

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class action)

No.: 500-06-001158-217

JACQUES LEDUC

Applicant

v.

ELAD CANADA INC.

-and-

ELAD CANADA REALTY INC.

-and-

LES DÉVELOPPEMENTS CITÉ-NATURE
(PHASE IV) INC.

Defendants

**APPLICATION BY DEFENDANTS FOR
LEAVE TO ADDUCE RELEVANT EVIDENCE
(Articles 574, 575, 18 and 19 CCP)**

**TO THE HONOURABLE JUSTICE DONALD BISSON S.C.J., THE DEFENDANTS
RESPECTFULLY SUBMIT THE FOLLOWING:**

I. Introduction

1. On August 1, 2021, the Applicant Jacques Leduc (the “**Applicant**” or “**Mr. Leduc**”) filed its *Demande en autorisation d'exercer une action collective et pour être désigné représentant*, as appears from the Court record (the “**Application**”);
2. As appears from the Application, the Applicant seeks authorization to institute a class action on behalf of the following class:

All persons who made a deposit in order to purchase a condominium, in the Harmonia at Cité-Nature (phase IV) project;

(hereinafter referred to as the “**Class**”)
3. The Applicant essentially argues that the Defendants acted in bad faith and misled the proposed class members, as part of a scheme whereby they cancelled sales of the Cité-Nature Harmonia (Phase IV) project (the “**Harmonia Project**”) units, for the sole purpose, allegedly, that it was more profitable to rent the units once they were built;

4. The Applicant further alleges that clause 5.10 of the contract signed by the Class members, which specifically provides that the vendor's obligations are subject to it obtaining financing to its entire satisfaction, is not enforceable;
5. The Applicant identifies the following issues of fact and law to be dealt with collectively in the judgment to be rendered, should the Class Action be authorized:
 - a) Did the Defendants act in bad faith?
 - b) Is clause 5.10 enforceable against the Class Members?
 - c) Are the Class Members entitled to compensatory and/or punitive damages and, if so, in what amount?
 - d) Are the Class Members, as consumers, entitled to punitive damages under the CPA, and if so, in what amount?
 - e) Are the Defendants jointly and severally liable for the damages claimed?

II. The Evidence Defendants Seek to Adduce Evidence

6. The facts alleged in the Application are not only incomplete, but also misleading;
7. As a result, clarification and additional information from the Defendants is necessary in order to assist the Court in determining whether the authorization criteria of article 575 CCP are met and, in particular, whether Plaintiffs have demonstrated an arguable case (art. 575 (2) CCP), whether there are any common questions and whether the composition of the class justifies the authorization of the proposed class action (art. 575 (1) and (3) CCP);

A. The Affidavit of Mtre Rachel Couture

8. This is not a case in which the number of class members and their identity are unknown to the parties. Also, all steps were taken by the Defendants to return the deposits to the class members and no damages were suffered in that regard;
9. The affidavit of Mtre Rachel Couture, communicated herewith as **Exhibit R-1**, together its supporting document, **Exhibit RC-1**, are useful for the Court for the following different reasons:
 - a) To demonstrate that the required steps were taken to refund the deposits to the Class Members;
 - b) To demonstrate that almost all Class Members (except for two (2), who are identified) have received their deposits;
 - c) To confirm that the Defendants know the identity and the contact information of all class members;

- d) To confirm that all cheques returning the deposit indicate “paiement final”;
10. Defendants intend to raise arguments at the authorization hearing that this case does not meet the criteria for authorization because class members are clearly identified, the contract between the parties was duly respected and that, in addition, no damages were suffered by the class;
 11. The affidavit of Mtre Rachel Couture and its supporting document, Exhibit RC-1, will greatly assist the Court in determining whether the Applicant has met his burden of demonstrating an arguable case (article 575(2) CCP) against the defendants and whether the criteria of article 575 (1) and (3) CCP are met;

B. The Affidavit of Krysta Greenberg

12. At para, 33 of the Application, it is alleged that Ms. Greenberg, a representative of Elad Canada, “admitted” that the contracts were cancelled because it would be “more lucrative to lease the units”;
13. Notwithstanding the fact that is complete hearsay, the Court will benefit from the affidavit of Ms. Krysta Greenberg, who no longer works for Elad Canada Realty Inc. and indicates that she did not say those words, as appears from the affidavit of Ms. Krysta Greenberg, communicated herewith as **Exhibit R-2**;
14. This affidavit is useful to contradict para. 32 of the Application and Exhibit P-21, which are clearly false and ill-founded;
15. This is the type of evidence that clearly contradicts allegations made in the Application and inadmissible hearsay, the whole which needs to be corrected in view of the authorization hearing;
16. The affidavit of Ms. Greenberg also explains that Elad Canada Inc. was not, to her knowledge, involved in the Harmonia Project;
17. Notwithstanding the Defendants contestation of the authorization of the proposed class action, should it be authorized, there is no reason for Elad Canada Inc. to be a named defendant;
18. The affidavit of Ms. Krysta Greenberg will assist the Court in determining whether the Applicant has met its burden of demonstrating an arguable case (article 575(2) CCP) against the defendants;

C. The Affidavit of Rafael Lazer

19. The Application makes blunt allegations against all of the Defendants and indicates that the reason why the Harmonia Project was transformed into a rental project is because it was more lucrative to do so;

20. The affidavit of Mr. Rafael Lazer, communicated herewith as **Exhibit R-3**, together with its Exhibits RL-1 and RL-2 proves these allegations are frivolous and proves *inter alia* that:
- a) Elad Canada Inc. should not be included in this class action;
 - b) In the context where Les Développements Cité-Nature (Phase IV) Inc. needed to resume construction on a short timeline in order to work within the permits issued by the City of Montréal and of its contract with Magil Construction Est du Canada Inc, (both of which required work to commence within a very short period of time) and in which it did not have sufficient sales to receive condo construction financing in accordance with reasonable equity requirements, Les Développements Cité-Nature (Phase IV) Inc. had no choice but to transform the Harmonia Project into a rental project;
 - c) The Harmonia Project was not cancelled because it would be “more profitable to lease the units”, contrary to what is alleged by the Applicant. In fact, significant costs were incurred as a result of the cancellation of the Harmonia Project;
 - d) The deeds of hypothec filed by the Applicant as Exhibit P-20 and signed on or after April 29, 2021 are not related to the financing of the construction of the Harmonia Project, but are rather related to the purchase of the shares of Elad Canada Realty Inc. by Rester Ontario Investments Inc;
21. The affidavit of Mr. Rafael Lazer will assist the Court in determining whether the Applicant has met its burden of demonstrating an arguable case (article 575(2) CCP) against the defendants;

D. The Affidavit of Mr. Shai Ben Haroosh

22. The affidavit of Mr. Shai Ben Haroosh, communicated herewith as **Exhibit R-4**, together with its Exhibits **SBA-1 to SBA-4** prove the context in which Les Développements Cité-Nature (Phase IV) Inc. needed to resume the construction work, as a result of the permits issued by the City of Montréal and of its contract with Magil Construction Est du Canada Inc.;
23. Those facts, read in conjunction with the facts alleged in the affidavit of Rafael Lazer, clearly explain the context in which financing was required by Les Développements Cité-Nature (Phase IV) Inc. and that the delays associated with the construction work performed were not the result of an illicit scheme as alleged by the Applicant;
24. All of the affidavits and supporting exhibits that the Defendants seek leave to adduce are essential to the Court’s determination of whether the Applicant has met

its burden of demonstrating an arguable case (article 575(2) CCP) against the Defendants and whether the criteria of article 575 (1) and (3) CCP are met;

III. The Examination of the Representative Plaintiff Jacques Leduc

25. The Defendants intend to argue at the authorization hearing that Mr. Leduc does not have a valid cause of action, that there are no common questions in his matter and that there is in fact no potential group of putative class members who would be in the same position as Mr. Leduc;
26. The deposition of Mr. Leduc will assist the Court in order to:
 - e) Obtain details regarding Mr. Leduc's personal cause of action, more specifically regarding the decision to move to a new location and to sell furniture more than three (3) years before what he alleges to be the anticipated move-in date (para. 17 of the Application);
 - f) Obtain details and the supporting documentation regarding the damages claimed by Mr. Leduc, on his own behalf as well as for the putative class members, for which no supporting evidence has been filed (para. 50 and following of the Application);
 - g) Seek information regarding the steps taken by Mr. Leduc to identify the members of the class;
 - h) Understand on which basis Mr. Leduc claims that "all members are in the same situation that he is" (para. 55 and following of the Application);
27. The undersigned lawyers estimate that the examination of Mr. Leduc will not exceed two (2) hours and suggest that it be held out of court, prior to the authorization hearing;
28. The above stated evidence is essential to a proper determination of whether the Applicant's proposed class action should be authorized against the Defendants;
29. The present Application for Leave to Adduce Relevant Evidence is well founded in fact and law.

FOR THESE REASONS, MAY IT PLEASE THE HONOURABLE COURT TO:

- A. GRANT** the present Application for Leave to Adduce Relevant Evidence;
- B. ALLOW** Defendants to file the Affidavit of Mtre Rachel Couture, as evidence into the Court Record as **Exhibit R-1**, together with **Exhibit RC-1**;

- C. **ALLOW** Defendants to file the Affidavit of Ms. Krysta Greenberg into the Court Record as **Exhibit R-2**;
- D. **ALLOW** Defendants to file the Affidavit of Rafael Lazer, as evidence into the Court Record as **Exhibit R-3**, together with **Exhibits RL-1 and RL-2**;
- E. **ALLOW** Defendants to file the Affidavit of Shai Ben Haroosh, as evidence into the Court Record as **Exhibit R-4**, together with **Exhibits SBA-1 to SBA-4**;
- F. **GRANT** Defendants leave to examine the Applicant Jacques Leduc out of Court, prior to the authorization hearing, regarding the issues outlined at paragraph 26 hereinabove;
- G. **RESERVE** Defendants' right to submit the transcript of the Applicant Jacques Leduc's examination and the exhibits and documents produced during the examination or as undertakings, in whole or in part, as evidence at the authorization hearing;
- H. **THE WHOLE**, with cost to follow suit.

Montréal, December 14, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

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TAKE NOTICE that the *Application by the Defendants for Leave to Adduce Relevant Evidence* will be presented for hearing and adjudication before Honourable justice Donald Bisson of the Superior Court, at a date and time to be determined by the Court.

KINDLY GOVERN YOURSELF ACCORDINGLY.

Montréal, December 14, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

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**LES DÉVELOPPEMENTS CITÉ-NATURE
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Defendants

LIST OF EXHIBITS

- Exhibit R-1 Affidavit of Rachel Couture;
- Exhibit R-2 Affidavit of Krysta Greenberg;
- Exhibit R-3 Affidavit of Rafael Lazer;
- Exhibit R-4 Affidavit of Shai Ben Haroosh.

Montréal, December 14, 2021

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Objet: NOTIFICATION: Jacques Leduc v. Elad Canada Inc. et al. (500-06-001158-217) /
Application by Defendants for Leave to Adduce Relevant Evidence and R-1 to R-4 [BLG-
DOCUMENTS.FID8017466]
Pièces jointes: Application for leave to adduce evidence- Leduc class action(126322382.2).pdf; Exhibit
R-3.pdf; Exhibit R-4.pdf; Exhibit R-1.pdf; Exhibit R-2.pdf

NOTIFICATION BY ELECTRONIC COURIER TRANSMISSION SLIP (ARTICLE 134 C.P.C.)

DATE:

Montréal, December 15, 2021

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Parties: Jacques Leduc v. Elad Canada Inc., Elad Canada Realty Inc., Les Développements Cité-Nature (Phase IV) Inc.

Nature of the document: **Application by Defendants for Leave to Adduce Relevant Evidence and Exhibits R-1 to R- 4 (Art. 574, 575, 18 and 19 CCP)**

Number of pages: **-11- (excluding exhibits)**
(attachments only)



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LEAVE TO ADDUCE RELEVANT
EVIDENCE AND EXHIBITS R-1 TO R-4
(Articles 574, 575, 18 and 19 CCP)**

Amount: \$

Nature: Class action

Code:

ORIGINAL

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