CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-06-000904-181

S U P E R I O R C O U R T
(Class Actions)

MARC BOUDREAU

-and-

N.P.

Petitioners

-vs.-

ATTORNEY GENERAL OF CANADA
- and -
PROCUREUR GÉNÉRAL DU QUÉBEC
- and -
LES SOEURS DE LA PROVIDENCE
- and -
LES SOEURS DE MISÉRICORDE, DE MONTRÉAL
- and -
LES SOEURS GRISES DE MONTRÉAL
- and -
LES PETITES FRANCISCAINES DE MARIE
- and -
LES SOEURS DU BON-PASTEUR DE QUÉBEC
- and -
CONGRÉGATION DES SOEURS DE NOTREDAME AUXILIATRICE
- and -
CLERCS DE SAINT-VIATEUR DU CANADA
- and -
SOEURS DE LA CHARITÉ DE QUÉBEC
- and **-**
LES SOEURS DOMINICAINES DE LA TRINITÉ

Respondents

PETITIONERS' PLAN OF ARGUMENT FOR CLASS ACTION AUTHORIZATION
(Arts. 574 f.f CCP)

I. OVERVIEW

1. Jurisprudence resonates with the Supreme Court's affirmation that class action is the most effective procedural vehicle of access to justice for victims of systemic abuse, given the enormous obstacles victims face in individual actions and that victims must be encouraged to enforce their rights;

- *Infineon Technologies AG v. Option consommateurs* [2013] 3 SCR 600, para. 60, ("*Infineon")* [TAB 1]
- *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, paras. 122, 133, 137, 143 ("J.J") [TAB 2]

2. The Petitioners Mr. Marc Boudreau and Ms. N.P. seek leave to bring a class action in civil liability against the Respondents on behalf of persons who, like them, were physically, psychologically, emotionally, and/or sexually abused in Quebec by a member or employee of a religious congregation in the context of the victims' sojourn in the orphanages under the Respondents' administration, in the case of the Congregation Respondents, and at the directive, financing, and facilitation of same, in the case of the governmental Respondents;

3. The group to which the Petitioners belong has thus far already counted over a thousand victims, falling within the following group description contained in the Re-Amended Motion for Authorization ("Motion") (paras. 1.1 and 1.1.1):

> *1.1. All persons, and estates of deceased persons, who were victims of either psychological, and/or physical and/or sexual abuse, and/or subjected to persecution and/or human experimentation at any of the institutions operated/administered or directed by the Respondent congregations in the province of Quebec between the years of 1935 and 1975, inclusively.*
>
> *1.1.1. Within this Class, three Sub-Groups are identified as:*
> *(i) persons who were unaware of the Programme national de réconciliation avec les orphelins et orphelines de Duplessis (PNROOD);*
> *(ii) persons aware of PNROOD but not having participated therein;*
> *(iii) persons who participated in PNROOD.*

4. Due to the horrific fact that abuse inflicted on children by clergy was an epidemic during our province's darkest times, there have been numerous class actions addressing these issues – among those, two involved class descriptions overlapping with the action at hand, and the Petitioners have respectfully excluded the putative members of those actions from their class description (para. 1.1.2);

A) Mr. Marc Boudreau

5. Mr. Boudreau was severely beaten on repeated occasions during his stay at the Monastery of Huberdeau in Argenteuil, Quebec, where violence was often accompanied by measures reserved for the mentally ill, such as being placed in a straightjacket and frequent solitary confinement (paras. 2.5 to 2.8);

6. Similar treatment was inflicted on him at the Roberval monastery in Lac Saint Jean, with added humiliation tactics of being forced to appear in common areas in nothing more than underwear and enduring sexual molestation by his guard-post monitor (para. 2.9);

7. The subsequent sojourn at Berthollet imposed prison-like conditions on Mr. Boudreau, however this paled in comparison with the atrocities that ensued at Mont Providence Psychiatric Hospital in Rivières des Prairies in Montreal, where instructors, namely Professor Béliveau, took sadistic pleasure in either exposing Mr. Boudreau to violence at the hands of his peers or inflicting violence on him directly (para. 2.11);

8. The foregoing is compounded by the imposed designation of mental retardation on children like Mr. Boudreau which was a strategy promulgated by the congregational and governmental Respondents, yielding financial gains at the cost of epidemic mistreatment and resulting long-lasting trauma for the children falsely labeled as such;

B) Ms. N.P

9. Ms. N.P's experience at the L'Orphelinat L'Immaculée à Chicoutimi, Quebec, mirrored Mr. Boudreau's in terms of witnessing atrocities commonly inflicted on the child residents of orphanages;

10. Ms. N.P was spared the sexual molestation suffered by her putative co-Representative, however she was subjected to similar incidents of malnutrition, isolation, and frequent brutal beatings with no explicable reason nor provocation (paras. 2.38 to 2.40);

11. Both Petitioners experienced fear, confusion, anguish, as well as, depleted sense of self-worth and a complete loss of trust in authority, particularly in men;

12. Mr. Boudreau suffered and continues to suffer serious ramifications of his trauma. He oscillates between waves of rage and disgust and bouts of overwhelming shame and sadness. His general distrust and insecurity have made him incapable of expressing love and affection – he has had tremendous trouble maintaining relationships (paras. 2.16 to 2.18);

13. Ms. N.P has found herself in a domestically abusive relationship with a much older man – a pattern not uncommon for victims of childhood violence (para. 2.45). She has been diagnosed with various forms of post-traumatic stress disorder which manifests itself through flash-backs, intrusive thoughts, trouble breathing, nausea, insomnia, loss of appetite, occasional agora-phobia and self-isolation, sense of hopelessness, low self-worth, crying spells, memory problems, suicidal thoughts and past symptoms of mania and rage (paras.2.50 to 2.51);

14. Ms. N.P has struggled with alcoholism for most of her life, which took hold in her early adolescence (para. 2.44) and despite vigorous efforts, she experiences severe social anxiety and has never been able to sustain employment (para. 2.45 to 2.47);

15. The childhood abuse suffered by both Mr. Boudreau and Ms. N.P did not constitute isolated acts. There has been systemic institutional abuse by clergy and other congregational employees in Quebec over several decades, affecting innumerable vulnerable victims;

16. To succeed in a civil liability action, a claimant must prove fault, harm and a causal link between the two (Art. 1457 CCQ);

17. In *M. (K.) v. M. (H.)*, Hon. La Forest J., writing for the Supreme Court majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse was often elusive;

- *M.(K.) v. M.(H.)* [1992] 3 SCR 6, ("M(K)") [TAB 3]

18. In *J.J.* – a case dealing with a class action on behalf of victims of sexual abuse by a religious congregation in Quebec, the Supreme Court has held that "sexual assault has *always* been a fault that automatically causes serious injury" – as such, all three elements of the civil responsibility are thus reunited as soon as there is a sexual assault;

- *J.J.*, para. 64

19. Consequently, whether the Respondents acted knowingly by allowing the abusive conduct and child exploitation to be perpetuated against the Petitioners and the other group members, or if they were grossly negligent by willfully blinding themselves in the presence of systemic sexual assault, matters little. In either case, the Supreme Court affirms that they must be held responsible:

> "[…] in order to succeed in his action, J.J. does not need to prove that the Oratory, or more specifically its directors, had *actual* or *subjective* knowledge of the assaults that are alleged to have been committed at the Oratory. Civil fault under Art. 1457 *C.c.q* "is the difference between the agent's conduct and the abstract, objective conduct of a person who is reasonable, prudent and diligent" […] Because J.J.'s allegations, like the table of victims, show that what is at issue in the instant case is not a single event or an isolated incident, but alleged assaults on multiple victims at the Oratory on a

> regular basis over a period of many years, it is entirely possible that the trial judge will conclude that the Oratory, or more specifically its directors, *ought to have* known about the assaults that are alleged to have been committed at the Oratory, and that the directors were negligent in not putting a stop to them […]"

- *J.J.*, para 70

20. Due to the fact that the Petitioners were childhood victims of abuse, they have a well-recognized legal right to obtain compensatory damages for the damages suffered as well as punitive and exemplary damages;

21. Furthermore, as Respondents are legally liable for such damages as the institutional administrators and facilitators of the situs, the occurrence, and the institutionalized culture of abuse, in the case of the Congregations, and as financiers and facilitators of same, in the case of the provincial and federal governments;

22. This legal syllogism applies to all members of the group;

23. At the authorization stage, the court must therefore determine whether:

(a) there is at least one question of law or fact that is identical, similar or related to the class members (Art. 575 (1) CCP);

(b) it is possible or defensible that the Respondents be held liable to the class members for the serious harm automatically caused by the sexual, physical and psychological assaults perpetrated by the congregations in the context of the orphanages (Art. 575 (2) CCP);

(c) the composition of the group renders difficult or impractical the application of the rules on the mandate to sue on behalf of another person or the joinder of proceedings (Art. 575 (3) CCP) and

(d) Mr. Boudreau and Ms. N.P are able to ensure adequate representation of group members (Art. 575 (4) CCP);

24. Considering the decision of the Supreme Court in *J.J.* confirming that all the criteria of Art. 575 CCP are satisfied in a class action of this nature and considering that the Superior Court has already accepted on merit a class action against a religious congregation on behalf of victims of sexual assault in the case of *Tremblay* c. *Les Rédemptoristes et al.*, the Petitioners respectfully request the court authorize the proposed class action against the Respondents, and thus allow the many victims of heinous crimes, which have been suffering in silence for decades, to finally have access to the justice they deserve;

- *Tremblay c. Lavoie*, 2014 QCCS 3185 ("*Rédemptoristes")* [TAB 4]

II. LEGAL FRAMEWORK OF CLASS AUTHORIZATION

A) Authorization Principles

25. The National Assembly has legislated the class action procedure, in particular in order to facilitate access to justice and conserve judicial resources, as the Court of Appeal has recognized in *Pharmascience Inc. v. Option Consommateurs*:

> "Ce régime n'est pas exceptionnel. C'est une mesure sociale qui favorise l'accès à la justice en permettant une réparation comparable et équitable à tous les membres sans qu'il y ait surmultiplication de recours similaires, et dans un cadre qui assure l'équilibre des forces entre les parties."

- *Pharmascience Inc. c. Option Consommateurs*, 2005 QCCA 437, at para. 20 ("*Pharmascience")* [TAB 5]

26. Quebec's embrace of this importance for promotion of access to justice for victims of sexual violence has been exemplified in the appeal level decision of the J.J case:

> Par le passé, l'action collective a bien servi l'intérêt de différents groupes dont notamment ceux des consommateurs. Ces derniers ont pu profiter des régimes de présomptions que leur accorde la Loi de sorte à obtenir des réparations adéquates qui auraient pu difficilement être envisageables sur la base d'une initiative individuelle. De la même manière, il ne devrait exister aucune raison susceptible d'entraver l'efficacité de l'action collective en matière de responsabilité pour sévices sexuels.
> Le double objectif poursuivi par cette procédure que sont la *dénonciation* et *l'indemnisation* commande une approche contextualisée basée sur des conditions propices à l'émergence de la vérité. Les normes juridiques rattachées aux conditions de l'article 575 *C.p.c*. telles qu'identifiées par la Cour suprême dans *Infineon* et *Vivendi,* lorsque correctement appliquées, favorisent l'atteinte de ces buts.
>
> (emphasis ours, references omitted)

- *J.J. c. Oratoire Saint-Joseph du Mont-Royal*, 2017 QCCA 1460 at para 48 ("J.J. QCCA") [TAB 6]

B) Action Filtration and the Role of the Court

27. The Supreme Court confirmed that the authorization stage is limited to a filtering mechanism to rule out frivolous or unsustainable claims, and without prejudging the substance of the dispute:

> "The judge's function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits […] However, the law does not impose an onerous burden on the applicant at this stage, as he or she need only establish a "*prima facie* case", or an "arguable case" […] Thus, all the judge must do is decide whether the applicant has shown that the four criteria of art. 1003 C.C.P. are met. If the answer is yes, the class action will be authorized. The Superior Court will then consider the merits of the case. In considering whether the criteria of art. 1003 are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted."
>
> (emphasis ours, references omitted)

- *Vivendi Canada Inc. c. Dell'Aniello*, [2014] 1 RCS 3, ("Vivendi") [TAB 7]
- *Infineon*

28. The application for leave is therefore not intended to prejudge the merits of the case and is not part of the trial. The court must only decide whether the four conditions of Art. 575 CCP are met;

C) Large, Liberal Interpretation and Proportionality

29. The Supreme Court has repeatedly confirmed that the social nature of class actions which ensures that the rules relating to the interpretation thereof must be large and liberal in order to further the objectives of this procedure:

> "As this Court noted in *Marcotte*, at para. 22, the courts have, by interpreting and applying the criteria of art. 1003 *C.C.P.* broadly, favoured easier access to the class action."

- *Vivendi*, para. 55
- *Infineon*, para. 60

30. This approach directs that in case of doubt or ambiguity, the courts must choose the interpretation that favors the exercise of the remedy;

31. The four criteria listed in Art. 575 CCP. are exhaustive and the principle of proportionality (Art. 18 CCP) or the common law rule of the preferable procedure do not constitute additional criteria allowing the judge to deny authorization to an action that also meets the four criteria:

> *Marcotte* confirmed the importance of the principle of proportionality in civil procedure, and as a source of the courts' power to intervene in the management of a case. In the

> class action context, however, the judge's discretion in respect of the application of the four criteria of art. 1003 *C.C.P.* must be reconciled with the power provided for in art. 4.2 *C.C.P.* […] In our view, insofar as the four criteria set out in art. 1003 *C.C.P.* are exhaustive, and it is our opinion that they are, the principle of proportionality must be considered in the assessment with respect to each of these criteria. The proportionality of the class action is not a separate fifth criterion.
>
> This conclusion is supported by the wording of the legislation and by the case law. In enacting the class action provisions of the *C.C.P.*, the Quebec legislature did not consider it appropriate to require that a class action be the "preferable" procedure for the resolution of the dispute or the common issues, which is the criterion found in the legislation of other provinces. Caution therefore dictates that such a criterion not be introduced indirectly into Quebec's rules of civil procedure. Article 1003 is clear: the motion judge must authorize the class action if he or she is of the opinion that the four criteria are met. The judge does not have to ask whether a class action is the most appropriate procedural vehicle.
>
> (emphasis ours, references omitted)

- *Vivendi* at paras. 66-67

III. APPLICATION OF AUTHORIZATION CRITERIA

A) Art. 575 (1) Common Issues

32. The Supreme Court of Canada and the Quebec Court of Appeal impart the following concerning the first test of Art. 575 CCP:

(a) The threshold for establishing common issues is extremely low;

- *Infineon*, para. 72
- *J.J.*, para. 44
- *Sibiga* c. *Fido solutions inc.*, 2016 QCCA 1299, para. 123 ("*Sibiga"*) [TAB 8]

(b) An aspect of the dispute must demonstrably lend itself to a common decision and that once that aspect has been decided, the parties will have settled a significant part of the dispute, thus only a single question of law or of fact which is identical, related or similar is sufficient to satisfy this first criterion;

- *Vivendi*, para. 58
- *J.J.*, para. 44

(c) It is not mandatory that the proposed issue be inevitably common to all members of the group – as the caselaw provides, it may also be “connected”;

- *J.J.*, para. 44
- *Infineon*, para. 72
- *Vivendi*, para. 57

d) Where the common question does not allow a complete resolution of the dispute and it may possibly give rise to small trials at the stage of the individual settlement of the claims, this does not preclude a class action suit;

- *J.J.*, para. 15
- *Vivendi*, paras. 42, 58

e) It is not required that the common question call for a common answer – this first authorization criterion can be fulfilled even if nuanced answers must be provided to the common questions for the various members of the group;

- *Vivendi*, paras. 45, 46, 59
- *Sibiga*, para. 128

(f) It is not required that each class member has a personal cause of action against each Respondent;

- *Infineon*, para. 73
- *Sibiga*, paras. 123 et 128
- *J.J.*, para. 44

(g) It is erroneous at law to emphasize the differences and disparities between the members of the group and lose sight of the test to seek an issue that would significantly advance the debate:

> “The judge did not apply this test of a single, significant common question but focused instead on what he presumed to be disparate contractual arrangement amongst members of the class that, he wrote, precluded him on finding commonality. Again, in Vivendi the Supreme Court warned against this kind of analysis that risks overemphasizing variation between members of the class and losing sight of one or more common questions that will advance the class action...”

- *Sibiga*, para. 123
- See also *Vivendi*, para. 60

33. In light of the foregoing, the Petitioners' action raises several identical, similar or related issues as identified in their Motion;

34. These issues, analogous to those confirmed in *J.J.* where, the Supreme Court stated that the trial judge erred in concluding that the test of Art. 575 (1) CCP (formerly Art. 1003(a) CCP) was not met by wrongly focusing on the differences in the situations of the group members:

> The Superior Court judge also stressed that there were differences between the situations of the class members, given that [TRANSLATION] "there could be an indeterminate number of places where wrongful acts are alleged to have been committed": para. 120. In addition, he stated that "[a]ll the other cases of the same nature . . . in which authorization to institute a class action was granted concerned a single institution in which acts had allegedly been committed by one or more well-identified persons": para. 119 […] As the judge himself noted at para. 119 (footnote 39) of his reasons, however, there is at least one exception. In *Cornellier v. Province canadienne de la Congrégation de Ste-Croix*, […] the Superior Court authorized the institution of a class action in a case that concerned sexual abuse, by members of the Congregation, of students who had attended Collège Notre-Dame, Collège Saint-Césaire and École Notre-Dame-de-Pohénégamook.

- *J.J.*, *supra* note 1, para. 16;

35. The issues raised by the Petitioners are also similar to those authorized in several other class actions on behalf of victims of abuse by clergy:

- *Tremblay* c. *Les Rédemptoristes et al.*, 2010 QCCS 5945 (C.S.), para. 68
- *CCSMM c. The Clerics of St. Viator of Canada et al.* 2012 QCCS 1146 (C.S.), para. 131
- *A.* c. *Les Frères du Sacré-Cœur et al.*, 2017 QCCS 34, para. 154
- *Y.* c. *Les Servites de Marie et al.* 2018 QCCS 4889, para. 40
- *Association des jeunes victimes de l'Église* c. *Harvey et al*, para. 59

B) Art. 575 (2) Syllogism

The Supreme Court of Canada and the Quebec Court of Appeal impart the following concerning the second criterion of Art. 575 CCP:

(a) The threshold of proof of the plaintiff is low;

- *J.J.*, para. 61
- *Infineon*, para. 59

(b) In considering the facts as proven, the role of the judge is to determine whether the plaintiff has established a mere opportunity to succeed on the merits, not even a "realistic" or "reasonable possibility";

- *J.J.*, para. 58;

(c) The authorization stage is therefore used only to filter out only the most frivolous and unsubstantiated claims and it is now "well established that at the authorization stage, the role of the judge is to exclude only 'Frivolous,' 'manifestly ill-founded' or 'unsustainable' [claims] (...) or [those] with no chance of success";

- *Sibiga*, para. 50;
- *J.J.*, para. 56;
- *Infineon*, para. 61;

The Petitioners submit that the facts of their Motion justify, or at least appear to justify, the conclusions in compensatory and punitive damages against the Respondents, because:

(1) it is established at law that a religious congregation can be held responsible for sexual assaults perpetrated by its members under both the vicarious liability regime and under the regime of direct responsibility;

(2) The sexual, physical and psychological abuses were perpetrated in orphanages administered at least one of these Respondents;

(3) The federal and provincial governments created the conditions and financed the system which fostered a culture of abuse;

i. The legal regime of vicarious liability with respect to the Congregations

36. In paragraphs 3.6 to 3.8 of their Motion, the Petitioners point to the responsibility of the congregational Respondents, which is not only direct but also falls under the legal designation of vicarious liability for the abuses perpetrated by their members and employees;

37. In accordance with Arts. 1463 and 1464 CCQ, the impleaded religious orders are, as principals, responsible for the injurious acts of their agents and servants in the performance of their duties and the fact that abuse inflicted on children by the latter was illegal and unauthorized does not disturb that responsibility;

38. In the case of *K.L.B. v. British Columbia*, the Supreme Court held that for a party to be vicariously liable two elements must be established:

1) that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate; and

2) that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise.

- *K.L.B. v. British Columbia* [2003] 2 SCR 403, para. 19 ("KLB") [TAB 9]

39. Again, the threshold for the sufficiency of this connection at the authorization stage is low;

40. The legal syllogism put forth by the Petitioners is analogous to that which has been retained in similar cases won on merit:

a) In *John Doe v. Bennett*, the Supreme Court of Canada held the religious organization (bishop's diocesan corporation) vicariously (as well as directly) responsible for the sexual assaults perpetrated by a priest on boys, affirming that the relationship between a priest and his religious organization is similar to an employer-employee, although the manifestations of authority far exceeded those found in the latter model;

- *John Doe v Bennett* [2004] 1 RCS 436, paras. 17 to 33 ("*John Doe"*) [TAB 10]

b) In *Redemptorists*, the Superior Court allowed meritorious class action and held the religious congregation vicariously responsible for the sexual assaults perpetrated by its priests on the members of the group, emphasizing through detailed analysis the broad power that priests exercise over young people and how this power is intrinsically linked to the religious status conferred by the congregation;

- *Les Rédemptoristes*, paras. 120 – 169;

c) In *Blackwater v. Plint*, it was also de jure established that several corporations acting in partnership, as is the case with the Respondents, can all be considered the employer or principal of the aggressor and be held liable for the acts of its agents;

- *Blackwater* v. *Plint*, [2005] 3 RCS. 3 ("Blackwater") [TAB 11]

d) In *Bazley v. Curry*, Justice McLachlin, in her emphatic unanimously supported decision echoed the reasoned postulate that "if the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children" particularly in light of the fact that "[i]n many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven

matter";

- Bazley v. Curry, [1999] 2 SCR 534, at paras. 32 and 33 ("Bazley") [TAB 12]

41. In one of the lower trial decisions in *Blackwater*, Justice Brenner, as he then was, explained the concept of vicarious liability as espoused by doctrine:

> "The doctrine of vicarious liability is described by Professor Atiyah in The Law of Torts (London; Butterworths, 1967) at p. 1:
>
> > Vicarious liability in the law of tort may be defined as liability imposed by the law upon a person as a result of 1) a tortious act or omission by another, 2) some relationship between the actual tortfeasor and the Respondent whom it is sought to make liable, and 3) some connection between the tortious act or omission and that relationship. In the modern law there are three and only three relationships which satisfy the second requirement of vicarious liability namely that of master and servant, that of principal and agent, and that of employer and independent contractor.
>
> Vicarious liability is the imposition of liability without fault. It is entirely dependent upon the relationship between the wrongdoer and the person or entity to whom a party seeks to attribute vicarious liability.

- *Blackwater,* paras 108 and 109

42. It cannot escape noting that the very term "vicar" is by definition and etymology is intrinsically denotative of both ecclesiastical duty and its inherent agency for the acts of the church, and as such all acts performed by clergy or laity in charge of religious duties, are *de facto* acts of the religious organization which bestowed such powers on same:

> Definition of *vicar*
> **1:** an ecclesiastical agent: such as
> **a:** a Church of England incumbent receiving a stipend but not the tithes of a parish
> **b:** a member of the Episcopal clergy or laity who has charge of a mission or chapel
> **c:** a member of the clergy who exercises a broad pastoral responsibility as the representative of a prelate
> **2:** one serving as a substitute or agent *specifically***:** an administrative deputy

- Merriam Webster Dictionary

43. Members of the clergy are thus vicars of the ecclesiastic power of the religious organizations and thus inversely the latter are vicariously responsible for the acts emanating from those members;

ii. The legal regime of direct liability with respect to the Governments

44. In their Motion, the Petitioners point to the concerted conduct of the federal and Quebec governments which resulted in the creation and institutionalization of conditions leading to the abuse and mistreatment of the children, now known as the Duplessis Orphans (paras. 1.4 to 1.7 and 3.1 to 3.5);

45. The responsibility of the governmental Respondents concerns not only the Petitioners' experiences of abuse at the orphanages but also extends to the mistreatment and torture suffered by the group members at the psychiatric institutions, be they operated by the state, or contracted out to the religious orders;

46. In *K.L.B. v. British Columbia*, the Supreme Court pointed to the "careful parent test" as the standard for the duty of care incumbent on government in the context of care for children – in that case, foster care;

47. The test, the court held, does not make the government a guarantor against all harm but does impose responsibility for harm sustained by children in foster care, when, it is reasonably foreseeable that the government's conduct would expose children to harm;

- *K.L.B. v. British Columbia*, [2003] 2 SCR 403at para. 14 ("KLB") [TAB 13]

48. Although the above test resided within the auspices of the applicable legislation, in that case the *Protection of Children Act*, it cannot be stipulated that absent any specific statutory provision, the duty to "best meet the needs of a child" ceases to weigh on the state;

49. In KLB, the court focused on foreseeability as the clinching factor:

> It is reasonably foreseeable that some people, if left in charge of children in difficult or overcrowded circumstances, will use excessive physical and verbal discipline. It is also reasonably foreseeable that some people will take advantage of the complete dependence of children in their care, and will sexually abuse them. To lessen the likelihood that either form of abuse will occur, the government must set up adequate procedures to screen prospective foster parents. And it must monitor homes so that any abuse that does occur can be promptly detected.

- *KLB* at para. 15

50. Where caselaw establishes that the government is directly responsible for the type of care received by children in individual, diverse, and private households permitted by the former to provide foster care, the responsibility becomes that much more

pronounced where the care is institutionally provided on a mass scale by organizations mandated by the government;

51. Because the Quebec government received much more generous subsidies from the federal government for building hospitals than to support orphanages, this funding disparity provided a strong monetary incentive for reclassification of orphans as mentally deficient;

52. Since orphans and unwanted children are and were by default under the guardianship of the state, both levels of government had a binding duty to ensure that their care is safeguarded and free from any risk of abuse;

53. According to the research cited in the Motion, conducted in 1999 by Prof. Léo-Paul Lauzon, the Quebec government and the Catholic Church made substantial profits by falsely certifying thousands of Quebec orphans as mentally ill;

54. The research estimated that religious organizations received $70 million in subsidies by claiming the children as "mentally deficient" while the government saved $37 million simply by having one of its orphanages re-designated from an educational institution to a psychiatric hospital (para. 1.6);

55. The state connection to operations of institutions, as sites of abuse, has been addressed in a class action certification context by Newfoundland's Court of Appeal in the case of *Canada (Attorney General) v. Anderson*:

> "The pleadings in the present case allege that Canada, by its funding of education for aboriginals in this Province and by its participation in management committees overseeing the expenditure of funds, involved the federal government sufficiently in the management and operations relating to the residential schools attended by the respondents in this Province so as to give rise to a common law duty of care to the respondents, which Canada breached."

- *Canada (Attorney General) v. Anderson*, 2011 NLCA 82 at para. 12 ("Anderson") [TAB 14]

56. In upholding the certification, the above court reasoned that the only factor challenging the connection of the federal government to the abuse endured by children in residential schools, was the operational/policy question – a matter best left to the trial on the merits:

> Establishing a breach of duty in the case of governmental malfeasance has been constrained by the threshold requirement that claimants identify a negligent act or omission in an operational context rather than in a policy making mode.
>
> […]

> Whether Canada moved from the policy stage to assume operational and administrative obligations is a matter for trial. At a preliminary stage of a class action proceeding it is difficult to make these determinations.

- *Anderson* at paras. 72 and 77

57. The financial benefits gained, the intentional manipulations via medical mislabeling of society's most vulnerable members, the contractual arrangements both between the federal and Quebec governments, as well as those governing the mandates for care of orphans and the care for the mentally ill in Quebec between the provincial government and the religious orders, all create a direct line of liability for the resulting atrocities, which by their prevalence could only be defined as 'institutionalized culture of abuse';

58. The direct liability concerning the abuse endured in the orphanages follows the syllogistic premise that: The state, as the primary guardian of orphaned or unwanted children, and also the financier of their care, thus had a duty to guard those children from harm – the Duplessis Orphans were at the mercy of the state, which mandated the congregational Respondents with their care but provided conditions for foreseeable abuse of this responsibility, thus, the state is responsible for the harm and abuse suffered;

59. The liability concerning the group members' placement in psychiatric institutions is even more direct: The state financed, administered, or delegated the administration of mental health institutions – it thus has a direct responsibility to all those who suffered mistreatment and abuse therein;

C) Art. 575 (3) Impractical for application of rules of mandate

60. It is impossible, for the Petitioners to apply the rules of the mandate to litigate for others or to proceed via joinder of proceedings because thousands of children across Quebec have been housed or interned at the institutions where countless religious offenders worked and perpetrated abuse;

61. It has been recognized that where one child has been the victim of sexual and/or physical abuse at the hands of a superior or guarding in an institution, there is high likelihood that other children under the perpetrator's charge likely suffered a similar fate;

62. As the Supreme Court of Canada points out in *J.J.*, citing the words of the authors Langevin and Des Rosiers:

"[...] Si un enseignant ou un prêtre l'a agressée pendant un an, et qu'il a œuvré auprès de l'établissement pendant quelques années, n'est-il pas logique de conclure que d'autres enfants ont pu subir le même sort? Il importe peu à notre avis que cinq, dix, cinquante ou cent victimes se joignent au recours collectif une fois qu'il est autorisé. Bien qu'au départ, ce nombre ne puisse être déterminé, le recours collectif devrait être autorisé pour favoriser l'accessibilité à la justice aux victimes de violence sexuelle, qui doivent déjà surmonter d'énormes difficultés dans l'exercice de leurs recours individuels. D'ailleurs, certains tribunaux canadiens ont même conclu que le recours collectif est susceptible d'aider les victimes, qui sont particulièrement vulnérables."

(emphasis ours)

- *J.J.*, para. 69;

63. Moreover, victims of sexual assault have a great deal of difficulty reporting sexual assault, as the court in *Les Frères du Sacré Cœur* points out, under the pen of Justice Provencher:

"[…] Il est reconnu que les personnes ayant été victimes d'agressions sexuelles par un religieux dans un milieu scolaire et hiérarchisé ont énormément de difficultés à dénoncer les agressions sexuelles, notamment en raison de la honte, des séquelles psychologiques qui en découlent, des tabous, de la peur de ne pas être crues et de la crainte de confronter une institution idéalisée

Cette difficulté à dénoncer les agressions sexuelles rend difficiles, voire quasi impossibles, les échanges, discussions ou rencontres entre A. et les victimes, et entre les victimes elles-mêmes.

Considérant que les agressions sexuelles seraient survenues sur plusieurs décennies, que les élèves ayant fréquenté le CMSC durant ces années représentent un nombre important de personnes dont l'identité pour la plupart est inconnue de A., que de nombreux Frères ont œuvré au Collège, ainsi que la grande difficulté pour les victimes de dénoncer leurs agresseurs, le Tribunal est d'avis qu'il est difficile ou peu pratique d'appliquer les règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instances.

Cela est d'autant difficile ou peu pratique que les victimes ne se connaissent aucunement, vivent possiblement aux quatre coins de la province et même à l'extérieur de celle-ci et surtout, qu'un nombre important de celles- ci désire probablement conserver l'anonymat. Il faut accepter que les victimes d'agressions sexuelles, incluant le représentant d'un Groupe en matière d'action collective, bénéficient du droit à l'anonymat, à la confidentialité pour ainsi favoriser les dénonciations et la prise de recours visant l'indemnisation."

(emphasis ours, references omitted)

- *A.* c. *Les Frères du Sacré Cœur et al.*, 2017 QCCS 5394, paras. 115-118 ("Frères") [TAB 15];

64. On the subject of anonymity, the Supreme Court confirms that victims of sexual assault benefit from the right to anonymity and that their contacts are through counsel for the representative;

- *J.J.*, para. 32;

65. Finally, the fact that the definition of the group is broad does not constitute an obstacle to Art. 575 (3) CCP and a liberal and imaginative approach to the application of this condition must prevail;

- *J.J. QCCA,* para. 102;

D) 575 (4) Representative

66. In *Sibiga*, the Court of Appeal held that it is important not to discredit a potential representative who presents a cause of action that appears serious, whereas without him the group would be deprived of the exercise of a right:

> "No proposed representative should be excluded unless his or her interest or qualifications is such that the case could not possibly proceed fairly."

- *Sibiga*, para 97

67. Accordingly, in Infineon, the Supreme Court stipulated that adequacy of representation has to correspond to three key factors: interest, competence, and absence of conflict, in order to ensure equitable process, as articulated by Professor Lafond, and cited therein:

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

- *Infineon*, para. 149.

68. In this regard, the Supreme Court of Canada states in J.J.:

> "[...] These three criteria must be interpreted "liberally"; thus, "[a] proposed representative should not be excluded unless his interests or jurisdiction are such that it would be impossible for the matter to survive fairly"

- *J.J* para. 32

69. It is clear that the Petitioners' action is very serious and that without their representation of the class action, many victims who do not have the capacity to act will have no access to justice;

70. There is no conflict of interest, neither real nor apparent, between the Petitioners and the members of the group they aim to represent – their interests and their rights, much like their unfortunate stories, run parallel to those experienced by the putative class;

71. It has been in held that in Quebec, courts should lean toward authorization unless there is a presence of conflict of interest susceptible of creating an unfair result for any members of the Class, as pointedly observed by Justice Kasirer in *Sibiga*, there is no typicality model where it comes to the Representative:

> "[115] As a final point, counsel for the respondents argued that given the change in the law relating to standing since *Marcotte*, the rules on adequate representation in article 1003(d) should be more strictly enforced. In service of this argument, they point to *dicta* in the judgment of this Court in *Marcotte* where Dalphond, J.A. suggested that article 1003(d) stood as a protection against unmanageable or unfounded class actions against unconnected Respondents. Indeed, one might argue that the adequacy of representation, as well as the common question requirement, might prove to be especially important on the facts of a given case where there are members of the class who, unlike the representative, have no direct cause of action against one or another Respondent. But a new reading of articles 1003(a) and 1003(d) C.C.P. cannot be proposed in a manner that would revive the standing debate that *Marcotte* has put to rest. It might also be recalled in this context that Québec does not have a typicality test for the representative, and that article 1003(d) should not be interpreted to create one."

  - *Sibiga*, para. 115

72. On the subject of the Representatives' right of action against each and every impleaded Respondent, the Supreme Court has settled the issue in stating that granting the representative plaintiffs standing even where they do not have a personal cause of action against each Respondent was consistent with the criteria of Art. 575 CCP (formerly Art. 1003):

> Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action. […] As noted in *Infineon Technologies AG v. Option consommateurs*, this Court has given a broad interpretation and application to the requirements for authorization, and "the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation" […] Under this provision, the court has the authority to assess whether a proposed representative plaintiff could adequately represent members of a class against defendants with whom he would not otherwise have standing to sue.
>
> (emphasis ours, references omitted)

- *Bank of Montreal v. Marcotte* [2014] 2 SCR 725, para. 43 ("Marcotte") [TAB 16]

73. Lastly, with regard to class actions implicative of sexual assault, it has been recognized that the Representative does not have to make an inquiry or take personal steps to attempt to personally seek or identify members of the group, in light of the right to anonymity and professional secrecy enjoyed by victims of sexual assault;

- *J.J.*, paras. 31 and 32;

IV. PRESCRIPTION, PNROOD AND QUITTANCES

74. In an Application to Admit Relevant Proof ("Application"), granted by this court on June 14th, 2019, the Respondent, Attorney General of Quebec ("AGQ") has raised a number of issues pertaining to the admissibility criteria applicable to the case at hand, which warrant a pointed address;

75. The issues therein raised and supported by certain submitted evidence pertain *inter alia* to:

a) The similarity of the facts and issues in a prior decision in another Authorization case of *Kelly* vs. *La Communauté des Sœurs de la Charité de Québec* ("Kelly") and its impact on Arts. 575(1) and (2) CCP criteria;

b) The social and historical context as demonstrated by statements of Lucien Bouchard at the National Assembly on March 4th, 1999;

c) The publicity and scope of financial aid disbursements in virtue of the PNROOD programs as pertinent to the analysis of the appearance of right (Art. 575(2) CCP) as well as the existence of an identifiable class and a potential obstacle to suspend prescription based on an impossibility to act (Art. 575(1) CCP);

d) The PNROOD's conditions of a requisite release of all rights to sue and the acceptance of same by the recipients of the financial aid as relevant in placing the colour of right and issues of law into questions (Arts. 575(1) and (2) CCP);

e) The Minutes from a meeting relating the acceptance of the Quebec government's offer of PNROOD by the Comite des orphelins et orphelines institutionnalises de Duplessis ("COOID") as indicative of their consent to, and satisfaction with, same, as well as Mr. Boudreau's familiarity with the PNROOD programs and attempted participation therein – thus relating to the quality of Mr. Boudreau's Representative capacity, the prescription of his rights, and attributes of the putative class (Arts. 575(4) and 574 al.2 CCP);

A) The Kelly Ruling and Estoppel

76. The Respondent AGQ points to the *Kelly* ruling's pertinence to Art. 575(1) and (2) CCP criteria due to the similarity of the factual context as well as juridical facts, implicitly proposing a type of *res judicata* estoppel impairing the present action (Application at paras. 39 and 40);

77. The Kelly action was premised on differential focus on the issues, thus the class composition joined by common issues imperative of Art. 575(1) as well as the resulting syllogism are not affected – the Kelly class description is indicative of this from the outset:

"Toutes les personnes qui entre 1935 et 1964 ont été placées à l'hôpital Saint-Julien de St-Ferdinand d'Halifax alors qu'elles liaient mineurs et orphelines ou considérées comme telles et n'étaient ni idiotes aliénées, démentes ou imbéciles et sans nécessité d'être traitées dans un asile d'aliénés et d'y être retenues renfermées".

- *Kelly* vs. *La Communauté des Sœurs de la Charité de Québec*

78. As for *res judicata*, refusal of authorization does not carry the weight of *chose jugée* as that concerns only definitive judgments disposing of the issues:

> **809.** - *Jugement définitif* – L'autorité de la chose jugée ne vise que le jugement définitif, soit celui qui dispose de la totalité ou d'une partie de la demande, ou encore d'un litige incident survenu en cours d'instance, sans que l'on puisse y revenir devant la même juridiction. Une décision finale qui termine un procès est un jugement définitif. Cependant, un jugement final est parfois révocable ou révisible. En règle générale, une décision interlocutoire n'est pas définitive et n'a pas l'autorité de la chose jugée. Cependant, plusieurs jugements

interlocutoires disposent définitivement d'une question et ont l'autorité de la chose jugée.

- Jean-Claude Royer, *La preuve civile*, 3e édition, Éditions Yvon Blais, 2003, p. 586, para. 809.

B) Prescription

79. In their Motion, the Petitioners pose the question of the applicability of the three-year prescription that guided the court in *Kelly* (para. 6.2);

80. In *Kelly*, whilst refusing to recognize the suspension of prescription by way of an impossibility to act (currently Art. 2904 CCQ), Judge Denis reasoned that ignorance and laxness do not exempt a claimant from the prescriptive obstacles – to this end, he cited Hon. Justice Lamer:

> Ainsi suis-je d'avis que c'est à bon droit que de façon générale les auteurs refusent de considérer l'ignorance, par le créancier, des faits juridiques générateurs de son droit, comme étant une impossibilité absolue en fait d'agir (voir Pierre Martineau, *La prescription, P.U.M.,* 1977, aux pp. 353 et ss.). Par ailleurs, on semble tout autant d'accord, et j'y souscris, pour reconnaître que l'ignorance des faits juridiques générateurs de son droit, lorsque cette ignorance résulte d'une faute du débiteur, est une impossibilité en fait d'agir prévue à l'art. 2232 et que le point de départ de la computation des délais sera suspendu jusqu'à ce que le créancier ait eu connaissance de l'existence de son droit, en autant, ajouterais-je, qu'il se soit comporté avec la vigilance du bon père de famille.
>
> (emphasis ours)

- *Kelly,* para. 64 citing *Oznaga c. Société d'exploitation des loteries*, [1981] 2 RCS 113, pg. 26

81. Applied to our case, both the beneficiaries of the PNROOD as well as those cognizant thereof but denied, were under the mistaken belief that the program foreclosed any rights of action, and the "reconciliation" it boasted closed all such avenues;

82. For those who were aware of PNROOD but non-participant (Subclass ii), their denial of eligibility convinced them of their exclusion from the group comprehended by the term "Duplessis Orphan";

83. For those who were accepted by PNROOD (Subclass iii) their signed "Quittance" provided a perceived block;

84. The above distortions of the group members' rights were a direct result of the acts of the government as opposed to a lax insouciance on the part of the rights-claimant-PNROOD applicants;

85. It must be noted, that the passage of time evolved rules concerning prescription through the enactment and enlargement of Art. 2926.1 CCQ as well as an increasingly more liberal approach embraced by the courts, especially in sexual assault and abuse cases;

86. The markedly changed legal landscape in this regard was notable a mere few years following the Kelly decision:

> Au moment où la décision de principe M.(K.) c. M.(H.) est rendue par la Cour suprême en 1992, les tribunaux québécois appliquent de façon très étroite l'impossibilité d'agir pour suspendre la prescription (art. 2232 C.c.B.C.). L'impossibilité d'agir doit équivaloir à un cas de force majeure. Cette interprétation restrictive empêche toute forme d'accès à la justice civile pour les victimes de violence sexuelle, dont la capacité d'action et le libre arbitre sont paralysés par une multitude de facteurs. Le recours collectif intenté par "Les Orphelins de Duplessis" en 1995 est rejeté pour cette raison. L'article 2904 C.c.Q., qui abandonne le caractère "absolu" de l'impossibilité d'agir, entre en vigueur en 1994. En 1998, dans un litige en responsabilité extracontractuelle pour inceste, une première décision de la Cour supérieure applique la présomption de conscience de l'arrêt M.(K.) c. M.(H.) pour suspendre la prescription. La thérapie ne sera pas l'élément déclencheur, mais plutôt un événement particulier qui permettra à la demanderesse victime d'inceste d'établir le lien entre l'agression subie dans le passé et ses problèmes actuels.
>
> La même année, dans une affaire de violence policière la Cour suprême se prononce en droit civil sur l'interprétation de l'impossibilité psychologique d'agir comme mécanisme d'assouplissement de la prescription. Le juge Gonthier rejette la force majeure comme critère d'évaluation de l'impossibilité d'agir. Selon lui, le droit civil québécois reconnaît que l'impossibilité d'agir peut résulter de la faute du débiteur, par exemple lorsque l'état psychologique de crainte du demandeur est causé par la faute du défendeur. En s'inspirant de la crainte, vice de consentement (art. 1402 C.c.Q., 995 C.c.B.C.), le magistrat adopte un critère d'évaluation de l'impossibilité d'agir à la fois objectif et subjectif. Le tribunal doit déterminer de façon objective l'existence d'un mal sérieux et présent, mais il doit aussi évaluer subjectivement le caractère déterminant de la crainte. La Cour suprême indique que la crainte du demandeur, engendrée par la faute du défendeur, peut expliquer l'impossibilité psychologique d'agir de celui-ci et suspendre la prescription.

- Langevin, L. (2013). "Féminisme et droit comparé: un mariage possible?" *Revue de droit de l'Université de Sherbrooke*, 43(1), paras. 41 and 42 [TAB XX]

87. The triggering element that now dominates analysis of abuse victims' impossibility to act cannot be conflated with an awareness of financial aid or any other reconciliatory endeavors on the part of the government;

88. A "triggering element" (l'élément déclencheur) is an event whereby a victim makes a connection between the problems and damage experienced in her/his life and the previous abuse s/he suffered – which may have been long suppressed – thus making the tripartite elements of Art. 1457 CCQ (fault, prejudice and link between the two) come to light and entitle the victim to an action at law;

89. The auspices of this element cannot receive a comprehensive examination at the preliminary stages of class authorization;

90. The necessary venture on the merits is consistent with the general approach to the issue of prescription which has been normally relegated to the merits stage:

> "La Cour est consciente du rôle d'un tribunal de première instance lors de la présentation d'une requête en autorisation de recours collectif, en tant, entre autres, que le moyen d'irrecevabilité pour cause de prescription est concerné: les allégations de la requête devant, à ce stade, être tenues pour avérées, il n'appartient pas au tribunal qui en est saisi de retenir des considérations non encore soutenues par une preuve pour conclure à la prescription de la réclamation: Tremaine c. A.H. Robins Canada Inc., (1990) R.D.J. 500 [C.A.]; requête pour autorisation de pourvoi à la Cour suprême rejetée (1991-03-21 no. 22236); Carole Giguère c. Jean-M. Parenteau et autres, (1990)."

- *Godin c. Société canadienne de la croix-rouge*, 1993 (QC CA) 3881, pgs.2-3

91. The "triggering element" will inevitably vary among individuals however, albeit incontestably applicable to those group members unaware of PNROOD (Subclass i), it must also be extended to those comprising Subclass ii and iii, unless some determinant proof can establish that the eligibility criteria as textually presented to the PNROOD applicants could be linked to their experience of abuse;

92. However, it must be kept in mind that the program purported to be "financial aid" and was available to those who were present in certain institutions during certain periods - there was no criterion of experienced abuse in as far as eligibility for the aid was concerned, and consequently the only connection an applicant could be understood to make at that juncture was between his/her presence in an institution and a possible entitlement to financial aid;

93. There is much room for confusion on the part of any PNROOD applicant: the program, albeit applying the term “reconciliation” was in no way presented as any offer of settlement of potential claims – it was “financial aid” administered by the Ministère du Travail, de l'Emploi et de la Solidarité sociale (MTESS);

94. As such, in portraying itself as “financial aid” the PNROOD program cannot benefit from the status of a valid contract by which a vulnerable applicant traded off her/his human rights in exchange for a paltry sum of $15,000;

C) Quittances

95. In the context of an application for financial aid, the Quebec government included a condition of eligibility which required a signed release (quittance) in renunciation of all rights and recourses related to an applicant’s sojourn in the institutions listed therein (PGQ Exhibits 11-13);

96. The text of the quittance ensured renunciation of rights and recourses for all and any injury suffered and englobed not only the governments (both Quebec and federal) but also all and any other affiliated party including religious orders, their employees, directors, etc. (PGQ Exhibits 11-13);

97. There are several grounds on which the validity of the quittances is contestable:

a) If, in fact, the application for financial aid can be considered as a contract, its object was not settlement of claims in the context of suffered abuse, but rather financial assistance to those having attended certain institutions at certain times, thus, the renunciation of rights as a corollary to that contract, can only pertain to actions based on that same object (sojourn in an institution) and not extend to actions based on abuses suffered therein;

b) Since many of the applicants, albeit cognizant of the fact that they attended certain institutions, may not have yet experienced their proper “triggering” events linking the problems in their lives to the abuse they suffered, they could not be held to renounce a right that they did not yet know they had;

c) Outside the context of an express settlement agreement, such renunciation is in fact an exclusion of liability for bodily and moral injury – that which is contrary to public order in virtue of Art. 1474 CCQ;

d) If, in fact, the application for financial aid can be considered as a contract, in its conscious cognisance of the applicants’ vulnerability (both financial and personal), and in light of the fact that the applicants would be alienating their most fundamental rights (physical, psychological and emotional integrity and their Charter guaranteed right of

inviolability), the government ought to have required, and ensured, that each applicant receive independent legal advice;

e) If the quittance is to have the breadth and extension to the congregational Respondents, who were not parties to that agreement, it must respond to the requirements of “stipulation pour l’autrui” in virtue of Art. 1444 CCQ, which it does not;

98. In order for a stipulation for another to be valid, it must meet four conditions:

(1) contract between the stipulator and the promisor is valid;
(2) the stipulator has an interest in stipulating which is not necessarily pecuniary, because the moral interest is sufficient;
(3) the beneficiary can be determined and exists when the promisor is required to execute;
(4) the stipulation is accepted and this acceptance is brought to the attention of the promisor;

- See: Jean-Louis Baudouin, Pierre-Gabriel Jobin et Nathalie Vézina, *Les obligations*, 7e éd., Cowansville, Éditions Yvon Blais, 2013, n° 465-468, p. 558-560.

99. The financial aid application fails the first criterion because it was not a contract, but an offer to contract, there was no meeting of the minds, lacking also free and enlightened consent;

100. Even if the financial aid application was considered a contract, its object (monetary assistance to past residents of certain institutions) is too far detached from the object that would provide cause of action (compensatory and punitive damages for civil and human rights violation by way of abuse);

101. The second criterion is not met because the government denies any admission of fault (stated in the application and quittance, PGQ-11 to 13) and as such could not have interest in stipulating, neither pecuniary nor moral;

102. The third criterion is impossible to meet because there is no determinable time at which the applicant is required to execute (the obligation is a negative act in this context);

103. There has been no acceptance by the (large number and the broad scope of) putative beneficiaries that has been brought to the attention of the promisors (applicants) and thus the fourth criterion also falls;

104. According to what the Supreme Court wrote in 1979 in *Demers c. Dufresne Engineering Co.,* written by Hon. Justice Pratte (for the majority), the existence of a stipulation for another is a matter of contract interpretation:

> "A stipulation for the benefit of a third person does not require that the parties use a set formula, any more than it results from the mere fact that a contract may benefit a third person; it exists when the parties intended to confer a right on the third person. There can be no stipulation for the benefit of another if the parties did not intend to stipulate for another, but only for themselves. The existence of a stipulation for the benefit of a third party thus depends essentially on the intent of the parties. In some cases this intent is manifested clearly; this is the case "where the parties formally stipulate that the debtor is obligating himself for the benefit of a third person" (Mazeaud, *Leçons de droit civil,* Tome 2, Vol. 1, No. 778, at p. 797).
>
> In other cases the stipulation is not expressly stated in the contract and the intent to stipulate for the benefit of another is only implicit; it flows from the interpretation given to the contract by the Court in the light of all the circumstances. In such a case the existence of the stipulation for the benefit of a third party is properly a matter of contract interpretation. Whether there existed the necessary intent to make a stipulation for the benefit of a third party must be determined in accordance with the ordinary rules governing the interpretation of contracts (Weill, *Droit civil, les obligations,* 1971, No. 532, at p. 561)."

- *Demers c. Dufresne Engineering Co* [1979] 1 R.C.S., pgs. 148-149 [TAB 18]

105. The interpretation necessitated therein is a robust exercise appropriate at the merits stage – the fact that Subclass (iii) members signed the quittances does not abrogate their issue commonality, even if, during the merits stage, their claim will meet a specific set of challenges;

V. CONCLUSION

106. The Petitioners' story is well known – they, like all the group members who have come to be known as the "Duplessis Orphans", are not a novel figment of imagination – they have been thus "classified" long ago;

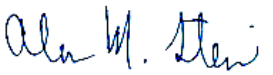
107. Class action was introduced in 1978 to promote access to justice for vulnerable persons who otherwise would not have access, in a setting that ensures the balance of power between the parties;

108. The procedural vehicle of class action has demonstrated its effectiveness in cases of abuse, since it permitted countless victims to have access to justice in Quebec;

109. The Petitioners thus respectfully submit that their Motion for authorization fulfills all the criteria of Art. 575 CCP, and that it is in the interest of justice to allow victims to proceed together so that justice is done with respect of their fundamental rights;

THE WHOLE RESPECTFULLY SUBMITTED

Westmount, 6th of December 2019



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VI. AUTHORITIES

CASE LAW

Tab

15) A c. Frères du Sacré-Coeur, 2017 QCCS 5394 <http://canlii.ca/t/hnz6z>

16) Bank of Montreal v. Marcotte [2014] 2 SCR 725 <http://canlii.ca/t/g91dq>

17) Godin c. Société canadienne de la croix-rouge, [1993] QCCA 3881 (QC CA) 3 <http://canlii.ca/t/1pccf>

18) Demers et autres c. Dufresne Engineering Co. Ltd. et al. [1979] 1 RCS 146, <http://canlii.ca/t/1zbgf>

DOCTRINE

19) Langevin, L. (2013). “Féminisme et droit comparé: un mariage possible?” *Revue de droit de l’Université de Sherbrooke*, 43(1)

NO: 500-06-000904-181

SUPERIOR COURT
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MARC BOUDREAU
-and-
N.P.

Petitioners

-v-

PROCUREUR GÉNÉRAL DU CANADA ET AL

Respondents

PLAN OF ARGUMENT AND
LIST OF AUTHORITIES
IN SUPPORT OF
MOTION FOR CLASS ACTION AUTHORIZATION

ORIGINAL

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PROCUREUR GÉNÉRAL DU CANADA ET AL

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