabetic in the family and no food available”;

FF. “On **May 20, 2019**, I visited Rue Joly where Nineteen people signed the petition. Three people refused but with the condition that they would sign if they see enough other people sign. One person verbally assaulted me because of my efforts to organize

the class action”;

GG. “I was told by local residents of Rue Joly that the military did help on this street and built one dike, but when the dike failed the Mayor did not allow the military to return to fix the problem as indicated in the military report produced as **Exhibit R-3 en liasse**. Before starting this class action, I encountered the military on this street and they talked to me about their frustration with the Mayor not giving permission to help this area, and that volunteers from Pierrefonds-Roxboro were prevented from helping as well”;

HH. “During this visit on **May 20, 2019**, I was told that a social worker visited recently, after the flood waters had almost completely disappeared”;

II. “Also on **May 20**, I encountered the Mayor of the Borough, who with his wife and another Borough councillor, confronted me in a way that I perceived as an attempt to intimidate and entrap me.” This encounter is described in Applicant Idsinga’s email message to Charles O’Brien sent on **May 20, 2019** at 21:59 and produced herewith as **Exhibit R-1**;

JJ. “In the late evening of **May 20**, I was called by the local aid group, ‘On Rock’, whose manager is Craig Shaw. He informed me that they would no longer be working with the Mayor of Île Bizard. He has a lot of information about the failure of the Mayor to support the people who needed it. His group did a lot of work to deliver food and to build sand bag dikes to protect many homes. Much of this effort was hampered by the Mayor”;

KK. “I have various photographs and videos of the flooded areas.” These photographs and videos are produced herewith as **Exhibit R-2**;

LL. “I did not visit all the flooded areas. There are still many affected streets where there are people affected by the flooding who want to sign. I have also been contacted by local residents of Île Bizard on Facebook requesting a meeting to sign the petition. I attempted to reach the nearby area of Île Mercier, which is also part of the Borough, but was stopped by the police and not allowed to enter. I planned on going there by boat but now there is also a restriction on boats going to the island”;

MM. “Locals tell me they feel they are being forced to abandon their homes”;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE CLASS MEMBERS

8. The facts giving rise to personal claims by each of the class members against the Defendants are the same as those which justify the Applicants' individual recourses, as is made evident through the following documents:
 - A. A copy of a petition to institute a class action against the Mayor and the Borough circulated in mid-May 2019 and signed by approximately 139 Borough residents as of the date of the original Application is filed by Applicants and produced herewith as **Exhibit R-4**;
 - B. A copy of a spreadsheet with names and addresses of 139 Borough residents affected by the flooding, including the 70 persons who signed the original petition, described above and filed as Exhibit R-4, and including overview maps showing the location of the flooded neighborhoods of primary concern in this action, including the streets on which the signatories to the petition reside, is filed by the Applicants and produced herewith as **Exhibit R-6.1**;
 - C. A copy of a Corrected Notice dated **June 19, 2019** to the attorneys representing the Mayor and the Borough indicating that the negligent and improper installation of storm drains in the Borough, first known on **June 5, 2019**, and that these negligently and improperly installed storm drains led to flooding of many homes on Ile Bizard is filed by the Applicants and produced herewith as **Exhibit R-7** as well as a report from Leigh Redding also produced in Exhibit R-7 *en liasse*;
 - D. A copy of a Notice dated **September 11, 2019** to the attorneys representing the Mayor and the Borough indicating that, in general, the negligent and improper nature of the actions and inaction by both the Mayor and the Borough to undertake proper flood prevention measures for the Borough's residents in order to minimize flood damages during the spring 2019 flood was first known on **April 17, 2019**, is filed by the Applicants and produced herewith as Exhibit R-7;
 - E. Commencing in early October 2019 there was additional flooding in the area of rue Joly, rue Roy, rue Paquin and rue Jean-Yves affecting approximately 35 homes. This recurrent problem is a result in part of the fact that the storm drains are inadequate for the volume of water which occurs during heavy rainfall and other flooding events.
 - F. Two seminal articles indicating the Public Trust duties owed by all levels of government to citizens Flora and Fauna and that any citizen has standing to sue: John C. Maquire, "Fashioning an Equitable Vision For Public Resource Protection and Development in Canada : The Public Trust Doctrine Revisited and Reconceptualized (7 J.E.L.P. 1, 1998) and Kate Smallwood Coming Out of Hibernation : The Canadian Public Trust Doctrine U.B.C., 1993 produced *en liasse* as Exhibit R-11;

9. The identical, similar or related questions of law or [...] between each member of the class and the Defendants, which Applicants wish to have decided by the class action are:
- A. Class members suffer from the cumulative effects of flooding produced and emitted by all Defendants including the willful blindness, gross negligence and failure to protect citizens' fundamental rights, Defendants having contravened sections 19.1 and 20 of the *Environment Quality Act, R.S.Q., c. Q-2 ("E.Q.A.")*;
 - B. Defendants, including the municipal government by their gross negligence and bad faith, have contravened sections 1,4 5, 6, 7, 8, 10, 10.1, 15, 46.1, and 48 of the *Quebec Charter*;
 - C. In particular, Defendants have acted intentionally, willfully, negligently in their failure to recognize and protect citizens, flora and fauna from the cumulative effects of flooding and contaminated water;
 - D. Defendants, well aware of the risks of flooding, have intentionally, willfully, negligently and in concert with the other Defendants, failed to protect citizens, flora and fauna from the deleterious cumulative effects of flooding, in particular as concerns children, the elderly, the disabled, flora and fauna;
 - E. All Defendants have and continue to commit faults within the meaning of Article 1457 C.C.Q., causing continuing bodily, moral and material injury including health damages, damages to nature and the environment, for which reparation is due;
 - F. As well, the class members are entirely justified in having the damages immediately curtailed to ensure that no further flooding occurs, such that the injunctive relief set out herein is warranted and in the public interest, as well as in the interest of future generations, nature and the environment (*Mono Lake*, 658 P.2d at 719, *Marks*, 491 P.2d at 380, *Robinson*, 658 P.2d at 310). The damage alleged herein is, for the most part, difficult and expensive impossible to reverse and becomes worse over time;
 - G. Class members allege that it is in the interests of justice, proportionality, fairness, and the precautionary principle that both collective recovery and the amount to be awarded each individual member be assessed using an average determined for each sub-group;
 - H. Defendants intentionally failed to protect, and therefore breached, the rights under the *Quebec Charter* and, where applicable, the *Canadian Charter* of the elderly, the disabled, and all members in relation to flora and fauna affected by the flooding, for which exemplary and punitive damages should be awarded;
 - I. Class members allege the failure of Defendants to warn class members of potential risks and dangers in advance of the flooding as a breach of a legal duty, and the commission of a fault causing damages and contamination despite Defendants' knowledge of the dangers of those decisions;

- J. All of the class members are neighbours of Defendants within the meaning of Article 976 C.C.Q. and in light of jurisprudence on neighbourhood annoyance in which governments are considered neighbours, notably *Antrim Truck Centre Ltd. v. Ontario (Transportation)* [2013] 1 SCR 594, and discussed in doctrine, David E. Roberge, “Nuisance Law in Quebec (article 976 C.C.Q.): 10 years after *Ciment du Saint-Laurent*, where do we stand?” 76 *Revue du Barreau* 2017, 321-346 at 325, 328-330, 336 and 346:

10. [... Now paragraphs 19 to 25]

CONDITIONS REQUIRED TO AUTHORIZE A CLASS ACTION AND APPOINT CLASS MEMBERS AS REPRESENTATIVE PLAINTIFFS

The class members’ claims raise identical, similar or related issues of law or fact (Article 575 (1) C.C.Q.)

11. Applicants assert that the identical, similar or related issues of fact or law between each member of the class and the Defendants, are as follows:
- A. The Applicants and all class members and their families reside in the Borough of L’Île-Bizard-Saint Geneviève, in the vicinity of the Lac des Deux Montagnes or the Rivière des Prairies, which has been the subject of sudden and severe floods in the spring of 2017 and twice in 2019, resulting in the flooding of their residences in either or both of those years;
 - B. In addition to damage to the residences themselves, some of the contents and personal property within many of the houses and modular homes closest to the shoreline were also damaged by spring flood waters;
 - C. Regular and recurring floods for several years, and in particular 2017 and twice in 2019, have caused harm to the Applicants and class members because the floods have on three occasions (so far) caused damage that is intolerable and excessive due to a failure of Defendants to properly prevent residential damage due to the flooding;
 - D. The inconvenience, discomfort, stress, economic and health problems suffered by the Applicants and class members were caused by and/or created as a result of unnecessary flooding and contamination of their homes and surrounding areas are due to operational decisions made by Defendants in relation to flood prevention and emergency response;
 - E. Defendant Quebec’s Zis Floodmap is grossly negligent and faulty and not properly maintained as does not indicate areas flooded as flood zones. This constitutes a failure to warn and failure to protect pursuant to the province’s fiduciary duty to its citizens;

- F. There is presumptive evidence of causality between the operational decisions made by Defendants and the damages suffered by the Applicants and class members from the flooding in 2017 and 2019. Furthermore, given the “serious, precise and concordant” facts alleged, this Honourable Court is entirely justified in coming to a presumption of fact that cumulative flooding and contamination causes serious health effects to humans, flora and fauna and causes cancer for a significant number of humans. As a result of this prima facie presumptive evidence, this Honourable Court should conclude that the burden of proof shifts to Defendants who now must prove the cumulative effects of this flooding are not harmful to humans’ flora and fauna. The approach is entirely consistent with the precautionary principle and the purposes of deterrence and the public interest in environmental protection, as discussed by the Quebec Court of Appeal in Carrier v. Québec (Procureur général), 2011 QCCA 1231 (CanLII), (“Carrier”), a decision that forms the basis of Quebec environmental class actions;
- G. The operational decisions of Defendants that resulted in severe and unnecessary flooding of the residences of Applicants and class members contravene sections 1(5), 19.1, 20, 90, 91, 92 and 94 *E.Q.A.*;
- H. The severe and unnecessary flooding and pollution described herein also contravene section 20 *in fine E.Q.A.* since they “porte atteinte au confort de l’être humain”;
- I. The pollutants resulting from flooding constitute “contaminants” within the meaning of section 1(5) *E.Q.A.* and further contravene sections 6.01, 7.01, 7.02, 7.04, 7.05, 7.06, 7.08, and 7.09 *E.Q.A.* and must be statutorily recognized as such;
- J. The severe and unnecessary flooding and resulting pollution constitute a nuisance within the meaning of Article 976 C.C.Q. as it exceeds that which is reasonable and tolerable in a residential environment;
- K. The severe and unnecessary flooding and resulting pollution constitute an abuse of right within the meaning of Articles 6 and 7 C.C.Q. as exercised in bad faith, with the intent to injure another or exercised unreasonably;
- L. The flooding and resulting pollution constitute neighbourhood annoyance beyond reasonable levels such as to trigger the provision of Article 976 C.C.Q., additionally if that flooding and pollution constitutes a fault, was it intentional and Defendants were complicit therein, such that punitive, exemplary and treble damages are warranted pursuant to *Ciment du Saint-Laurent inc. c. Barrette* [2008] 3 S.C.R. 392 (“*Ciment St.-Laurent*”) and, as concerns exemplary damages, against governments, *Hinse v. Canada* [2015] S.C.C. 35, Article 1457 C.C.Q. and section 49 of the *Quebec Charter* as well as L. Perret “De l’impact de la charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité” (1981), 12 R.D.J. 121 at page 170. Applicants claims that all involuntary exposure to harm should be compensated by treble damages as set out in the Ford Pinto line of jurisprudence *Grimshaw v. Ford Motor Company* (119 Cal.App.3d 757, 174 Cal.Rptr. 348);

- M. Given the fiduciary duty owed to Applicants and class members by the Mayor and Borough of L'Île-Bizard–Sainte-Geneviève and the Government of the Province of Québec imposed by the Public Trust Doctrine, any impediment, contamination or diminished use of public roadways or public lands is strictly prohibited and in breach of that fiduciary duty;
- N. Given that the Public Trust Doctrine further protects the environment including flora and fauna, Applicants are, as a result, entitled to seek an injunctive order that all flooded lands be returned to their condition and environmental cleanliness prior to the severe, unnecessary and therefore illegal flooding described herein;
- O. Defendants failed to warn Applicants and class members of the severity of the oncoming floods and inform them about what assistance would and would not be provided to them, in breach of a legal duties to do so and constituting fault that caused damages;
- P. Defendants committed willful errors, acts and omissions with regard to flood damage protection such that their liability is solidary or *in solidum* (Article C.C.Q. 1480): Where several persons have jointly participated in a wrongful act or omission which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily and in solidum liable to the class members (*Prévost-Masson c. General Trust of Canada*; [2001] 3 RCS. 882, 2001 CSC 87, paragr. 28 et 29) *Roy c. Mout* 2015 QCCA 692, bound to make reparation, See also *Montreal c. Biondi*, 2013 QCCA 404, at para. 150 and fn. 44 concerning apportionment of liability in a class action pursuant to Article 1478 C.C.Q.;
- Q. As a result of the foregoing, liable to punitive or exemplary damages are due by operation of section 49 of the *Quebec Charter* as well as, where applicable, by operation of section 24 (1) of the *Canadian Charter* for unlawful and intentional breaches of fundamental Charter rights. (See *Hinse v. Canada*, where the Minister of Justice was found to have committed a fault pursuant to Article 1457 C.C.Q. and assessed punitive and compensatory damages pursuant to section 49 of the *Quebec Charter* for "unlawful and intentional interference" with Charter Rights);
- R. Even if Defendants are able to prove they complied with all regulatory requirements, which is denied, civil liability under Article 976 C.C.Q. is triggered even in the absence of fault as abnormal inconvenience has arisen from abuse of the right of property pursuant to *Drysdale v. Dugas*, (1896) 26 SCR 20 (“*Drysdale v. Dugas*”) and *Ciment St.-Laurent*;
- S. The right of the Applicants and each member of the class to claim damages, as well as moral, exemplary and damages under the *Quebec Charter* and *Canadian Charter* from the Defendants;

- T. Defendants are jointly and severally liable (or liable *in solidum*) for the damages caused to Applicants and the class members;
- U. Defendants are at fault in not taking sufficient measures to assure that flooding and resulting pollution did not create nuisance, exceed safe levels, or constitute an abuse of right, and their actions in this regard were intentional and/or fraudulent;
- V. Having knowledge of the nuisance and/or abuse of right, Defendants were at fault in not acting in a timely manner to curtail the flooding and resulting pollution alleged;
- W. Contaminated spills and/or other unplanned releases of water referred to herein breached Applicants and class members' rights under sections 6 (peaceful enjoyment and free disposition of property) and 46.1 of the *Quebec Charter* (the right to a healthful environment and one respectful of biodiversity), and that unlawful interference entitles Applicants and other class members to obtain the cessation of that interference and, given the intentional nature of the interference, punitive damages pursuant to section 49 of the *Quebec Charter*;
- X. Applicants and class members may claim on behalf of affected fauna, and the displaced or harmed fauna must be returned in the same numbers and to the same locations and in a safe environment by the Defendants pursuant to the rule in the Washington state Pacific Northwest decision of Mr. Justice George Boldt, *United States v. Washington*, 384 F. Supp. 312 (D. 1974), aff'd, 520 F. 2d 674 (9th Cir. 1975), cert denied, 96 S. Ct. 877, and *Plantons A.et P.inc. c. Delage*, aff'd 2015 QCCA 7 ("*Plantons c. Delage*");
- Y. By failing to adequately regulate and apply laws, regulations, codes or bylaws, the governmental entities named herein were at fault, acted in bad faith and willingly participated in or sanctioned flooding and resulting pollution and the breach of class members' fundamental rights;
- Z. The awarding of treble damages is justified in the circumstances, as per *Grimshaw v. Ford Motor Company* (119 Cal.App.3d 757, 174 Cal.Rptr. 348);

The facts alleged appear to justify the conclusions sought (Article 575 (2) C.C.Q.)

- 12. The facts alleged herein appear to justify the conclusions sought by the Applicants for the reasons that follow;
- 13. The recurring spring floods on Ile Bizard, and in particular the floods in the spring of 2017 and 2019, are causing many residents who rent or own homes near the waterfront harm and inconvenience that is excessive and intolerable in relation to neighbourhood constraints;

14. Defendants are not fulfilling their legal obligations to prevent these extremely serious and recurring conditions and/or mitigate the damages caused to Applicants as a result of the floods;

14.1. Quebec is liable for damage resulting from the intrusion of its water and the eroded banks and degraded berms (on the high-water line) under its control and is at fault for failing to maintain those berms;

14.2 Ile Bizard – Sainte Geneviève is responsible for its insufficient and improperly maintained infrastructure, a thing under its control (Art. 1465 C.C.Q.);

14.3 Defendants are jointly and severally liable for failing to address the Modular home community’s long term water pollution problems of which they have been aware since 2013;

15. Harmful flooding can and is typically predicted days in advance, providing enough time for emergency, mitigative measures to be taken by Defendants, yet such measures have been impeded, are not being taken at all and/or are insufficient;

16. Based on flood activities in past years, and also in anticipation of the fact that flooding is likely to become more frequent and/or increase in severity as a result of climate change, Defendants’ have obligations to ensure that the serious and sometimes severe neighbourhood inconveniences caused by flooding do not continue. Yet Defendants are not implementing reasonable measures to protect waterfront residents on Ile Bizard;

17. As a result of Defendants’ negligence in fulfilling obligations to mitigate or prevent the neighbourhood annoyance in the form of severe spring flooding on and near the waterfront at many locations on Ile Bizard, Applicants are suffering recurring harm to:

- A. Rental and real property;
- B. Personal property;
- C. Physical health;
- D. Mental health;
- E. Health and wellbeing of pets;

18. As a result of Defendants’ negligence in fulfilling obligations to mitigate or prevent the neighbourhood annoyance in the form of severe spring flooding on and near the waterfront at many locations on Ile Bizard, the environment, flora and fauna in these locations have been harmed, permanently or temporarily;

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 (Article 575 (3) C.C.Q.)

19. The composition of the class makes the application of Articles 86 and 91 C.C.P. difficult or impractical for the reasons that follow;

20. The number of physical persons affected, at least 1,000, makes it impossible for these persons to meet together and negotiate a specific mandate in virtue of which they might name a mandatary, or act as Applicants together in the same case, as contemplated by Articles 86 and 91 C.C.P. as well as the fact that some of them are under the age of 18;
21. It would be highly impracticable, costly, uneconomical, unjust, and inconsistent with the rule of proportionality, if not entirely impossible for each of the persons herein identified as class members to pursue an individual action in particular given their economic and physical circumstances;
22. All class members are affected in the same or a very similar manner, although [...] to different degrees, by the behavior of the Defendants and, [...] their interests will be better protected in a class action where the Court will have broad powers to protect the rights of absent parties than they would be than if these parties took individual actions;
23. Contrarily, class action proceedings are the most effective, efficient and appropriate legal proceedings available to ensure that each of the Class members' rights are duly protected and preserved both now and in the future, in particular as concerns environmental matters, as noted in *Alcan*, the Quebec Court of Appeal stating that class action suits are by far the most appropriate manner of litigating environmental claims given the large number of victims and the exceptional cost of such litigation;
24. Moreover, due to the significant experts' costs associated with the litigation of this matter, it is in the best interests of each of the class members, and of justice, that the institution of a class action be authorized;

The class members appointed as representative plaintiffs are in a position to properly represent the class members (Article 575 (4) C.C.Q.)

25. The Applicants seeking to be appointed as representative plaintiffs are in a position to represent the members adequately, for the reasons that follow;
26. Applicants live in neighbourhoods directly affected by the flooding and resulting pollution in the Borough of L'Île-Bizard–Sainte-Geneviève and in the Borough of Pierrefonds-Roxboro, which is directly adjacent to the Borough of L'Île-Bizard–Sainte-Geneviève;
27. Applicants have been directly affected by the flooding and resulting pollution described herein;
28. Applicants have acquainted themselves with all aspects of the case as well as with the flood victims on Ile Bizard;
29. Applicants have gathered records, documents, photos and other evidence in these proceedings and will continue to do so;

30. Applicants possess all the personal, moral and intellectual qualities to see this class action through to its final resolution and will act for the benefit of the class members;
31. Furthermore, Applicant Idsinga, who resides in the adjacent borough of Pierrefonds-Roxboro, has taken numerous steps to acquaint himself with the nature of the problems created as a result of the flooding and resulting pollution, and is informed on the impacts and consequences of this activity as it affected those in the neighbourhoods identified under the description of class presented above;
32. Applicant Idsinga gathered the names, addresses and phone numbers of 139 persons who have been affected by the flooding and resulting pollution (**Exhibit R-6**). He also gathered information on the nature of the various harm and inconvenience suffered by those persons;
33. Applicant Idsinga has acquainted himself with the concerns of many class members, and has been present and involved at every stage of the proceedings;

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

34. The action that the Applicants wish to institute for the benefit of the Class members is an action in damages, restitution/remediation and injunctive relief;
35. The conclusions that the Applicants wish to introduce by way of an originating Application are:
 - A. **GRANT** the class action requested by the Applicants;
 - B. **ATTRIBUTE** to the Applicants the status of Representative Plaintiffs;
 - C. **DECLARE** that all Defendants have contravened sections 19.1 and 20 *E.Q.A.*;
 - D. **DECLARE** that all Defendants have contravened sections 1, 5, 6, 7, 8, 46.1 and 48 of the *Quebec Charter* and the Defendant Government of the Province of Quebec has contravened section 7 of the *Canadian Charter*;
 - E. **CONDEMN** the Defendants to pay to the Applicants and the Class compensatory damages for all monetary losses;
 - F. **ORDER** collective recovery of said damages in accordance with Articles 595 to 598 C.C.P.;
 - G. **THE WHOLE** with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery of this action;

H. CONDEMN the Defendants to pay to the Applicants punitive and exemplary damages for breach of rights under section 49 of the *Quebec Charter* and, where applicable, section 24(1) of the *Canadian Charter*;

I. **ORDER** Defendants jointly and severally solidarily, and *in solidum*, to remediate the environment where fauna and flora that have been negatively impacted by the flooding and resulting pollution alleged herein such that they return in the same number and same location to where they were found prior to the flooding and resulting pollution;

J. **ORDER** injunctive relief to the Applicants as follows:

(i) Construct or otherwise establish permanent physical barriers designed to protect the neighbourhoods identified in this class action from future flooding;

(ii) Procure and install backflow preventers on general storm drains as well as individual residences wherever possible in the neighbourhoods identified in this class action;

(iii) Improve the “311” emergency services hotline service in such a way that prior to, during and after any future flooding events, the Borough residents are able to immediately reach persons capable of providing information and assistance;

(iv) Establish procedures for the deployment of emergency services, including assistance by the Canadian Forces and citizen volunteers, to ensure the future safety of all residents in neighbourhoods identified in this class action prior to, during and after flood events;

JURISDICTION

36. The Applicants request that the class action be brought before the Superior Court of the District of Montreal for the following reasons:

- A. The Defendants, being the Mayor and Borough of L’Île-Bizard–Sainte-Geneviève, and the Government of the Province of Québec, allowed flooding and resulting pollution resulting in property damages and Charter damages to Applicants in the Borough of L’Île-Bizard–Sainte-Geneviève, Quebec located in the City of Montréal;
- B. The flooding and resulting pollution complained of that caused the harms suffered by Applicants and the other class members occurred in the Province of Québec and thus under the authority of the Government of Québec;

- C. Applicants as well as the class members they represent all reside in the Province of Québec;
- D. There exists no better suited forum or district to render justice in the present dispute;

WHEREFORE, APPLICANTS PRAY THIS HONOURABLE COURT TO:

GRANT the present amended Application;

AUTHORIZE the institution of a class action as follows:

ATTRIBUTE to Applicants the status of Plaintiff Representatives for the purpose of bringing the class action for the benefit of the following class of natural persons, namely:

*All Quebec residents of Ile Bizard – Saint Geneviève, Quebec in the area bounded by the shoreline running south-west from starting point 45°29'17.6"N 73°52'09.0"W (Jacques Bizard Bridge) all the way clockwise to 45°30'26.9"N+73°54'17.3"W (end of Croissant Barabe) between the shoreline and the streets of rue Cherrier - Montee Wilson - Chemin du Bord-du-lac and isle Mercier and the area of Saint-Geneviève from Jacques Bizard bridge west to rue Saint Saint Paul between the shoreline and Blvd Gouin Ouest who in 2017 and/or 2019 were flooded as well as those who wish to invoke the Public Trust Doctrine on their own behalf, in the public interest and/or for the benefit of flora and fauna affected by that flooding as shown in the map attached as **Exhibit R-6.1**;*

DEFINE four sub-groups of the class as follows:

- a. Persons who experienced flooding and suffered damages in the spring of 2017;
- b. Persons who experienced flooding and suffered damages in the spring of 2019;
- c. Persons who experienced flooding and suffered damages in both the spring of 2017 and the spring of 2019;
- d. Persons who experienced flooding in the spring of either 2017 or 2019 and who suffered damages at homes within the modular home community located on the following streets on the southwest end of Ile Bizard which is bordered by the Lac des Deux Montagnes, near where it flows into the Rivière des Prairies: Rues Ferdinand, Roger, Daniel, Harris, Michel, Jacques, Marc and Lucien;

IDENTIFY as follows the principal questions of fact and of law to be treated collectively in the class action proceedings:

The inconvenience, discomfort, stress, economic and health problems that were suffered by each of the class members were caused by/or created as a result of flooding and resulting pollution;

Presumptive evidence of causality i.e. that given the “serious, precise and concordant” facts alleged, this Honourable Court is entirely justified in coming to a presumption of fact that the damages claimed herein are a result of Defendants’ actions and omissions;

[...] Are Defendants liable for a thing under their control pursuant to Art. 1465 C.C.Q.?

The flooding and resulting pollution contravene sections 1(5) 19.1, 20, 90, 91, 92 and 94 *E.Q.A.*;

Whether the pollutants described herein contravene section 20 *in fine E.Q.A.* since they “porte atteinte au confort de l’être humain”;

The pollutants resulting from flooding constitute “contaminants” within the meaning of section 1(5) *E.Q.A.* and further contravene Articles 6.01, 7.01, 7.02, 7.04, 7.05, 7.06, 7.08, 7.09 and must be statutorily recognized as such;

The flooding and resulting pollution constitute a nuisance within the meaning of Article 976 C.C.Q. as they exceed that which is reasonable and tolerable in a residential environment;

The flooding and resulting pollution constitute an abuse of right within the meaning of Articles 6 and 7 C.C.Q. as exercised in bad faith, with the intent to injure another or exercised unreasonably;

Whether the pollution resulting from the flooding constitutes a neighbourhood annoyance beyond normal levels such as to trigger the provision of Article 976 C.C.Q., and, additionally if that pollution constitutes a fault, were they intentional and whether the governmental Defendants were complicit therein, such that punitive, exemplary and treble damages are warranted pursuant to *Ciment St.-Laurent* and, as concerns exemplary damages, against governments, *Hinse v. Canada*, Article 1457 C.C.Q. and section 49 of the *Quebec Charter* as well as L. Perret “De l’impact de la charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité” (1981), 12 R.D.J. 121 at page 170. Applicants claim that all involuntary exposure should be compensated by treble damages as set out in the Ford Pinto line of jurisprudence, *Grimshaw v. Ford Motor Company* (119 Cal.App.3d 757, 174 Cal.Rptr. 348);

Whether, even if Defendants are able to prove they complied with all regulatory requirements, which is denied, civil liability under Article 976 C.C.Q. is triggered, even in the absence of fault as abnormal inconvenience has arisen from abuse of the right of property pursuant to *Drysdale v. Dugas* and *Ciment St-Laurent*;

The right of the Applicants and each member of the class to claim damages, as well as punitive, exemplary and treble damages under the *Quebec Charter* and *Canadian Charter*, from the Defendants;

Whether Defendants are jointly and severally liable (or liable *in solidum*) for the damages caused to Applicants and the class members;

Whether Defendants were at fault in not taking sufficient measures to assure the pollution resulting from the flooding did not create nuisance, exceed a safe level, or constitute an abuse of right, and whether their actions in this regard were intentional and/or fraudulent;

Whether, having knowledge of the nuisance and/or abuse of right, Defendants were at fault in not acting in a timely manner to curtail the flooding and pollution alleged;

Whether Applicants may claim on behalf of affected fauna; and more specifically whether the displaced or harmed fauna must be returned in the same numbers and to the same locations and in a safe environment by the Defendants pursuant to the rule in the Washington State Pacific Northwest decision of Mr. Justice George Boldt, *United States v. Washington*, 384 F. Supp. 312 (D. 1974), aff'd, 520 F. 2d 674 (9th Cir. 1975), cert denied, 96 S. Ct. 877, and *Plantons. c. Delage*;

Whether the awarding of treble damages is justified in the circumstances, as per *Grimshaw v. Ford Motor Company* (119 Cal.App.3d 757, 174 Cal.Rptr. 348);

Whether the class should be defined as:

All Quebec residents of Ile Bizard – Saint Geneviève, Quebec in the area bounded by the shoreline running south-west from starting point 45°29'17.6"N 73°52'09.0"W (Jacques Bizard Bridge) all the way clockwise to 45°30'26.9"N+73°54'17.3"W (end of Croissant Barabe) between the shoreline and the streets of rue Cherrier - Montee Wilson - Chemin du Bord-du-lac and isle Mercier and the area of Saint-Geneviève from Jacques Bizard bridge west to rue Saint Saint Paul between the shoreline and Blvd Gouin Ouest who in 2017 and/or 2019 were flooded as well as those who wish to invoke the Public Trust Doctrine on their own behalf, in the public interest and/or for the benefit of flora and fauna affected by that flooding as shown in the map attached as **Exhibit R-6.1**;

Whether the sub-groups of the class should be defined as:

- a. Persons who experienced flooding and suffered damages in the spring of 2017;
- b. Persons who experienced flooding and suffered damages in the spring of 2019;

- c. Persons who experienced flooding and suffered damages in both the spring of 2017 and the spring of 2019;
- d. Persons who experienced flooding in the spring of either 2017 or 2019 and who suffered damages at homes within the modular home community located on the following streets on the southwest end of Ile Bizard which is bordered by the Lac des Deux Montagnes, near where it flows into the Rivière des Prairies: Rues Ferdinand, Roger, Daniel, Harris, Michel, Jacques, Marc and Lucien;

IDENTIFY as follows the conclusions sought with relation to such questions:

DECLARE that all Defendants have contravened sections 19.1 and 20 *E.Q.A.*;

DECLARE that all Defendants have contravened sections 1, 5, 6, 7, 8, 46.1 and 48 of the Quebec Charter and the Defendant Government of the Province of Quebec has contravened section 7 of the Canadian Charter;

CONDEMN the Defendants to pay to the Applicants and the Class compensatory damages for all monetary losses;

ORDER collective recovery of said damages in accordance with Articles 595 to 598 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery of this action;

CONDEMN the Defendants to pay to the Applicants punitive and exemplary damages for breach of rights under section 49 of the Quebec Charter and where applicable, section 24(1) of the Canadian Charter;

ORDER Defendants jointly and severally solidarily, and in solidum, to remediate the environment where fauna and flora that have been negatively impacted by the flooding and resulting pollution alleged herein such that they return in the same number and same location to where they were found prior to the flooding and resulting pollution;

ORDER injunctive relief to the Applicants as follows:

1. Construct or otherwise establish permanent physical barriers designed to protect the neighbourhoods identified in this class action from future flooding;
2. Procure and install backflow preventers on all general storm drains as well as individual residences wherever possible in the neighbourhoods identified in this class action;

3. Improve the “311” emergency services hotline service in such a way that prior to, during and after any future flooding events, the Borough residents are able to immediately reach persons capable of providing information and assistance;
4. Establish procedures for the deployment of emergency services, including assistance by the Canadian Forces and citizen volunteers, to ensure the future safety of all residents in neighbourhoods identified in this class action prior to, during and after flood events;

ORDER the publication of a notice to the class members in accordance with Article 579 C.C.P., pursuant to a further order of the Court, and **ORDER** Defendants to pay for said publication costs;

FIX the delay for a class member to opt out of the class at 60 days from the date of the publication of the notice to the members;

DECLARE that all class members who have not requested their exclusion from the class in the prescribed delay will be bound by any judgment to be rendered on the class action to be instituted;

REFER the present record to the Chief Justice of this Honourable Court so that he or she may determine the district in which the class action is to be brought and designate the Judge before whom it will be heard;

ORDER that in the event that the class action is to be brought in another district, the clerk of the Court, upon receiving the decision of the Chief Justice, is to transmit the present record to the clerk of the district designated; and

MAKE ANY OTHER ORDER this Honourable Court deems appropriate.

THE WHOLE with costs.

WHEREFORE, APPLICANTS AND MEMBERS OF THE CLASSES SEEK AUTHORIZATION AGAINST DEFENDANTS, AS FOLLOWS:

- (a) Certifying the classes and subclasses and recognizing them as Representatives
- (b) Awarding Applicants and the Class the costs of medical monitoring, damages suffered by Applicants and the Class;
- (c) Awarding compensatory and punitive damages pursuant to the Quebec and Canadian Charters and the Public Trust Doctrine;
- (d) Awarding punitive damages pursuant to the Quebec and Canadian Charters and the Public Trust Doctrine

- (e) Finding against Defendants as concerns the injunctive relief sought; and
- (f) Remediation of all contaminated public and private land and water to its pre-contaminated condition;

GRANT the present Motion;

AUTHORISE the present Collective Action;

ATTRIBUTE to Krysta Urban, Don Smyth, Robert Idsinga, Joanna Sabatella Lemieux and Jason Lemieux the status of Representatives and act for the following group:

*All Quebec residents of Ile Bizard – Saint Geneviève, Quebec in the area bounded by the shoreline running south-west from starting point 45°29'17.6"N 73°52'09.0"W (Jacques Bizard Bridge) all the way clockwise to 45°30'26.9"N+73°54'17.3"W (end of Croissant Barabe) between the shoreline and the streets of rue Cherrier - Montee Wilson - Chemin du Bord-du-lac and isle Mercier and the area of Saint-Geneviève from Jacques Bizard bridge west to rue Saint Saint Paul between the shoreline and Blvd Gouin Ouest who in 2017 and/or 2019 were flooded as well as those who wish to invoke the Public Trust Doctrine on their own behalf, in the public interest and/or for the benefit of flora and fauna affected by that flooding as shown in the map attached as **Exhibit R-6.1**;*

IDENTIFY as follows the principle questions of fact and law to be considered collectively:

1. Did Defendants mislead, fail to inform, or fail to warn as concerns the 2017 and 2019 flooding?
2. What amount of compensatory damages are due to class members for those failures?
3. Are the Class Representatives and members entitled to decontamination of land and water and all affected public land, water and the foreshore?
4. Are the designated Representatives and members entitled to clean-up and decontamination costs of their homes and vehicles?
5. Are the Class Representatives and members entitled to medical monitoring and if so in what manner?
7. What compensatory damages are due by Defendants to class members for those breaches?
8. What punitive/exemplary damages are due by Defendants to class members for those breaches?
9. Do Defendants faults and emissions constitute a “contaminant”, “contaminant release”, “hazardous material”, within the meaning of article 1 of the *Environment Quality Act*?

10. Do Defendants faults and omissions constitute a breach of articles 19.1 to 22 of the Environment Quality Act?
11. Do Defendants faults and omissions constitute intentional breaches of articles 1, 6, 7, 24, 39, 44, 46.1, 48 and 49 of the Charte des droits et libertés de la personne?
12. [...] Are Defendants liable for a thing under their control pursuant to Article 1465 C.C.Q.?
13. Did the 2017 and 2019 flooding contamination in excess of that which is reasonable and tolerable and as such does it constitute a public nuisance and/or neighborhood annoyance?
14. Did Defendants emit into the environment emissions or pollutants exceeding prescribed norms?
15. Did Defendants, illicitly and intentionally fail to respect the Public Trust Doctrine as concerns highways, the foreshore, water and parks? What is the appropriate remedy?
16. Given the application of Article 1621 (2) C.C.Q., the gravity of Defendants unconscionable behaviour, their disproportionate patrimonial and informational advantage over victim class members, what is the proper amount of punitive damages required to dissuade, denounce and prevent Defendants (and similar companies) future bad conduct?
17. Are the designated members and all members of the group entitled to claim from Defendants the sum of \$15,000 for the year 2017 and \$30,000 for the year 2019 as compensatory damages?
18. Are the designated Representatives and members of the group entitled to injunctive relief such that no further flooding is to occur, should this relief be a berm, and if so where and how high?
19. Are the designated Representatives and members of the group entitled to have Defendants reimburse all sums spent in the present proceedings including Expert fees and disbursements?
21. To what amount of Punitive damages is each member of the group entitled?
22. Are the designated Representatives and members of the group entitled to have Defendants install proper infrastructure including drainage and piping?

IDENTIFY as the conclusions sought:

GRANT the Applicants' Motion Seeking Authorization to Institute a Collective Action on behalf of all members;

DECLARE Defendants have contravened the Public Trust Doctrine;

DECLARE Defendants have contravened article 967 C.C.Q.;

DECLARE Defendants have contravened articles 19.1 to 22 of the *Loi sur la qualité de l'environnement*;

DECLARE Defendants have contravened articles 1, 6, 7, 24, 39, 46.1 et 49 de la *Charte des droits et libertés de la personne*;

DECLARE Defendants committed a fault in failing to take all necessary measures to cease or considerably diminish the contaminated pollution suffered by members;

DECLARE Defendants liable for a thing under their control;

CONDEMN Defendants to solidarily pay to group members the sum of fifteen thousand dollars for the year 2017 (15 000\$), per member, and thirty thousand dollars (\$30,000) per member for the year 2019 (and, should further flooding occur, forty five thousand dollars (\$45,000) for each additional year until such time as the flooding pollution is curtailed, with interest at the legal rate as well as the special indemnity provide for at article 1619 du C.C.Q. calculated from the date of Notice;

CONDEMN Defendants to pay to group members the cost of medical monitoring;

ORDER Defendants to fully remediate all contaminated private and Public Trust lands and waterways;

ORDER collective recovery in accordance with articles 595 to 598 of the Code of Civil Procedure;

ORDER that each member's claim be individually assessed, but if impracticable, **ORDER** distribution of the *reliquat* collectively recovered to be used to implement measures for the benefit of Class Members to be determined by this Honourable Court;

ORDER the publication of a notice to the class members in accordance with Article 579 of the Code of Civil Procedure, pursuant to a further order of the Court, and **ORDER** Defendant to pay for said publication costs;

FIX the delay to request exclusion from the class as 30 days following publication of the Notice to Members, after which members not requesting exclusion be deemed Class Members;

DECLARE that all members of the class who have not requested their exclusion from the class in the prescribed delay be bound by any judgment rendered on the class action to be instituted;

SOLIDARILY or IN SOLIDUM CONDEMN Defendants to pay interest and the special indemnity on all amounts awarded, from the date of Notice or of Service;

ORDER such further and other relief that this Honourable Court deems just;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action;

MONTREAL, this 20th day of November, 2020

CHARLES O'BRIEN
Lorax Litigation
Attorney for Applicants