



SUPREME COURT OF CANADA

CITATION: L'Oratoire Saint-Joseph du Mont-Royal v.
J.J., 2019 SCC 35

APPEALS HEARD: November 7, 2018
JUDGMENT RENDERED: June 7, 2019
DOCKET: 37855

BETWEEN:

L'Oratoire Saint-Joseph du Mont-Royal
Appellant

and

J.J.
Respondent

- and -

Province canadienne de la Congrégation de Sainte-Croix
Intervener

AND BETWEEN:

Province canadienne de la Congrégation de Sainte-Croix
Appellant

and

J.J.
Respondent

- and -

L'Oratoire Saint-Joseph du Mont-Royal
Intervener

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Brown J. (Abella, Moldaver, Karakatsanis and Martin JJ. (paras. 1 to 83) concurring)

REASONS DISSENTING IN PART: Gascon J. (Wagner C.J. and Rowe J. concurring) (paras. 84 to 189):

DISSENTING REASONS: Côté J. (paras. 190 to 287)

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L'ORATOIRE SAINT-JOSEPH DU MONT-ROYAL v. J.J.

L'Oratoire Saint-Joseph du Mont-Royal

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2019 SCC 35

File No.: 37855.

2018: November 7; 2019: June 7.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil procedure — Class action — Authorization to institute class action — Conditions for authorization of action — Application for authorization to institute class action for damages for injuries caused by sexual assaults allegedly committed by members of religious community — Superior Court dismissing application for authorization — Court of Appeal reversing judgment and authorizing class action — Whether Court of Appeal’s intervention in Superior Court’s decision was warranted — Whether Court of Appeal’s decision authorizing institution of class action is tainted by error justifying review — Code of Civil Procedure, CQLR, c. C-25.01, art. 575.

Prescription — Civil liability — Applicable period for instituting action for damages for bodily injury resulting from act which could constitute criminal offence — Sexual assaults being alleged against members, since deceased, of religious congregation — Application for authorization to institute class action being

filed against congregation and against religious institution whose board of directors is composed of members of that congregation on basis of their own fault and of act of another person — Whether three-year period provided for in art. 2926.1 para. 2 of Civil Code for instituting action in case in which author of act has died results in forfeiture of remedy — Whether that period begins running at time of death of author of act or on date victim becomes aware that injury suffered is attributable to that act — Whether that period applies to every action instituted in relation to that act — Civil Code of Québec, art. 2926.1.

J alleged that he had been sexually abused by two members, since deceased, of the religious community known as the Congregation of Holy Cross when he was attending Notre-Dame-des-Neiges elementary school and when he was an altar boy at St. Joseph's Oratory of Mount Royal. He applied for authorization to institute a class action on behalf of victims of sexual assaults that were alleged to have been committed in various institutions in Quebec by brothers and fathers who were members of that religious community. As defendants, J designated Province canadienne de la Congrégation de Sainte Croix ("Congregation") and Oratoire Saint-Joseph du Mont Royal ("Oratory"). The Congregation contested the application for authorization on the basis that it could not be held liable for acts that were for the most part alleged to have been committed before it was incorporated, and the Oratory did so on the basis that it had no connection with the religious community known as the Congregation of Holy Cross. In addition, both the Congregation and the Oratory were of the view that J's personal action was irreparably forfeit as a result of

art. 2926.1 para. 2 of the *Civil Code of Québec* (“*C.C.Q.*”). The Superior Court found that none of the conditions for authorization set out in art. 575 of the *Code of Civil Procedure* (“*C.C.P.*”) were met and refused to authorize the institution of the class action. The Court of Appeal reversed that judgment and authorized the institution of the class action against the Congregation and the Oratory.

Held (Wagner C.J. and Gascon and Rowe JJ. dissenting in part and Côté J. dissenting): The appeals should be dismissed.

Per Abella, Moldaver, Karakatsanis, **Brown** and Martin JJ.: The Court of Appeal’s decision to authorize the institution of the class action against both the Congregation and the Oratory is not tainted by an error that justifies a review, and there is nothing that would justify the Court in reversing that decision. The judgment in which the Superior Court denied authorization to institute a class action against both the Congregation and the Oratory is tainted by numerous errors, of fact and of law, in relation to all the conditions of art. 575 *C.C.P.* It was therefore open to the Court of Appeal to intervene and to substitute its own assessment with regard to those conditions for that of the Superior Court judge. Finally, Gascon J.’s analysis on the subject of art. 2926.1 *C.C.Q.* is agreed with: J’s personal action is neither forfeit nor prescribed. The second paragraph of that article does not create a term for forfeiture (*délai de déchéance*).

Article 571 para. 1 *C.C.P.* defines the class action as a procedural means enabling a person who is a member of a class of persons to sue on behalf of all the

members of the class and to represent the class. Article 574 para. 1 *C.C.P.* provides that prior authorization of a court is required for a person to institute a class action. At the authorization stage, the court plays a screening role and must simply ensure that the applicant meets the four conditions of art. 575 *C.C.P.* If the conditions are met, the class action must be authorized. The court will consider the merits of the case later. This means that the application judge is ruling on a purely procedural question. The Court has given a broad interpretation and application to the conditions of art. 575 *C.C.P.*

The Court of Appeal's power to intervene is limited when it hears an appeal from a decision on an application for authorization to institute a class action, and it must show deference to the application judge's decision. The Court of Appeal will therefore intervene only if the application judge erred in law or if the judge's assessment with respect to the conditions of art. 575 *C.C.P.* is clearly wrong. If the application judge has made such an error with respect to any of the four conditions, the Court of Appeal can substitute its own assessment, but only for that condition and not for the others. Moreover, the application judge's role is limited at the authorization stage. An application judge who oversteps the bounds of his or her screening role and imposes an excessive evidentiary threshold requirement on the applicant or considers the merits of the case makes an error of law warranting the Court of Appeal's intervention.

In this case, given the numerous errors made by the Superior Court judge with respect to all the conditions of art. 575 C.C.P., the Court of Appeal was right to substitute its own assessment for that of the application judge with respect to all those conditions. The Superior Court judge had erred in law in considering the condition of commonality of issues set out in art. 575(1) by emphasizing the differences between the class members rather than acknowledging that there was at least one common question stemming from the fact that all the class members were alleged to be victims of members of the Congregation. On the condition of sufficiency of the alleged facts set out in art. 575(2), when the judge found that no specific, tangible facts were alleged in the application and discounted certain of the exhibits in the record, he clearly overstepped the bounds of his screening role by considering the merits of the case. As for the condition of J's status as representative plaintiff set out in art. 575(4), the judge clearly erred in concluding that the leading role played by J's lawyers in bringing the application for authorization was inconsistent with his status as representative plaintiff. The judge also erred in faulting J for not personally having taken any steps to verify the institutions where assaults were alleged to have taken place and the number of people in the proposed class. What is more, this error influenced the judge's analysis with respect to other conditions such as that of the composition of the class set out in art. 575(3).

Next, the Court of Appeal's decision to authorize the class action against both the Congregation and the Oratory is not tainted by an error that justifies a review with respect to the conditions of commonality of issues (art. 575(1)) and sufficiency

of the alleged facts (art. 575(2)), the only ones the Oratory contests in the Court. As for the Congregation, there is agreement with Gascon J., who dismisses the Congregation's appeal.

Article 575(1) *C.C.P.* provides that a class action cannot be authorized unless the court finds that "the claims of the members of the class raise identical, similar or related issues of law or fact". This is the condition of commonality of issues. There is no requirement of a fundamental identity of the individual claims of the proposed class's members: a single identical, similar or related question of law would be sufficient to meet this condition provided that it is significant enough to affect the outcome of the class action. The fact that the situations of all members of the class are not perfectly identical does not mean that the class does not exist or is not uniform. Nor is it necessary for each member of the class to have a personal cause of action against each of the defendants.

This condition is met in this case: there are similar or related issues. J's personal cause of action against the Oratory is primarily based on it being directly liable for assaults allegedly committed at the Oratory. All the common issues identified by J actually related to the question whether the Oratory and the Congregation were negligent toward sexual assault victims. J alleges, among other things, that the Oratory knowingly and consciously chose to ignore the issue of sexual abuse by members of the Congregation at the Oratory. For a legal person such as the Oratory, to be aware of sexual abuse can mean only one thing: the Oratory's directors

were aware of the abuse. Given that the Oratory's affairs were managed in whole or in part by the Congregation's members, the allegations relating to direct liability of the Oratory are actually allegations relating to faults of members of the Congregation acting as directors of the Oratory. The question of faults allegedly committed by the Congregation's members is undeniably one that is common to all the members of the class. This means that any finding of direct liability of the Oratory will advance the action of each member of the class, particularly in that it will tend to establish the existence of systemic negligence within the Congregation in relation to the alleged sexual abuse of children by its members.

Article 575(2) *C.C.P.* provides that the facts alleged in the application must "appear to justify" the conclusions being sought. This is the condition of sufficiency of the alleged facts. At the authorization stage, the role of the judge is to screen out only those applications which are frivolous, clearly unfounded or untenable. The applicant's burden is to establish an arguable case in light of the facts and the applicable law. This is a low threshold. The legal threshold requirement is a simple burden of demonstration that the proposed legal syllogism is tenable: the applicant must establish a good colour of right. The evidentiary threshold requirement falls comfortably below the standard of proof on a balance of probabilities. The applicant is not required to show that the claim has a sufficient basis in fact.

Furthermore, at the authorization stage, the facts alleged in the application are assumed to be true, so long as the allegations of fact are sufficiently

precise. Where the allegations are not sufficiently precise, they must absolutely be accompanied by some evidence in order to form an arguable case. It is in fact possible for the evidence submitted in support of the application to contain concrete, specific or tangible facts that could be used to establish an arguable case even though the allegations in the application seem to be vague, general or imprecise. A court that must determine whether an applicant has shown an arguable case must consider the allegations in the application in light of all the evidence.

In this case, J has met the evidentiary and the legal threshold requirements under art. 575(2) *C.C.P.* The seeming vagueness, generality or imprecision of J's allegations in the application must be assessed in light of the context of the application and the evidence presented in support of it. That context involves incidents that occurred when J was a child. The fact that nothing was reported at the time of the events explains why no concrete, specific or tangible allegations of fact are made in the application itself. What is more, J's seemingly general allegations of fault against the Oratory are not being made in the abstract, but are supported by some evidence. His personal cause of action is founded on the Oratory's direct liability for assaults that are alleged to have been committed at that place by a member of the Congregation whom the Oratory had made one of the essential players in one of the central activities for which the Oratory was responsible. In addition, the Oratory's directors, who themselves were all members of the Congregation, knew or ought to have known about the assaults that are alleged to have been committed at the Oratory by members of the Congregation. The

Congregation is hidden behind the Oratory, and this is definitely something that may be taken into consideration in law in order to impute direct liability to the Oratory. In light of some evidence that has been produced, an argument that the Oratory may have breached its duty to protect its altar boys is not frivolous, clearly unfounded or untenable. The allegations made against the Oratory and those made against the Congregation in J's application and the exhibits filed in support of it simply cannot be distinguished in any way that would be legally relevant. Lastly, the fact that other defendants could possibly have been sued but were not cannot release the Oratory from its liability for assaults allegedly committed at the Oratory.

Per Wagner C.J. and **Gascon** and Rowe JJ. (dissenting in part): J's remedy is neither forfeit nor clearly prescribed under art. 2926.1 *C.C.Q.* The class action against Province canadienne de la Congrégation de Sainte-Croix ("Congregation") should not be dismissed at the stage of the application for authorization. The application for authorization against Oratoire Saint-Joseph du Mont-Royal ("Oratory") should be dismissed, however.

The first paragraph of art. 2926.1 *C.C.Q.* provides that an action for damages for bodily injury resulting from an act which could constitute a criminal offence is prescribed by 10 years. That period becomes 30 years if the injury results from, among others, sexual assault. One of these periods begins running on the date the victim becomes aware that his or her injury is attributable to such an act. The second paragraph provides that if the victim or the author of the act dies, "the

prescriptive period . . . is reduced to three years . . . from the date of death”, provided that the period has not already expired. This paragraph does not create a term for forfeiture — art. 2926.1 *C.C.Q.* is in its entirety an integral part of the scheme of prescription, and the second paragraph is no exception to that.

In Quebec civil law, the forfeiture of a remedy cannot be presumed. Indeed, art. 2878 *C.C.Q.* states that forfeiture results only where expressly provided for in a text. And where there is a doubt or ambiguity, a specified period must be interpreted as a prescriptive period. Neither the words of the second paragraph of art. 2926.1 *C.C.Q.* nor its context or its underlying objectives lead to the conclusion that there was a clear, precise and unambiguous intention to adopt a term for forfeiture that will apply should the author of the act die. The provision contains no express and unequivocal language relating to forfeiture, and the words of the second paragraph refer to the prescriptive periods in question in the first paragraph. The proposition that a three-year period is intrinsically short is erroneous. By reducing the period in question to three years, the legislature has simply restored the general law prescriptive period that applies under art. 2925 *C.C.Q.* The explanatory notes for the *Act to amend the Crime Victims Compensation Act, the Act to promote good citizenship and certain provisions of the Civil Code concerning prescription* (“amending Act”) — by which art. 2926.1 *C.C.Q.* was enacted — and the consequential amendments to, among others, art. 2905 *C.C.Q.* — pursuant to which prescription no longer runs against a minor for an act which could constitute a criminal offence — confirm this interpretation. Lastly, the addition of art. 2926.1 at a

specific place within the framework of the *C.C.Q.*, that is, in Book Eight on prescription, is a further indication of the legislature's intention regarding the meaning to be given to this particular provision.

Moreover, the adoption of a term for forfeiture would clearly frustrate the amending Act's objective of facilitating access to civil justice and would have consequences that are illogical or even absurd. A victim whose assailant died could no longer submit that it had been impossible for him or her to act, given that such a term cannot be suspended or interrupted. The victim would then have a maximum of three years from the date the author of the act died to institute an action, even if the injury had not yet appeared. The effect of such an interpretation is that an action for damages for bodily injury for an act to which art. 2926.1 *C.C.Q.* applies would be subject to stricter rules than an action for damages for an injury that is not attributable to an act which could constitute a criminal offence. Finally, under the amending Act's transitional provisions, the periods — and their starting point — provided for in art. 2926.1 are of immediate application because they are declaratory. The effect of the adoption of a term for forfeiture would be that if a victim's assailant died before the amending Act was enacted, his or her right of action would be retroactively forfeit three years after the assailant's death, even if the victim's action was not prescribed before that Act came into force.

Under art. 2926.1 para. 2, the death of the victim or the author of the act merely changes the length of the period, not its starting point, which continues to be

when the victim becomes aware of the connection between the assault and the injury. It is clear from the record of the legislative debate that this second paragraph does not introduce a new period: the death simply changes the period provided for in the first paragraph by reducing it to three years. By providing that the second paragraph applies if one of the principal protagonists dies, the legislature ensured a proper balancing of the interests affected by the lengthy prescriptive period, such as uncertainty with respect to the property of the succession and the integrity of the adversarial process, without diminishing the objective of facilitating access to justice for victims. Furthermore, the amending Act's transitional provisions state that the provisions concerning the starting point of the prescriptive periods provided for in art. 2926.1 *C.C.Q.* are declaratory. Thus, the effect of finding that the death of one of the principal protagonists is a distinct starting point would be that the right of action of a victim whose assailant died more than three years before the amending Act came into force would be extinguished retroactively.

The reduction of the period provided for in art. 2926.1 para. 2 applies only in relation to the succession of the victim or to that of the author of the act. Under the general rules of civil liability, the victim's remedy against a third party who is liable for his or her own fault or for the act or omission of another person is not dependent on the direct remedy against the author of the act. Prescription is determined for each action individually. Any other conclusion would clearly frustrate the purpose of facilitating access to civil justice for assault victims and would allow parties who may be at fault to go on with their lives without liability.

In this case, the starting point of the applicable period was the time when J became aware of the connection between the assaults and his injury, not the date of death of his alleged assailants. Exactly when he became aware of the connection and how this might have affected the applicable prescriptive period will be determined at the trial on the merits. At the authorization stage, despite the fact that the alleged acts occurred more than 30 years ago, J's allegation that he did not become aware of that connection until 2011 must be assumed to be true.

The class action against the Congregation should not be dismissed at the stage of the application for authorization. At this stage, the court's role is to screen applications in order to filter out any that are frivolous and to ensure that parties are not being forced to defend against untenable claims. The evidentiary threshold that must be met in order to determine whether each of the conditions set out in art. 575 *C.C.P.* is satisfied is a low one at this preliminary stage. It will suffice for the applicant to show an arguable case in light of the facts and the applicable law. For an arguable case to be established, however, more than vague, general or imprecise allegations are required. The allegations and the exhibits filed in support of them, when considered as a whole, establish an arguable case against the Congregation. Although the Congregation was constituted only in 2008, the exhibits in the record show that a number of the Congregation's establishments have used the appellation "Sainte-Croix" in one form or another over the years. Moreover, the Congregation has not argued that the alleged assailants might have been part of a religious community other than the one it represents. And in 2009, the Congregation had

agreed to take up the interest of other entities in the context of a settlement flowing from another application for authorization in relation to alleged sexual abuse by members of the Congregation. On that occasion, the Superior Court had found that all the conditions for authorization were satisfied and had authorized the institution of the class action for the purpose of approving the settlement. In this case, it will be for the parties to address the Congregation's corporate structure at the trial on the merits and to make whatever complete submissions they consider appropriate at that time. The colour of right condition of art. 575(2) *C.C.P.* is satisfied: the application for authorization against the Congregation is neither untenable nor frivolous.

However, the allegations in the application and the exhibits filed in support of them do not support a cause of action in liability against the Oratory, an entity distinct from the Congregation. In this case, no facts, either alleged or found in the exhibits, support a rigorous deductive reasoning that involves more than mere assumptions and speculations.

Regarding the direct fault alleged against the Oratory, the allegations consist of conclusions of fact without any factual underpinning, of legal arguments, or of opinions. Unlike in the Congregation's case, no other allegation in the application and none of the exhibits filed in support of the allegations lend credence to these general allegations, which have no factual underpinning. There is nothing that illustrates how the Oratory's acts or omissions allowed the assaults to occur or facilitated them or that supports the allegation that a representative or employee of the

Oratory tried to conceal the assaults. Nor does the argument that any allegation made or evidence adduced against the Congregation can also apply to the Oratory because the Congregation, through some of its members, is alleged to have helped found the Oratory establish the necessary legal syllogism in the absence of specific and tangible allegations of negligence on the Oratory's part or of the existence of a relationship of subordination between it and the members of that religious community.

As for whether the Oratory is liable, as principal, it was necessary to allege, at a minimum, that members of the Congregation were subordinates of the Oratory who had committed faults in the performance of their duties. There is quite simply no factual support for such a determination either in the allegations or in the exhibits filed in support of them. Simply identifying a physical place belonging to the Oratory as the place at which some of the alleged assaults occurred cannot lead to the conclusion that the Oratory was the principal in relation to the member of the Congregation who allegedly assaulted J.

Because the colour of right condition of art. 575(2) *C.C.P.* is not met, the action against the Oratory must be dismissed. It is not necessary to consider the condition of commonality of issues (art. 575(1) *C.C.P.*).

Per Côté J. (dissenting): The appeal of Province canadienne de la Congrégation de Sainte-Croix ("Province canadienne") should be allowed because the Court of Appeal did not show that the application judge's assessment of the condition for authorization set out in art. 575(2) *C.C.P.* was clearly wrong. The

appeal of Oratoire Saint-Joseph du Mont-Royal (“Oratory”) should also be allowed for the reasons given by Gascon J. The application judge’s decision dismissing the application for authorization to institute a class action should therefore be restored in relation to both Province canadienne and the Oratory. However, for different reasons than those given by Gascon J., J’s right of action is neither forfeited nor prescribed under the second paragraph of art. 2926.1 *C.C.Q.*

An application for authorization to institute a class action will be granted if it meets four cumulative conditions set out in art. 575 *C.C.P.* This authorization mechanism must not be reduced to a mere formality. In particular, under art. 575(2) *C.C.P.*, the judge must ensure that “the facts alleged appear to justify the conclusions sought”. The burden on the applicant is to show an arguable case, which is equivalent to a good colour of right, and not only to establish that the application is not frivolous or clearly unfounded.

The application judge must be able to infer the proposed legal syllogism from the facts alleged in the application. The legal syllogism must be clear, complete and rigorous. Vague, general or imprecise allegations — as well as mere statements of a legal nature, opinions or assumptions — cannot suffice to establish an arguable case. No evidence can cure the absence of specific factual allegations regarding an essential element of the cause of action. The application judge should confine himself or herself to the facts that are alleged, without trying to complete them.

In the case at bar, it was certainly open to the application judge to conclude that J had not met his burden of demonstrating an arguable case. The facts alleged disclose no cause of action — no legal relationship — between him and Province canadienne. The uncontested evidence adduced by J himself clearly establishes that Province canadienne, as a distinct legal person, did not exist at the time of the alleged events. It was constituted on January 1, 2008 under the *Religious Corporations Act* and has not been amalgamated or continued. J's two alleged aggressors died in 2001 and 2004 and thus were never members of Province canadienne. Even if the facts are assumed to be true and the evidence adduced is considered, the application for authorization does not indicate the basis on which Province canadienne could be liable — whether for its own fault or for that of another person — for acts or omissions that occurred before it was constituted. The legal syllogism is flawed or clearly incomplete, if not absent.

The fact that Province canadienne has a religious mission does not allow its juridical personality to be disregarded. Being one of the legal vehicles of a religious community whose history dates back to well before 2008 cannot make it liable *per se* for acts and omissions committed before it was constituted by members of that community or by other legal entities that may have been connected to that community. The fact that two corporations may be constituted by the same members or by the same religious community is not in itself of any legal consequence. In the instant case, the application for authorization contains no factual allegations relating to fraud, abuse of right or contravention of public order that could possibly justify

disregarding or ignoring Province canadienne's juridical personality under art. 317 *C.C.Q.* Moreover, even if such allegations had been made, it is by no means clear that an arguable case could have been established on that basis given that Province canadienne did not exist at the relevant time. It therefore could not have taken part in the alleged acts and omissions and, for this reason, be liable for them.

A class action cannot be authorized in relation to a defendant solely on the basis of its close connections with other entities. In addition, in the case at bar, the application for authorization says practically nothing about the corporate identity of Province canadienne and the Oratory and nothing at all about their possible connections with other entities. The fact that Province canadienne took up the defence of other entities for their actions in another case relating to sexual aggressions has little legal significance. The settlement reached in that other case was clearly entered into without prejudice and without any admission, and it suggests that, if faults were committed, entities other than Province canadienne are liable for them. The Superior Court authorized the class action against Province canadienne in that other case solely for the purposes of the settlement; its decision rested on a laconic analysis carried out essentially as a matter of form, which could not be binding on the application judge in the present case.

Province canadienne and the Oratory have not shown that the period established by the second paragraph of art. 2926.1 *C.C.Q.* is a term for forfeiture. Prescription is based first and foremost on the idea of sanctioning failure to act by a

person who has a right to exercise, which explains why there are mechanisms like suspension and interruption that mitigate the rigours of prescription. By contrast, forfeiture is meant to quickly put an end, for all purposes, to the possibility of performing a particular act. Forfeiture is exceptional in nature: it automatically entails the loss of a right even though its holder has done nothing wrong. The legislature has therefore enacted an interpretative provision, the second paragraph of art. 2878 *C.C.Q.*, which states that “forfeiture is never presumed; it results only where expressly provided for in a text”. Although no set formula is necessary, a term for forfeiture can be found to exist only where the legislature has spoken in a precise, clear and unambiguous manner.

The second paragraph of art. 2926.1 states that the shortened period of three years “runs from the date of death”. The wording is clear and explicit: the death of the victim or the author of the act marks a starting point that differs from the one provided for in the first paragraph. The first paragraph codifies the judge-made rule that prescription does not run against a victim of sexual aggression who is not aware of the connection between that act and the injury suffered. It provides that an action “is prescribed . . . from the date the victim becomes aware” of that connection. It cannot be found from the wording of the second paragraph that the death simply has the effect of shortening the 10- or 30-year period provided for in the first paragraph. The expressions “from the date” in the first paragraph and “from the date of death” in the second paragraph are equivalent, and they both indicate the starting point for prescription. Words used by the legislature are presumed to have the same meaning

throughout the same statute. This interpretation is also the most coherent. If the death was not a new starting point but simply had the effect of shortening the period, an action by the victim's succession might be imprescriptible in some circumstances. The solution the legislature seems to have chosen is a three-year period that runs from the date of death of the victim or the author of the act, regardless of whether, before that date, the victim made the connection between the act and the injury suffered.

The fact that the three-year period under the second paragraph is linked to a specific, objective fact that is fixed in time, namely the death of the victim or the author of the act, provides a strong indication of forfeiture. The link to the death suggests that the period in question, unlike a prescriptive period, is not intended to sanction the victim's negligence. However, it is difficult to argue that the wording of the second paragraphs makes no reference to prescription. The French version refers to the "*délai applicable*", which is the 10- or 30-year prescriptive period under the first paragraph. The English version is even more explicit: "the prescriptive period, if not already expired, is reduced to three years". Therefore, it cannot be concluded from the wording of the provision that the legislature expressed an intention to create a term for forfeiture, rather than a prescriptive period, in a sufficiently precise, clear and unambiguous manner.

Absent an express provision to the contrary, the general provisions dealing with the suspension of prescription — including the provision on impossibility in fact to act (art. 2904 *C.C.Q.*) — apply to the period provided for in

the second paragraph of art. 2926.1 *C.C.Q.*, subject to the following exception. Given that the second paragraph of art. 2926.1 *C.C.Q.* sets a different starting point for prescription, separate from the one established by the first paragraph, lack of awareness of the connection between the alleged act and the injury suffered cannot suspend the period provided for in the second paragraph. The opposite interpretation would frustrate the legislature's intention that the period run from the date of death, and no longer from the date the victim becomes aware of the connection.

The second paragraph of art. 2926.1 *C.C.Q.* applies to all actions for damages for bodily injury resulting from sexual aggression. The wording of the provision draws no distinction between the author of the act and third parties who might also be liable for their own fault or for the act or omission of another person. The purpose of this provision is to address the legislature's concerns about the preservation of evidence and, more broadly, the integrity of the adversarial process.

The starting point under the second paragraph, the date of death, does not have retroactive effect, regardless of whether the period is a term for forfeiture or a prescriptive period. The introduction of a new period does not retroactively extinguish an existing right of action unless such an intention is clearly expressed. This is not the case here. First of all, the amending Act specifically mentions only prescription and contains no transitional provision that could apply to the starting point of a term for forfeiture. Second, if the second paragraph of art. 2926.1 *C.C.Q.* simply provides for a prescriptive period, s. 13 of the amending Act does not give it

any retroactive effect, because the new starting point set on the date of death is not declaratory in nature. The legislature stated in s. 13 that the provisions concerning the starting point for prescription are “declaratory”. A declaratory provision has retroactive effect insofar as it interprets existing law in the way that a judicial decision would. The starting point under the second paragraph, unlike the first paragraph, can hardly be characterized as declaratory given that it is entirely new law that is not meant to settle or clarify existing law. Therefore, the legislature did not express an intention to give it retroactive effect. If there is any doubt in this regard, the interpretation that limits the scope of provisions that are explicitly retroactive or declaratory is to be preferred. Accordingly, whatever the nature of the period under the second paragraph of art. 2926.1 *C.C.Q.*, it would not have begun to run, in relation to existing juridical situations, before the coming into force of the amending Act. As a result, the introduction of a new starting point set on the date of death would not affect J’s right of action in the instant case.

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By Brown J.

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APPEALS from a judgment of the Quebec Court of Appeal (Gagnon, Marcotte and Healy JJ.A.), 2017 QCCA 1460, [2017] J.Q. No. 13138 (QL), 2017 CarswellQue 8365 (WL Can.), setting aside a decision of Lanctôt J., 2015 QCCS 3583, [2015] J.Q. No. 7141 (QL), 2015 CarswellQue 7360 (WL Can.). Appeals dismissed, Wagner C.J. and Gascon and Rowe JJ. dissenting in part and Côté J. dissenting.

Marc Beauchemin and *Emmanuel Laurin-Légaré*, for the appellant/intervener L’Oratoire Saint-Joseph du Mont-Royal.

Éric Simard, *Stéphanie Lavallée* and *Marie-Pier Gagnon Nadeau*, for the appellant/intervener Province canadienne de la Congrégation de Sainte-Croix.

Robert Kugler, *Alain Arsenault*, *Gilles Gareau*, *Pierre Boivin* and *Olivera Pajani*, for the respondent.

English version of the judgment of Abella, Moldaver, Karakatsanis, Brown and Martin JJ. delivered by

BROWN J. —

I. Introduction

[1] I have read the carefully crafted reasons of my colleague Gascon J., in which he provides a thorough and comprehensive review of the facts and the judicial history. I will therefore limit myself here to a few words on the context of the two appeals before the Court. In his re-amended motion for authorization to institute a class action and to be a representative plaintiff dated May 8, 2015 (“application”), A.R.C., at pp. 96-111, and A.R.O., vol. I, at pp. 89-104, the respondent, J.J., applies for authorization to institute a class action on behalf of all¹ victims of sexual assaults that are alleged to have been committed in various institutions in Quebec since 1940 by brothers and fathers who were members of the religious community known as the Congregation of Holy Cross. As defendants, J.J. has designated the appellant Province canadienne de la Congrégation de Sainte-Croix (“Congregation”) — which is at present the legal person whose objects are to organize, administer and maintain that religious community — and the appellant Oratoire Saint-Joseph du Mont-Royal (“Oratory”) — which is an institution in which J.J. alleges he was sexually assaulted as a child and that is or was at the time of the events controlled by the religious

¹ With the exception of victims covered by another class action that has since been settled.

community known as the Congregation of Holy Cross. The appellants vehemently object to the granting of authorization to institute a class action against them.

[2] The Congregation argues that it was constituted a corporation only in 2008 and that it cannot be held liable for acts that are for the most part alleged to have been committed before it was incorporated. It suggests that J.J. should instead have sued Corporation Jean-Brillant — a legal person that existed at the time of the events as “Les Frères de Sainte-Croix”, but that today reports no establishments or employees and does not have as its objects to organize, administer and maintain a religious congregation. The Oratory, for its part, submits that it has no connection with the religious community known as the Congregation of Holy Cross. It claims to be a distinct entity whose sole mission is to operate and maintain that place of worship. In addition, both the appellants are of the view that, in any event, J.J.’s personal action is irreparably forfeit as a result of art. 2926.1 para. 2 of the *Civil Code of Québec* (“C.C.Q.”).

[3] The Quebec Superior Court refused to authorize the institution of the class action against the two appellants, but a majority of the Quebec Court of Appeal reversed that judgment. The dissenting Court of Appeal judge agreed with authorizing the class action against the Congregation, but not against the Oratory.

[4] I am in complete agreement with the analysis of my colleague Gascon J. on the subject of art. 2926.1 C.C.Q., and in particular with his conclusion that the second paragraph of that article does not, as the appellants argue, create a term for

forfeiture (*délai de déchéance*). I also concur in his proposal that the Congregation's appeal be dismissed. With great respect, however, I cannot agree with his conclusion regarding the Oratory. In my opinion, the judgment in which the Superior Court denied authorization to institute a class action against both the Congregation *and* the Oratory is tainted by numerous errors, of fact and of law, in relation to *all* the conditions set out in art. 575 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("C.C.P."), formerly art. 1003 of the *Code of Civil Procedure*, CQLR, c. C-25. It was therefore open to the Court of Appeal to intervene and to substitute its own assessment with regard to those conditions for that of the Superior Court judge.

[5] With respect, I see nothing that would justify this Court in reversing the Court of Appeal's decision to authorize the institution of a class action against both the Congregation *and* the Oratory. The connection between the Congregation and the Oratory is so close — J.J.'s allegations and the exhibits filed in support of the application against *both* these entities are in fact largely *identical* — that, respectfully, the result proposed by the dissenting Court of Appeal judge is not really convincing. Similarly, the Superior Court judge's assertion that the application is [TRANSLATION] "practically silent regarding involvement on the Oratory's part" is, again with respect, incorrect, and clearly does not suffice to dispose of the proposed class action against the Oratory: Sup. Ct. reasons, 2015 QCCS 3583, at para. 137. The main allegations in the application, set out in paras. 3.33 to 3.38, are written in the plural ([TRANSLATION] "the respondents") and therefore apply to the Oratory *as much as* to the Congregation. The two appeals should accordingly be dismissed, with costs to J.J.

II. Analysis

[6] Article 571 para. 1 *C.C.P.* defines the class action as a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class. This procedural vehicle has several objectives, namely to facilitate access to justice, to modify harmful behaviour and to conserve judicial resources: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29; *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 1. Prior authorization of a court is required for a person to institute a class action: art. 574 para. 1 *C.C.P.* In disposing of an application for authorization of this nature, the court must assess the four conditions set out in art. 575 *C.C.P.*, which reads as follows:

575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

(1) the claims of the members of the class raise identical, similar or related issues of law or fact;

(2) the facts alleged appear to justify the conclusions sought;

(3) 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; and

(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[7] At the authorization stage, the court plays a “screening” role: *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at paras. 59 and 65; *Vivendi*, at para. 37. It must simply ensure that the applicant meets the conditions of art. 575 *C.C.P.* If the conditions are met, the class action must be authorized. The Superior Court will consider the merits of the case later. This means that, in determining whether the conditions of art. 575 *C.C.P.* are met at the authorization stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted: *Infineon*, at para. 68; *Vivendi*, at para. 37; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 22.

[8] The Court has given “a broad interpretation and application to the requirements for authorization [of the institution of a class action], 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’”: *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 43, quoting *Infineon*, at para. 60; see also *Marcotte v. Longueuil (City)*, at para. 22. In other words, the class action is *not* an [TRANSLATION] “exceptional remedy” that must be interpreted narrowly: *Tremaine v. A.H. Robins Canada inc.*, [1990] R.D.J. 500 (Que. C.A.); see also *Comité d’environnement de La Baie inc. v. Société d’électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A.). On the contrary, it is [TRANSLATION] “an ordinary remedy whose purpose is to foster social justice”: *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380, at para. 29; see also *Bisaillon v. Concordia*

University, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 16; *Pharmascience inc. v. Option consommateurs*, 2005 QCCA 437, at para. 20; *Trottier v. Canadian Malartic Mine*, 2018 QCCA 1075, at paras. 35-36. There are those who consider that [TRANSLATION] “the class action is highly appropriate in sexual abuse cases, given the great vulnerability of the victims”: L. Langevin and N. Des Rosiers, with M.-P. Nadeau, *L’indemnisation des victimes de violence sexuelle et conjugale* (2nd ed. 2012), at p. 370; see also, on this point, *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 39; *Griffith v. Winter*, 2002 BCSC 1219, 23 C.P.C. (5th) 336, at para. 38, aff’d 2003 BCCA 367, 15 B.C.L.R. (4th) 390.

[9] In ruling on the Oratory’s appeal, there are two questions that must be answered. The first is whether the Court of Appeal’s intervention in the Superior Court judge’s decision was justified. The second, which arises only if the Court of Appeal is found to have been justified in intervening and in substituting its own assessment with respect to the conditions of art. 575 *C.C.P.* for that of the Superior Court judge, is whether the Court of Appeal’s decision to authorize the class action against both the Congregation *and* the Oratory is itself tainted by an error that justifies a review by this Court.

A. *Was the Court of Appeal’s Intervention in the Superior Court Judge’s Decision Justified?*

[10] The Court of Appeal’s “power to intervene . . . is limited” when it hears an appeal from a decision on an application for authorization to institute a class

action, which means that “it must show deference to the motion judge’s decision”:
Vivendi, at para. 34. It is well established that the assessment of whether the conditions for authorization are met entails the exercise of a discretion: *Harmegnies*, at paras. 20-24. The Court of Appeal “will therefore intervene . . . only if the motion judge erred in law or if the judge’s assessment with respect to the criteria of art. [575] *C.C.P.* is clearly wrong”: *Vivendi*, at para. 34. Moreover, “[i]f the motion judge errs in law or if his or her assessment with respect to any criterion of art. [575] *C.C.P.* is clearly wrong, the Court of Appeal can substitute its own assessment, but only for that criterion and not for the others”: *Vivendi*, at para. 35; see also *Sofio v. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, at para. 17; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, at paras. 32-35; *Charles v. Boiron Canada inc.*, 2016 QCCA 1716, at para. 37; *Belmamoun v. Brossard (Ville)*, 2017 QCCA 102, 68 M.P.L.R. (5th) 46, at para. 70.

[11] It should be noted, however, that while it is true that the Court of Appeal’s power to intervene in a decision on an application for authorization to institute a class action is limited, so too is the application judge’s role:

While the compass for appellate intervention is indeed limited, so too is the role of the motion judge. In clear terms, particularly since its decision in *Infineon*, the Supreme Court has repeatedly emphasized that the judge’s function at the authorization stage is only one of filtering out untenable claims. The [Supreme] Court stressed that the law does not impose an onerous burden on the person seeking authorization. “He or she need only establish a ‘prima facie case’ or an ‘arguable case’”, wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge “must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted”.

Since *Infineon*, [the] Court [of Appeal] has consistently relied upon this standard, invoking it when authorization has been wrongly denied because too high a burden was imposed.

(*Sibiga*, at paras. 34-35)

[12] Thus, a judge who oversteps the bounds of his or her screening role at the authorization stage, and in so doing imposes an excessive evidentiary threshold requirement on the applicant or considers the merits of the case, makes an error of law warranting the Court of Appeal's intervention: *Vivendi*, at paras. 4 and 37; *Infineon*, at paras. 40 and 68; *Marcotte v. Longueuil (City)*, at para. 22; see also *Sibiga*, at paras. 71 and 80; *Masella v. TD Bank Financial Group*, 2016 QCCA 24, at para. 9.

[13] In the case at bar, the Superior Court judge's reasons in support of his conclusion denying authorization to institute a class action against the Oratory were particularly brief: paras. 128-38. Aside from his comments casting doubt on the fact that only the Oratory was being sued together with the Congregation whereas, in his view, logic would instead have dictated either that *all* the institutions where members of the class are alleged to have been sexually assaulted should be sued or that *none* of them should be — an argument to which I will return below — the judge merely stated that [TRANSLATION] “the reasons that justify denying the action against the Congregation . . . are the same as the ones that apply to the action against the Oratory”: para. 138 (emphasis added). With respect, it therefore seems somewhat incongruous to conclude, as Gascon J. does, that the Court of Appeal's intervention was justified with regard to the proposed class action against the Congregation, but

that that court was not justified in intervening with regard to the contemplated class action against the Oratory.

[14] That being said, it is useful to review some of the errors made by the Superior Court judge that justified the Court of Appeal's intervention. I note that the Superior Court judge found that *none* of the conditions of art. 575 C.C.P. were met, whereas the Court of Appeal concluded to the contrary, that *all* of them were. In this Court, the Oratory is challenging *only* the conclusions that J.J. meets the conditions of commonality of issues (art. 575(1) C.C.P.) and sufficiency of the alleged facts (art. 575(2) C.C.P.). The Oratory is also arguing that a "forfeiture" of J.J.'s personal action affects his ability to obtain the status of a representative plaintiff who is capable of properly representing the class members (art. 575(4) C.C.P.): A.F.O., at para. 114. On the other hand, counsel for the Oratory expressly confirmed at the hearing of the appeal that his client would not be challenging the conclusion that J.J. meets the composition of the class condition (art. 575(3) C.C.P.). Although the Oratory's challenge to J.J.'s status as representative plaintiff for the class members is based solely on arguments relating to the supposed "forfeiture" of his personal action, I find it worthwhile to discuss the Superior Court judge's errors in relation to this condition as well as to the other two conditions at issue in this Court, given that the judge's own reasons suggest that the errors he made with respect to the condition of status as representative plaintiff affected his analysis regarding the other conditions. He stated that the circumstances of the case before him [TRANSLATION] "highlight the fact that the various conditions set out in [art. 575 C.C.P.] are not watertight

compartments” and that, as a result, “the reasons why [the application had to] fail with respect to one of the requirements also justif[ied] dismissing it in relation to another”: Sup. Ct. reasons, at para. 22, quoting *Del Guidice v. Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496, at para. 40; see also para. 23.

(1) Intervention of the Court of Appeal With Regard to the Condition of Commonality of Issues (Article 575(1) C.C.P.)

[15] The Superior Court judge noted that several issues raised by the proposed class action, such as those related to prescription and to the existence of damages or of a causal connection, [TRANSLATION] “will have to be analyzed individually, which means that they cannot be the subject of common questions of law or of fact”: para. 127. The Court of Appeal rightly found that this factor could not *in and of itself* justify dismissing the application for authorization: [TRANSLATION] “It is quite possible that the determination of common issues does not lead to the complete resolution of the case, but that it results instead in small trials at the stage of the individual settlement of the claims, which does not preclude a class action suit” (2017 QCCA 1460, at para. 55, quoting *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826, at para. 23, quoted with approval in *Vivendi*, at para. 42; see also *Sibiga*, at paras. 115, 123 and 128).

[16] 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 (emphasis added). 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*, 2011 QCCS 6670 (“*Cornellier*”), 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.

[17] But the Court of Appeal stressed that the Congregation was being sued [TRANSLATION] “not because of the establishments [it] operate[s], but because the assailants are members of the Congregation”: para. 64; see also para. 97. As the Court of Appeal pointed out, “[t]he idea of an independent establishment, in the sense of a distinct enterprise, that the Judge accepted does not reflect the Congregation’s reality”, as its members, depending on their assignments, “could probably move from one establishment to another quite informally”: para. 63; see, for example, Exhibit R-8 (“table of victims”), A.R.C., at pp. 151-52, regarding the situations of Brother Brunelle, who was assigned in succession to Orphelinat Saint-Joseph and École artisanale Notre-Dame-des-Monts, and Brother Bernard, who was assigned first to the Oratory and then to an establishment in Waterville. It should be mentioned in this

regard that the Congregation reports having nearly 20 establishments in Quebec: see Exhibits R-1 (amended), information statement for the Congregation in the enterprise register (2015), and R-1.2, information statement for the Congregation in the enterprise register (2014), A.R.C., at pp. 135-36 and 147-48.

[18] However, *all* the class members were allegedly assaulted by members of the Congregation, regardless of *the places* where the assaults are alleged to have occurred. These members of the Congregation necessarily engaged in their activities with children *with the consent or under the authority* of the Congregation's officers (C.A. reasons, at para. 57); J.J. alleges that the Congregation is an institute of consecrated life that is subject to canon law (paras. 3.39 to 3.40 of the application); regarding the authority of the superior of a religious institute over the institute's members, see paras. 3.40.1 to 3.47 of the application; see also Exhibits R-6, T. P. Doyle, *Canon Law: What Is It?* (2006) ("Doyle article (2006)"), A.R.O., vol. II, at p. 87, and R-7, excerpts from the *Code of Canon Law* (French version only), canons 1395 and 1717, A.R.O., vol. II, at pp. 89-93; finally, see by analogy *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436, at paras. 21 and 27-28; *Bazley v. Curry*, [1999] 2 S.C.R. 534, at paras. 44 and 46; M. H. Ogilvie, *Religious Institutions and the Law in Canada* (4th ed. 2017), at pp. 226 and 320. This means that *all* the class members clearly have an interest in having at least *one* common question decided, one "that would serve to advance the resolution of the litigation with respect to all the members of the group, and that would not play an insignificant role in the outcome of the case" (*Vivendi*, at para. 60), that is, the question of the Congregation's

liability for the alleged assaults on children by some of its members who were engaging in activities with those children *with the consent or under the authority* of the Congregation's officers.

[19] The main issue here concerns liability based on a *direct* fault of the Congregation (or, more simply, its *direct* liability) for alleged “systemic” negligence in relation to alleged assaults on children by its members. The Court of Appeal concluded in this regard that [TRANSLATION] “the questions inherent in the issue of direct liability of the [Congregation] are on their own capable of clearly advancing the case toward a resolution of the litigation”: para. 67 (emphasis added); see also para. 106. It should in fact be noted that all the common issues identified by J.J. that were authorized by the Court of Appeal actually related to the question whether the Congregation was *negligent* toward the victims of assaults allegedly committed by its members. J.J. alleges that the Congregation [TRANSLATION] “allowed [its] members . . . to sexually abuse minor children in public schools, in orphanages, at [the] Oratory and in other places”: para. 3.33 of the application. The Congregation also allegedly “subjected the victims to mental, religious and psychological duress by discouraging them from reporting the sexual abuse by [its] members”: para. 3.34 of the application. J.J. further alleges that the Congregation “[was] aware of the sexual abuse by [its] members . . . but nevertheless hushed it up”: para. 3.35 of the application. J.J. adds that the Congregation “knowingly and consciously chose to ignore the issue of sexual abuse of minor children by [its] members”: para. 3.36 of the application.

[20] In sum, the Court of Appeal was right to intervene in the Superior Court’s judgment, because the application judge had erred in law regarding the main components of art. 575(1) *C.C.P.* by emphasizing the differences between the class members that related to the fact that the assaults had allegedly been committed in [TRANSLATION] “an indeterminate number of places” (para. 120) rather than acknowledging that there was at least *one* common question stemming from the fact that *all* the class members were alleged to be victims of members of the Congregation: *Vivendi* at para. 60.

(2) Intervention of the Court of Appeal With Regard to the Condition of Sufficiency of the Alleged Facts (Article 575(2) *C.C.P.*)

[21] The Superior Court judge was essentially of the view that no [TRANSLATION] “specific, tangible facts” were alleged in the application in support of J.J.’s claim that the Congregation knew about the assaults on children allegedly committed by its members: para. 103; see also para. 105. The judge discounted Exhibit R-3, M. Benkert and T. P. Doyle, *Religious Duress and Its Impact on Victims of Clergy Sexual Abuse*, November 27, 2008 (“Benkert and Doyle article (2008)”), A.R.O., vol. II, at pp. 33-71, and the Doyle article (2006) on the basis that they were “opinion papers”: paras. 108-9. He also found that the information in Exhibit R-4, DVD of the Radio-Canada program *Enquête*, September 30, 2010 (“DVD of the *Enquête* program”), “[was] . . . of no assistance for the purposes of this proceeding”: para. 111. In addition, he attributed little — indeed no — probative value to the table of victims, particularly because J.J.’s counsel were involved in preparing it, and even

stated that “it cannot be assumed at this stage that the people listed in [the table of victims] are in fact victims of members of [the Congregation] as opposed to victims of other religious communities”: para. 57.

[22] With respect, the Superior Court judge clearly overstepped the bounds of his screening role by considering the merits of the case at the authorization stage: *Vivendi*, at paras. 4 and 37; *Infineon*, at paras. 40 and 68; *Marcotte*, at para. 22; *Sibiga*, at paras. 71 and 80. A judge who rules at the authorization stage on the probative value of evidence presented in support of the application or who, in the absence of exceptional circumstances, refuses to take it into consideration makes an error of law warranting the Court of Appeal’s intervention: *Sibiga*, at paras. 84-86; *Lambert (Gestion Peggy) v. Écolait ltée*, 2016 QCCA 659, at para. 32. For example, in *Charles*, the Court of Appeal concluded that the judge had [TRANSLATION] “clearly departed from his role and the large and liberal approach he was required to take” in choosing “to exclude from the evidence information from filed scientific articles on the basis that they had been written to discredit homeopathy in general and that, as a result, they lacked credibility”: para. 47; see also para. 17 (“The Superior Court judge [erred in discounting three scientific articles on the basis that they were too general, and in] considering at length the evidence before him, which he should have assumed to be true at this stage”); see also *Belmamoun*, at paras. 81-83; *Baulne v. Bélanger*, 2016 QCCS 5387, at para. 53.

[23] The Court of Appeal was therefore right to state in the case at bar that the Superior Court judge had [TRANSLATION] “unduly limited the significance of [the table of victims] . . . by ruling on its probative value”: para. 79. It was also right to point out that the judge should, at the authorization stage, have assumed the fact that all the alleged assailants listed in the table of victims were members of the Congregation to be true, and that he had been wrong to speculate that the alleged assailants could have belonged to another religious community: para. 80. If the “arguable case” standard is applied to the table of victims, as the Court of Appeal did, that exhibit does set out “specific, tangible” facts that in themselves support J.J.’s claim that the Congregation knew about the alleged assaults on children by its members.

[24] The table of victims lists 41 victims who were allegedly assaulted by close to 30 members of the Congregation over a period of more than 40 years in more than 20 institutions. Some of the alleged *assailants* were in *positions of authority* within the Congregation, as they held the title of Brother Superior; see also, on the list of alleged assailants, the principal of École Ste-Brigide, who was a member of the Congregation, and Superior D.L. I agree with the Court of Appeal’s conclusion that the combination of all these pieces of evidence — the number of assaults reported in the table of victims, the number of religious members involved, the length of the period covered by the reports and the number of places where assaults allegedly occurred — supports an argument, at the authorization stage, that it might be possible at the trial on the merits to draw from them an *inference* that the Congregation *knew*

or *could not have been unaware* that some of its members were assaulting children: C.A. reasons, at paras. 59-60 and 83-86. Indeed, at the authorization stage, the judge must pay particular attention not only to the alleged facts but also to any inferences or presumptions of fact or law that may stem from them and can serve to establish the existence of an “arguable case”: L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (2nd ed. 2017), at p. 2480; see, for example, *Sibiga*, at paras. 91-93; *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199, at para. 75.

[25] I therefore also agree with the Court of Appeal’s conclusion that [TRANSLATION] “the simple *prima facie* evidence that close to 30 members of the Congregation — fathers and brothers, including some who held the title of Brother Superior (and were therefore in positions of authority) — sexually abused minor children over a significant period of time is indicative of the probable existence of a *modus operandi* on the assailants’ part”: para. 83. In other words, J.J.’s claim that the Congregation knew about the assaults on children by its members must be considered in light of “concrete”, “specific” or “tangible” facts drawn from the table of victims:

[TRANSLATION] In sum, the allegations relating to knowledge on the Congregation’s part were, when the evidence discussed above is taken into account in conjunction with the hierarchy characteristic of traditional religious organizations, sufficient to show an arguable case with respect to the second condition of article 575 *C.C.P.* [Emphasis added.]

(C.A. reasons, at para. 86)

[26] In addition, the Superior Court judge should not, in light of the Benkert and Doyle article (2008), which had been presented to him, have attached so much importance to the failure, *in the application itself*, to allege “concrete”, “specific” or “tangible” facts in support of J.J.’s claim that the Congregation had known about the assaults on children by its members. But the judge refused to consider the content of a scientific article of that nature. The refusal to do so was an error, as I explained above, because the article contained evidence that was relevant to this case: on this point, see C.A. reasons, at paras. 88-90. Thus, it explains that mental duress resulting from the relationship of authority between the priest and the child is often the reason sexual abuse is not reported: see A.R.O., vol. II, at pp. 40 and 60. And J.J. in fact alleges in this case that he never *spoke* about being assaulted as a child until 2011: paras. 3.18 to 3.20 of the application. It goes without saying that he of course did not *report* the assaults at the time of the events. Yet a failure to report at the time of the events can itself be the reason why there are no “concrete”, “specific” or “tangible” facts on which to base an allegation that the officers in question knew about the assaults. (For example, in *Bennett*, the victims’ claim that the bishops responsible for supervising the abusive priest knew about the sexual abuse was supported by the fact that reports had been made at the time of the events: paras. 1 and 8.) Nevertheless, that does not mean that such knowledge does not really exist or cannot be inferred from other evidence. The Benkert and Doyle article (2008) also supports the allegation made at para. 3.34 of the application that the Congregation was able to [TRANSLATION] “subjec[t] the victims to mental, religious and psychological duress

by discouraging them from reporting the sexual abuse by [its] members”: see A.R.O., vol. II, at pp. 60 and 62-63.

[27] Finally, the Superior Court judge clearly erred in finding that the DVD of the *Enquête* program was irrelevant on the basis that the information in it was [TRANSLATION] “of no assistance for the purposes of this proceeding”: para. 111. It is true that the DVD refers at length to sexual assaults committed at Collège Notre-Dame, which were the subject of a settlement in *Cornellier*; see also *Cornellier v. Province canadienne de la Congrégation de Ste-Croix*, 2013 QCCS 3385. However, the DVD is not limited to those assaults. Rather, it supports the claim of a *general* knowledge of sexual abuse and a refusal to act on the part of the Congregation’s *officers*. There is evidence to that effect that specifically supports the allegation made in para. 3.35 of the application that the Congregation’s officers [TRANSLATION] “were aware of the sexual abuse by [its] members . . . but nevertheless hushed it up”, and it comes from a former brother of the Congregation, W. K., who personally knew about several sexual assaults and about his community’s inaction. This former brother stated unequivocally that the Congregation’s inaction regarding the sexual abuse of children was not confined to Collège Notre-Dame and that the Congregation’s officers knew that abuse was also occurring at other places where religious members were engaging in activities with children (minute 21 of the DVD); victims who attended institutions other than Collège Notre-Dame were also mentioned at minute 24 of the DVD ([TRANSLATION] “in one or another of the

institutions managed by Holy Cross”). In sum, the DVD attests to the *systemic* nature of sexual abuse by members of the Congregation in *various* institutions.

[28] The DVD of the *Enquête* program also reveals that Brother C.H. was allegedly protected by the Congregation even though more than one child had accused him of sexual abuse. (On the protection offered to assailants by the officers of religious organizations, see the Benkert and Doyle article (2008), A.R.O., vol. II, at pp. 39 and 70.) Brother C.H. is mentioned in the table of victims in association with acts he is alleged to have committed against victim B.L. at École Côte-des-Neiges and/or the Oratory. The senior officer of the Congregation who is alleged to have protected Brother C.H. by keeping silent about C.H.’s alleged sexual abuse is none other than C.S., who is a director of the Congregation *and* of Corporation Jean-Brillant: information statements for the Congregation in the enterprise register (2015) and (2014) and information statement for Corporation Jean-Brillant in the enterprise register (2014), A.R.C., at pp. 134, 141 and 146. Thus, the DVD supports the allegation that at least *one* senior officer of the Congregation may have had *actual* knowledge of the alleged sexual abuse by one of the assailants who is *expressly* identified in the table of victims. The Court of Appeal was therefore right to stress that the DVD was relevant at the authorization stage and therefore should not have been discounted by the Superior Court judge: para. 93.

- (3) Intervention of the Court of Appeal With Regard to the Condition of J.J.’s Status as Representative Plaintiff for the Class Members (Article 575(4) C.C.P.)

[29] The Superior Court judge found that J.J. did not have [TRANSLATION] “the competence needed to properly represent the class members”: para. 29. In his opinion, J.J. had not personally taken any steps to verify, for example, the institutions where assaults were alleged to have taken place and the number of people in the proposed class: para. 31. The judge also noted that the application for authorization had been initiated by J.J.’s lawyers: para. 31. In addition, J.J. wished to remain anonymous and to minimize possible contacts with other class members: paras. 33 and 35. Because J.J.’s role did not involve “more than simply being a figurehead”, he was not an appropriate representative plaintiff: paras. 28 and 34.

[30] In making this finding, the Superior Court judge relied heavily on two judgments on motions that have since been set aside by the Court of Appeal: *Sibiga v. Fido Solutions inc.*, 2014 QCCS 3235, and *Charles v. Boiron Canada inc.*, 2015 QCCS 312. Although the Superior Court judge cannot be faulted for relying on those two judgments, given that he did not at the time of his ruling have the benefit of the Court of Appeal’s decisions reversing them, his analysis with respect to the condition of J.J.’s status as representative plaintiff must nonetheless be reviewed on appeal in light of those recent decisions, as the dissenting Court of Appeal judge in fact recognized: para. 138. Thus, the Superior Court judge clearly erred in concluding that the leading role played by J.J.’s lawyers in bringing the application for authorization was inconsistent with J.J.’s status as representative plaintiff for the members of the proposed class: *Sibiga* at paras. 101-2; *Charles* at paras. 53-56.

[31] The Superior Court judge did, however, have the benefit of the principles from *Lévesque v. Vidéotron, s.e.n.c.*, 2015 QCCA 205, in which the Court of Appeal had stated that the application judge had erred in faulting the applicant for failing to try to identify other members of the class or determine how many of them there might be; see also *Martel v. Kia Canada inc.*, 2015 QCCA 1033, at para. 29, another case in which the Court of Appeal tempered the applicant's duty to investigate. These same criticisms should therefore not have been levelled against J.J. This error also influenced the Superior Court judge's analysis with respect to other conditions such as that of the composition of the class set out in art. 575(3) *C.C.P.*, since he also expressed the opinion, in discussing that condition, that [TRANSLATION] "the lack of any information together with J.J.'s failure to investigate or to take any steps whatsoever" meant "that the statement in [para. 4.1 of the application] regarding the possible number of victims" was only an "inference" or "hearsay": para. 73. The judge stated that "deficiencies in an investigation by a representative plaintiff" could "be fatal where meeting the condition set out in [art. 575(3) *C.C.P.*] is at issue": para. 74. He had in fact indicated that he would begin with the analysis concerning the condition of J.J.'s status as representative plaintiff, because the reasons why J.J.'s application failed with respect to that condition also justified dismissing it on other grounds: paras. 22-23.

[32] Thus, the Court of Appeal was amply justified in intervening with regard to the condition of J.J.'s status as representative plaintiff. As the Court of Appeal noted, at para. 104, three criteria must be considered in deciding whether an applicant

should be granted this status. The applicant must show (a) an interest in the suit, (b) competence and (c) an absence of conflict with the class members (P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 419; *Infineon*, at para. 149; *Union des consommateurs v. Air Canada*, 2014 QCCA 523, at para. 82). These three criteria are to be interpreted “liberally”, which means that “[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly”: *Infineon* at para. 149. In my view, the Court of Appeal was right to find, at para. 108, that J.J. met the legal requirements. The Court of Appeal was also right to point out that it is perfectly normal in this type of class action for sexual assault victims, including the representative plaintiff, to take advantage of the right to anonymity and for contact with members to be maintained primarily through the representative plaintiff’s lawyers: para. 105, quoting *A v. Les Frères du Sacré-Cœur*, 2017 QCCS 34, at paras. 71 and 79.

(4) Conclusion on the Court of Appeal’s Intervention

[33] There is no doubt that the Superior Court judge made numerous errors, of fact and of law, with respect to *all* the conditions of art. 575 *C.C.P.* Several of his errors, such as failing to identify at least *one* issue common to all the class members — namely the issue of the Congregation’s “systemic” negligence regarding assaults on children allegedly committed by its members — or discounting the DVD of the *Enquête* program and the table of victims, necessarily influenced his decision to deny

the institution of the class action against the Oratory. What is more, the Superior Court judge stated — and this is worth repeating — that [TRANSLATION] “the reasons that justify denying the action against the Congregation . . . are the same as the ones that apply to the action against the Oratory”: para. 138 (emphasis added).

[34] Given the numerous errors made by the Superior Court judge with respect to *all* the conditions of art. 575 C.C.P., the Court of Appeal was clearly right to “substitute its own assessment” for that of the application judge with respect to *all* the conditions: *Vivendi*, at para. 35. It must now be asked whether the Court of Appeal’s decision to authorize the institution of the class action against both the Congregation *and* the Oratory is itself tainted by an error that justifies a review by this Court.

B. *Is the Court of Appeal’s Decision to Authorize the Institution of the Class Action Against Both the Congregation and the Oratory Tainted by an Error that Justifies a Review?*

[35] Before I discuss the conditions of commonality of issues and sufficiency of the alleged facts, which as I mentioned above are the *only* ones at issue in the Oratory’s appeal (aside from its arguments concerning the supposed “forfeiture” of J.J.’s personal action that, it is argued, affects his status as an appropriate representative plaintiff for the class members), a few words about the “connection” between the Oratory and the Congregation are in order. I will conclude my analysis by addressing the fact that only the Oratory is being sued together with the Congregation.

(1) “Connection” Between the Oratory and the Congregation

[36] At the hearing in this Court, the Oratory disputed the existence of any “connection” between it and the Congregation. But it is important to recall the Court of Appeal’s finding that the Oratory’s affairs [TRANSLATION] “were managed in whole or in part by the Congregation’s members”: para. 111; see also paras. 14, 22 and 64. Moreover, the dissenting Court of Appeal judge did not dispute [TRANSLATION] “the . . . fact that the Oratory is managed by members of the Congregation”: para. 137. She merely questioned the legal consequence that fact might have. In my opinion, the Oratory has not shown how the Court of Appeal’s finding on this point is tainted by an error that justifies a review.

[37] In his application, J.J. alleges that the Congregation founded the Oratory: para. 3.3. The *Act to incorporate “St. Joseph’s Oratory of Mount Royal”*, S.Q. 1916, c. 90 (“1916 Act”), is attached to the application, and the following excerpt from that Act — from its preamble in particular — confirms his allegation:

WHEREAS the Reverend Georges Dion of the city of Montreal, the Reverend Elphège Hébert of the town of St. Laurent, the Reverend Absalon Renaud of the city of Montreal, and Messrs. Alfred Bessette and Augustin LeRoy, both of the city of Montreal, in religion respectively Brother André and Brother Marie-Auguste, all five members of the Congregation of the Holy Cross, have by their petition represented that a chapel dedicated to the devotion of St. Joseph has been established and maintained for many years past on the slope of Mount Royal in the city of Montreal, and that the faithful have been in the habit of frequenting it in large numbers; that in order to assure the permanent maintenance of the said chapel and to allow the extension of its sphere of action, it is expedient to incorporate the petitioners for the purpose of acquiring and maintaining the said chapel and thereby promoting the Roman Catholic

faith and the welfare of souls by the propagation of the devotion to St. Joseph;

...

Whereas the petitioners have prayed that an act for the purpose aforesaid be passed; and whereas it is expedient to grant their prayer;

Therefore His Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:

1. The said Reverend Georges Dion, Reverend Elphège Hébert, Reverend Absalon Renaud, Brother André and Brother Marie-Auguste, and all persons who hereafter associate themselves with them, and their successors, are and shall be constituted a corporation for the purpose of promoting the Roman Catholic faith and the welfare of souls by the propagation of the devotion to Saint Joseph under the name of “St. Joseph’s Oratory of Mount Royal.”

Furthermore, the following comments are made at the very beginning of the DVD of the *Enquête* program: [TRANSLATION] “Holy Cross officers knew very well what was happening”, and “[t]his scandal broke at a time when the Pope was about to canonize the most illustrious of the community’s members, Brother André, the builder of St. Joseph’s Oratory” (emphasis added). A little later, the speaker also refers to a “wealthy, influential and prestigious congregation” whose members “built a monument, St. Joseph’s Oratory, and . . . will [soon] have among them a saint, Brother André”.

[38] As well, s. 2 of the 1916 Act provided that the Oratory’s affairs were to be managed by five directors, *all* of them members of the Congregation:

2. The affairs of the corporation shall be managed by five directors, who shall be chosen from amongst its members who are at the same time

members of the Congregation of the Holy Cross, at a general meeting held for that purpose.

[39] In 1974, the Oratory was continued under the *Religious Corporations Act*, S.Q. 1971, c. 75 (now the *Religious Corporations Act*, CQLR, c. C-71): see Exhibit R-2, information statement for the Oratory in the enterprise register (2013), A.R.O., vol. II, at p. 23. For the entire period before 1974, however, there is *nothing* in the record to suggest that the Oratory was not governed by the 1916 Act. And *all* the assaults allegedly committed at the Oratory that are reported in the table of victims are in fact dated *earlier* than 1974, when the Oratory's affairs were, according to the evidence submitted at this stage, managed *entirely* by members of the Congregation.

[40] As for the period *after* 1974, it is true that in the information statement for the Oratory in the enterprise register from 2013, the Oratory reported having *nine* directors — not *five* or *seven*² as the 1916 Act would have it — and it is unclear whether they were all members of the Congregation.³ Nevertheless, as of the date in question, one of the Oratory's directors, L.D., was also a director of the Congregation *and* of Corporation Jean-Brillant: see A.R.O., vol. II, at p. 24; information statements for the Congregation in the enterprise register (2015) and (2014) and information statement for Corporation Jean-Brillant in the enterprise register (2014), A.R.C., at pp. 134, 141 and 146. What is more, Maison Sainte-Croix, one of the establishments

² Section 4 of the 1916 Act provides that “[t]he term of office of the directors [and] their number, not less than three or more than seven . . . may be fixed from time to time by by-law passed by the members of the corporation at a general meeting specially called for that purpose”.

³ Among these nine directors, there are two whose reported personal addresses corresponded to the addresses of establishments of the Congregation: see information statement for the Oratory in the enterprise register (2013), A.R.O., vol. II, at p. 24, and information statements for the Congregation in the enterprise register (2015) and (2014), A.R.C., at pp. 135-36 and 147-48.

reported by the Congregation, was located at the same address as the Oratory (one of the Congregation's directors in fact resided there): information statements for the Congregation in the enterprise register (2015) and (2014), A.R.C., at pp. 134, 136, 146 and 148. The Congregation also used certain names in Quebec that were associated with the Oratory, such as "Le Grand Saint-Joseph", "Maison Frère-André", "Résidence Alfred-Bessette" and "Maison Saint-Joseph": information statements for the Congregation in the enterprise register (2015) and (2014), A.R.C., at pp. 137-38 and 149-50.

[41] The Oratory will still, should it wish to do so, be able to raise a defence at the trial on the merits in order to deny the existence of any "connection" between it and the Congregation, but it is not appropriate to consider possible defences in this regard at the authorization stage: *Sibiga*, at para. 83; *Brown v. B2B Trust*, 2012 QCCA 900, at para. 40; see also *Carrier v. Québec (Procureur général)*, 2011 QCCA 1231, at para. 37. Moreover, if it appears that a distinction needs to be drawn between assaults allegedly committed at the Oratory *before* 1974 and those allegedly committed *after* that, the trial judge can, "even on [his or her] own initiative, modify or divide the class at any time": art. 588 para. 2 *C.C.P.*⁴

[42] Finally, if any doubt remains at this stage as to the existence of a "connection" between the Oratory and the Congregation in light of the parties' contradictory submissions on this point, the applicant, J.J., should in principle be

⁴ It should be noted that J.J.'s application covers the entire [TRANSLATION] "period from 1940 to a final judgment": Sup. Ct. reasons, at para. 2.

given the benefit of the doubt: *Lambert (Gestion Peggy)*, at para. 38 ([TRANSLATION] “should the application judge be so unfortunate as to be faced with contradictory facts, he or she must favour the general principle that the facts in the motion for authorization must be assumed to be true unless they seem implausible or clearly wrong”); *Harmegnies*, at para. 46 ([TRANSLATION] “the applicant must be given the benefit of the doubt”); *Sibiga*, at para. 51 (“courts should err on the side of caution and authorise the action where there is doubt as to whether the standard has been met”); *Charles*, at para. 43; see also per Gascon J. (then of the Superior Court) in *Adams v. Banque Amex du Canada*, 2006 QCCS 5358, at para. 23 ([TRANSLATION] “any doubt must be resolved in favour of the applicants, that is, in favour of authorizing the action”); S. Finn, *L’action collective au Québec* (2016), at p. 53; P.-C. Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at pp. 115-16. This cautious approach is justified by the principle that *merely* being named as a defendant in a class action does not *in and of itself* constitute irreparable harm, since the trial judge will still have free rein to dismiss the action after hearing all the evidence:

[TRANSLATION] Contrary to the position taken by companies and their counsel, the authorization of a class action does not impair the respondent’s rights, “since authorizing an action is not the same as deciding it”. Defendants will have the opportunity to assert their rights fully at the trial on the merits, as in any other action. A judgment on authorization is merely a preliminary decision that could be varied at the trial, or even before, and does not prejudice the final outcome of the litigation.

(Lafond (2006), at pp. 116-17)

(2) Condition of Commonality of Issues (Article 575(1) C.C.P.)

(a) *Applicable Law*

[43] Article 575(1) C.C.P. provides that the institution of a class action cannot be authorized unless the court finds that “the claims of the members of the class raise identical, similar or related issues of law or fact”. This is the condition of “commonality”, which “applies not only in Quebec law, but also in that of all the common law provinces of Canada”: *Vivendi*, at para. 38. The Court studied the condition of “commonality” in depth in *Vivendi*. It stressed that the test that applies in Quebec law appears to be less stringent than the one that is applied in the common law provinces, because the phrase “identical, similar or related issues of law or fact” used by the Quebec legislature does not align perfectly with the expression “common issues” or with the “common issue” condition of the common law provinces: *Vivendi*, at paras. 52-53.

[44] Moreover, it can be seen from the Quebec courts’ interpretation of art. 575(1) C.C.P. that their “approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces”, as “[they] propose a flexible approach to the common interest that must exist among the [class]’s members”: *Vivendi*, at para. 54, citing Lafond (1996), at p. 408; see also paras. 56-58. In *Infineon*, the Court added that “[t]here is no requirement of a fundamental identity of the individual claims of the proposed [class]’s members”, given that, “[a]t the authorization stage, the threshold requirement for common

questions is low”: para. 72. Thus, “even a single identical, similar or related question of law would be sufficient to meet the common questions requirement . . . provided that it is significant enough to affect the outcome of the class action”: *Infineon*, at para. 72. In addition, “[TRANSLATION] [t]he fact that the situations of all members of the [class] are not perfectly identical does not mean that the [class] does not exist or is not uniform”: *Infineon*, at para. 73, quoting *Guilbert v. Vacances sans Frontière Ltée*, [1991] R.D.J. 513 (Que. C.A.). Nor, as a result of *Bank of Montreal v. Marcotte*, is it necessary for each member of the class to have a personal cause of action against each of the defendants. J.J. is therefore right that the fact that not all the class members have a personal cause of action against the Oratory is no bar to authorizing the institution of a class action against it: R.F.O., at para. 52.

(b) *Application of the Law to the Facts of the Case*

[45] In *Vivendi*, the Court stated, citing *Dutton* and *Rumley*, that “a question will be considered common if it can serve to advance the resolution of every class member’s claim”: para. 46 (emphasis added). The Oratory’s challenge with respect to the condition of “commonality” is essentially based on this passage from *Vivendi* (A.F.O., at para. 65 (footnote 73)), as it argues that the Court of Appeal has not shown how the answer to any question relevant to the action against it would in any way advance the action of the class members who have no connection with the Oratory: A.F.O., at para. 59.

[46] I cannot agree with the Oratory, and this is so even if I were to assume that its strict interpretation of the Court's statement in *Vivendi* is correct.

[47] First, it is not entirely accurate to state, as the Oratory does in its factum (at para. 75), that there can be *no* common issue that connects the Oratory to a victim of an alleged assault by a member of the Congregation at a place other than the Oratory. On the contrary, the table of victims shows that there may in fact be victims of assaults allegedly committed by members of the Congregation at places other than the Oratory whose assailants are also alleged to have assaulted victims at the Oratory. For example, the name of Brother Bernard is associated with the institution in Waterville (1951-52) *and* with the Oratory (1958-60): table of victims; C.A. reasons, at para. 112. It should also be noted that J.J. is not the only class member with a personal cause of action against the Oratory. There are four other victims who have come forward at this point who also claim to have been assaulted at the Oratory: table of victims; C.A. reasons, at para. 112.

[48] Second, J.J.'s personal cause of action against the Oratory is primarily based on it being directly liable for assaults allegedly committed at the Oratory (and not on liability for the act of another person). As I have already mentioned, all the common issues identified by J.J. that were authorized by the Court of Appeal actually related to the question whether the Oratory and the Congregation were negligent toward sexual assault victims. J.J. alleges that the Oratory [TRANSLATION] "allowed members of the Congregation . . . to sexually abuse minor children . . . at [the]

Oratory”: para. 3.33 of the application. The Oratory also allegedly “subjected the victims to mental, religious and psychological duress by discouraging them from reporting the sexual abuse by members of the Congregation”: para. 3.34 of the application. J.J. further alleges that the Oratory “[was] aware of the sexual abuse by members of the Congregation . . . but nevertheless hushed it up”: para. 3.35 of the application. Lastly, he adds that the Oratory “knowingly and consciously chose to ignore the issue of sexual abuse of minor children by members of the Congregation”: para. 3.36 of the application.

[49] One might ask what it means, for a *legal person* such as the Oratory, “to be aware” of the alleged sexual abuse of children, to “knowingly and consciously choose to ignore” that abuse, or to “hush it up”. The answer is simple, as this can mean only one thing: the Oratory’s *directors* were aware of the alleged sexual abuse of children, and the Oratory’s *directors* are alleged to have knowingly and consciously chosen to ignore that abuse or to hush it up. As J.-L. Baudouin, P. Deslauriers and B. Moore explain:

[TRANSLATION] Because a legal person does not have a will of its own and therefore has no sense of judgment, one might ask whether it can be held liable independently of the individual liability of its representatives or of the natural persons who make it up or run it. In civil law, unlike in the criminal law, no distinction is drawn between natural persons and legal persons where the accountability for fault is concerned. In principle, therefore, given what is said in articles 300 and 1457 C.C., a legal person can be held directly liable if the wrongful act that caused damage was committed by one of its governing organs acting within the scope of its duties, or by a person for whom it is responsible by law. In practice, however, it is more common for a legal person to be sued as a principal for a wrongful act committed by one of its agents, employees or servants.

The courts have on many occasions recognized the principle of extracontractual liability of legal persons.

With the provisions of the Civil Code, it can now be asked which organs of a legal person can give rise to direct extracontractual liability. A principle appears to emerge from article 311 C.C. A director, first of all, is, as provided for in article 321 C.C., considered to be a mandatary, which means that, under articles [2160](#) and 2164 C.C., the legal person is liable for his or her acts, but probably on the basis of liability for the act of another person. As for the board of directors, it may also directly expose the legal person to liability, given that it manages the affairs of the legal person and exercises all the powers necessary for that purpose on the legal person's behalf (art. 335 C.C.). However, it seems harder to imagine that the legal person would be exposed to direct liability for an act resulting from a general meeting (arts. [345](#) et seq. C.C.). [Emphasis added.]

(*La responsabilité civile* (8th ed. 2014), Nos. 1-118 and 1-119)

[50] Thus, the allegations relating to direct liability of the Oratory actually concern allegedly wrongful conduct *on its directors' part*. As the Court of Appeal noted, at para. 111, [TRANSLATION] “[the Oratory’s] affairs were managed in whole or in part by the Congregation’s members” (see also paras. 14, 22 and 64). In other words, the allegations relating to direct liability of the Oratory are actually allegations relating to faults *of members of the Congregation*, and more specifically, allegations relating to faults of members of the Congregation *acting as directors of the Oratory*, who are alleged to have failed to put a stop to the sexual abuse or, worse, to have covered it up. The question of faults allegedly committed *by the Congregation's members* is undeniably one that is common to *all* the members of the class. This means that, contrary to what the Oratory argues, any finding of direct liability of the Oratory — because it would be a finding of faults *of members of the Congregation acting as directors of the Oratory* — will advance the action of each member of the

class, particularly in that it will tend to establish the existence of “systemic” negligence within the Congregation in relation to the alleged sexual abuse of children.

[51] This reasoning might not apply in a case concerning business corporations or legal persons of some other type. But the question does not need to be addressed in the context of these appeals, as the Oratory and the Congregation are *not* business corporations, but special legal persons. The Oratory is “a group of persons who form a religious body”: definition of “church”, s. 1(c) of the *Religious Corporations Act*; see information statement for the Oratory in the enterprise register (2013), A.R.O., vol. II, at p. 23. And the Congregation is “a group of religious who are members of a religious community”: definition of “congregation”, s. 1(a) of the *Religious Corporations Act*; see Exhibit R-1, information statement for the Congregation in the enterprise register (2009), and information statements for the Congregation in the enterprise register (2015) and (2014), A.R.C., at pp. 130, 133 and 145. As the Court of Appeal pointed out, traditional religious organizations are *essentially* characterized by strong solidarity among their members as a result [TRANSLATION] “[of] the temporal and spiritual hierarchical relationship that inevitably exists between a religious member and his or her religious community”: C.A. reasons, at para. 57; see also the Doyle article (2006); excerpts from the *Code of Canon Law*; *Bennett*, at paras. 21 and 27-28; *Bazley*, at paras. 44 and 46; *Ogilvie*, at pp. 226 and 320.

[52] Under the 1916 Act, it was the Oratory's five founding "petitioners" — "all five members of the Congregation of the Holy Cross" — together with "all persons who hereafter associate themselves with them, and their successors", who were constituted a corporation under the name of "St. Joseph's Oratory of Mount Royal". These excerpts from the 1916 Act suggest that those members of the religious community known as the Congregation of Holy Cross were *themselves*, and *in that capacity*, constituted a corporation under the name of "St. Joseph's Oratory of Mount Royal". In this sense, the Oratory is simply one of the *faces* of the religious community known as the Congregation of Holy Cross, and it was constituted a corporation in 1916, at a time when (a) the *Religious Corporations Act* was not yet in force (see S.Q. 1971, c. 75) and (b) the religious community known as the Congregation of Holy Cross *as a whole* was, according to the evidence presented at this stage, not yet carrying on its activities in any form of *unified* religious corporation: see *An Act to incorporate Les Religieux de Ste. Croix*, S.Q. 1935, c. 152; *An Act to amend the charter of Les Religieux de Sainte-Croix*, S.Q. 1947, c. 121; *An Act to incorporate Les Frères de Sainte-Croix*, S.Q. 1947, c. 122.

[53] Moreover, it can be seen from the scheme of the *Religious Corporations Act* as a whole that in the case of a "congregation", that is, a "group of religious who are members of a religious community" (s. 1(a)), there can only be *one* "corporation whose objects are to organize, administer and manage a congregation": s. 14. The letters patent of such a corporation may thus provide that the corporation's affairs "shall be administered by the person exercising the function of superior of the

congregation or any equivalent function”: s. 8.1. In addition, s. 13 of the Act provides that “[a]ny member of a corporation whose objects are to organize, administer and maintain a congregation may agree to devote his activities gratuitously to the service of the corporation and undertake to transfer to it all salary, remuneration or other advantages which are the result of his work, as long as he remains a member of the corporation”. Under the Act, a corporation like this also has powers over the congregation’s members that are inconsistent with the existence of more than *one* “corporation whose objects are to organize, administer and maintain a congregation”. For example, s. 14 of the *Religious Corporations Act* provides that such a corporation “shall represent its members and may, in its name but for their benefit, and with their consent, except in cases where it is impossible to obtain it, exercise their civil rights respecting the property they may own or acquire”. Similarly, s. 14.1 provides that “[w]here no protection mandate is given . . . the corporation whose objects are to organize, administer and maintain the congregation shall have the mandate and responsibility to fully ensure the care and administer the property of the member for as long as the member remains a member of the congregation”.

[54] In short, the *Religious Corporations Act* confirms that the members of the religious community known as the Congregation of Holy Cross who worked at the Oratory as officiating priests (like Father Bernard, who allegedly assaulted J.J.) or as directors may have *remained* closely connected with the Congregation. With respect, I cannot accept my colleague Gascon J.’s assertion that the Oratory was not “under the control” of the religious community known as the Congregation of Holy Cross:

Gascon J.’s reasons, at para. 180. The Oratory was *clearly* under the Congregation’s control, not only because *all* of the Oratory’s directors were members of the Congregation *at the time of the events*, but also because [TRANSLATION] “[of] the temporal and spiritual hierarchical relationship that inevitably exists between a religious member and his or her religious community” *and* the privileges (enjoyment of services provided gratuitously, transfer of salary, remuneration or any other advantages, etc.) and extraordinary powers (exercise of civil rights, protection mandate or mandate to administer property, etc.) the Congregation may have had in relation to its members.

[55] I will say no more in these reasons about the complex concepts of religious “organizations” or “corporations, “church” and “congregation”. A court *may* of course decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so, and to some extent the court *must* also interpret the legislation to determine whether the proposed class action is “frivolous” or “clearly wrong” in law: *Carrier*, at para. 37; *Trudel v. Banque Toronto-Dominion*, 2007 QCCA 413, at para. 3; *Fortier v. Meubles Léon ltée*, 2014 QCCA 195, at paras. 89-91; *Toure v. Brault & Martineau inc.*, 2014 QCCA 1577, at para. 38; *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433, at para. 12; *Groupe d’action d’investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923, at para. 33; Finn (2016), at p. 170. Aside from such situations, however, it is in principle not appropriate at the authorization stage for the court to “make any determination as to the merits in law of the conclusions, in light of the facts alleged”: *Comité régional des*

usagers des transports en commun de Québec v. Québec Urban Community Transit Commission, [1981] 1 S.C.R. 424, at p. 429; *Nadon v. Anjou (Ville)*, [1994] R.J.Q. 1823 (C.A.), at pp. 1827-28; *Infineon*, at para. 60. In the instant case, it is enough to note that the issue of direct liability of the Congregation for alleged sexual abuse of children by its members is difficult to distinguish from the issue of direct liability of the Oratory, which is but one of many *faces* of the Congregation, for the *same* alleged sexual abuse of children by members of the *same* religious community. Even if these issues are not “identical . . . issues of law or fact”, they are certainly at least “similar” or “related” issues within the meaning of art. 575(1) *C.C.P.* As the Court of Appeal explained in *Comité d’environnement de La Baie*:

. . . Article 1003(a) [now art. 575(1)] does not require that *all* of the questions of law or of fact in the claims of the members be identical or similar or related. Nor does the article even require that the majority of these questions be identical or similar or related. From the text of the article, it is sufficient if the claims of the members raise *some* questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action. [Emphasis in original; p. 659.]

(3) Condition of Sufficiency of the Alleged Facts (Article 575(2) C.C.P.)

(a) *Applicable Law*

[56] Article 575(2) *C.C.P.* provides that the facts alleged in the application must “appear to justify” the conclusions being sought. This condition, which was not included in the original bill on class actions, was added in response to pressure from certain companies [TRANSLATION] “that feared it would give rise to a significant

volume of frivolous actions”: V. Aimar, “L’ autorisation de l’ action collective: raisons d’ être, application et changements à venir”, in C. Piché, ed., *The Class Action Effect* (2018), 149, at p. 156 (emphasis added); P.-C. Lafond, “Le recours collectif: entre la commodité procédurale et la justice sociale” (1998-99), 29 *R.D.U.S.* 4, at p. 24. It is now well established that at the authorization stage, the role of the judge is to screen out *only* those applications which are “frivolous”, “clearly unfounded” or “untenable”: *Sibiga*, at paras. 34 (“the judge’s function at the authorization stage is only one of filtering out untenable claims” (emphasis added)), 52 (“A motion judge should only weed out class actions that are frivolous or have no prospect of success” (emphasis added)) and 78 (“it was enough to show that the appellant’s claim was not a frivolous one and that, at trial, she would have an arguable case to make on behalf of the class” (emphasis added)); see also *Charles*, at para. 70; Lafond (2006), at pp. 112 ([TRANSLATION] “[t]he purpose of [art. 575(2) C.C.P.] is . . . first, ‘to immediately eliminate actions that are *prima facie* frivolous’ and, second, to ‘dispose in the same way of actions that, although not frivolous, are clearly unfounded’”) and 116 (“the authorization stage exists solely to screen out applications that are frivolous or clearly unfounded in fact or in law, as the legislature originally intended”); see also *Fortier*, at para. 70; *Oubliés du viaduc de la Montée Monette v. Consultants SM inc.*, 2015 QCCS 3308, at para. 42. As this Court explained in *Infineon*, “the court’s role is merely to filter out frivolous motions”, which it does “to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims”: para. 61 (emphasis added); see also paras. 125 (“a judge hearing a

motion for authorization is responsible for weeding out frivolous cases”) and 150 (“the purpose of the authorization stage is merely to screen out frivolous claims”).

[57] This position was strengthened by the statutory amendments of 2003: *An Act to reform the Code of Civil Procedure*, S.Q. 2002, c. 7, s. 150. At that time, the legislature abolished the requirement that an affidavit be filed in support of the application, as a result of which the applicant had had to submit to examination as a deponent at the authorization stage. In addition, the defendant may now only contest the application orally, and the judge may allow relevant evidence to be submitted at the hearing: *Infineon*, at para. 66; see also R. Wagner, “How the Class Action has evolved to become the Procedural Tool it is today”, in C. Piché, ed., *The Class Action Effect* (2018), 273, at p. 282; Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), at p. 419 ([TRANSLATION] “[Article 574] preserves the rule in the existing law established by the *Act to reform the Code of Civil Procedure* . . . which requires that the application be contested orally and which allows relevant evidence to be submitted at this stage only with the court’s authorization. That amendment was essentially intended to limit proceedings for the authorization of a class action, which had grown ‘out of proportion’ over the years, to such an extent that the trial could be considered to take place at the stage of the application for authorization rather than on the action itself”). As the Court of Appeal explained in *Sibiga*, at para. 50: “The purpose of those amendments [by the Quebec legislature in 2003] ‘was to ensure that the authorization stage be used to filter out only the most frivolous and unsubstantiated claims and to

ensure that the authorization process was not being used by judges to render pre-emptive decisions on the merits”, quoting E. Yiannakis and N. Boudreau, “Paradise Lost? Rethinking Quebec’s Reputation as a Haven for Class Actions” (2014), 9 *Can. Class Action Rev.* 385, at p. 392 (emphasis added).

[58] The applicant’s burden at the authorization stage is simply to establish an “arguable case” in light of the facts and the applicable law: *Infineon*, at paras. 65 and 67; see also *Vivendi*, at para. 37; *Marcotte v. Longueuil (City)*, at para. 23. This is a “low threshold”: *Infineon*, at para. 66. The applicant need establish only a mere “possibility” of succeeding on the merits, as *not even* a “realistic” or “reasonable” possibility is required: *Infineon*, at paras. 80, 100, 101, 130, 136 and 144; *Charles*, at para. 70; *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at paras. 19, 35, 36 and 38; *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, at paras. 29-31. The legal threshold requirement under art. 575(2) *C.C.P.* is a simple burden of “demonstration” that the proposed “legal syllogism” is tenable: *Pharmascience Inc.*, at para. 25; *Martin v. Société Telus Communications*, 2010 QCCA 2376, at para. 32; *Infineon*, at para. 61. As I pointed out above, it is in principle not appropriate at the authorization stage for the court to make any determination as to the merits in law of the conclusions in light of the facts being alleged. It is enough that the application not be “frivolous” or “clearly wrong” in law, or in other words, the applicant must establish “a good colour of right”: *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at paras. 9-11; *Berdah v. Nolisair International Inc.*, [1991] R.D.J. 417 (Que. C.A.), at pp. 420-21, per

Brossard J.A.; *Infineon*, at para. 63. As for the evidentiary threshold requirement under art. 575(2) *C.C.P.*, it is more helpful to define it on the basis of what it is *not*. First, the applicant is *not* required to establish an arguable case in accordance with the civil standard of proof on a balance of probabilities, as the evidentiary threshold for establishing an arguable case falls “comfortably below” that standard: *Infineon*, at para. 127; see also paras. 65, 89 and 94. Second, he or she is *not*, unlike an applicant elsewhere in Canada, required to show that the claim has a “sufficient basis in fact”: *Infineon*, at para. 128.

[59] Furthermore, at the authorization stage, the facts alleged in the application are assumed to be true, so long as the allegations of fact are sufficiently precise: *Sibiga*, at para. 52; *Infineon*, at para. 67; *Harmegnies*, at para. 44; *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859, at para. 32; *Charles*, at para. 43; *Toure*, at para. 38; *Fortier*, at para. 69. Where allegations of fact are “vague”, “general” or “imprecise”, they are necessarily more akin to opinion or speculation, and it may therefore be difficult to assume them to be true, in which case they must absolutely “be accompanied by some evidence to form an arguable case”: *Infineon*, at para. 134. It is in fact strongly suggested in *Infineon*, at para. 134 (if not explicitly, then at least implicitly), that “bare allegations”, although “insufficient to meet the threshold requirement of an arguable case” (emphasis added), can be *supplemented* by “some evidence” that — “limited though it may be” — must accompany the application in order “to form an arguable case”.

[60] Thus, one of the natural corollaries of *Infineon* is that, while what is “vague”, “general” or “imprecise” does depend on the context, it also depends on the evidence adduced in support of the application: see, to the same effect, Finn (2016), at p. 170 ([TRANSLATION] “[t]he judge must not merely review the content of the pleading . . . but must also endeavour to consider it in its context”); see also, by analogy, *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, 4 B.C.L.R. (5th) 292, at para. 23 (“To hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the *Act* — judicial economy, access to justice, and behaviour modification”); *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 30. It is in fact possible for the evidence submitted in support of the application to contain “concrete”, “specific” or “tangible” facts that could be used to establish an arguable case even though the allegations in the application seem to be “vague”, “general” or “imprecise”. And it is well established that a court that must determine whether an applicant has discharged his or her burden of showing an “arguable case” must consider the allegations in the application for authorization in light of all the documentary evidence, sworn statements and transcripts in the record: S. E. Finn, *Manuel de l’action collective* (2017), at p. 16, citing *Option consommateurs v. Bell Mobilité*, 2008 QCCA 2201, at para. 30; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (5th ed. 2015), vol. 2, at No. 2-1615; *Masella*, at para. 8. For example, the Court of Appeal wrote the following in *Comité d’environnement de La Baie Inc.*:

It is certainly true, as the judge observes, that appellant's allegations are very vague and imprecise as to the factual basis of respondent's responsibility for the damages suffered by the residents. In its motion, appellant simply alleges that the damages have been caused by respondent's [[TRANSLATION] "fault, negligence and lack of care"] Some additional detail is provided, however, in exhibit P-3, and particulars may, in due course, be ordered by the Court if they are required.

Vague as appellant's allegations may be, however, they do assert that the damage has been caused to the residents in question by air pollution emanating from respondent's port operations and they do allege respondent's fault and negligence. At this stage of the proceedings, I believe this is sufficient to satisfy the requirement of Article 1003(b) that the facts alleged seem to justify the authorization of a class action.

It is important to bear in mind that the judge hearing a motion under Article 1003 for authorization to institute a class action is not called upon to decide that the action is well founded or that it will succeed. The only purpose of the hearing, at that stage, is to determine whether or not the conditions set out in sub-paragraphs (a), (b), (c) and (d) have been met. If the conditions are met, the authorization should be granted and the class action should be allowed to proceed even if the claims may involve difficult problems of proof or serious legal questions as to liability.

While the judge, on a motion for authorization, must be careful to screen out cases which are obviously frivolous or which do not meet the requirements of Article 1003, it is not his role to determine the merits of the claim. At that stage, he need only decide whether the facts alleged in the motion for authorization "seem to justify" a class action as required by Article 1003(b). [Emphasis added; pp. 660-61.]

In *Harmegnies*, in contrast, there was no evidence of harm other than a [TRANSLATION] "vague, general and imprecise allegation": para. 44. The applicant had come to court [TRANSLATION] "empty-handed, asking the judge to conclude that, because there was fault, there was also necessarily damage": *Harmegnies*, at para. 44; see on this point *Infineon*, at para. 129.

[61] In sum, this Court has held unequivocally that the threshold requirement, both legal and evidentiary, under art. 575(2) *C.C.P.* is “a low one” (*Infineon*, at paras. 59, 66, 72, 94, 124 and 137; *Vivendi*, at para. 72); in other words, the applicant’s burden at the authorization stage is not “onerous” (*Infineon*, at paras. 33, 61, 110, 126, 129 and 130). It is clear from *Infineon* and *Vivendi*, and from a consistent line of subsequent decisions in which the Court of Appeal has faithfully followed, interpreted and applied them, that a “frivolous”, “manifestly improper” or “untenable” application does not meet this “low” threshold and must therefore be “reject[ed] entirely”: *Infineon*, at paras. 61 and 62, quoting *Comité régional des usagers*, at p. 429. I wish to be clear here — and I say this with great respect — that it does not seem to me to be entirely accurate to say, as Côté J. does at para. 203 of her reasons, that her “disagreement” with Gascon J. essentially concerns the “application” of the criterion applicable to the condition set out in art. 575(2) *C.C.P.* to the case at bar, and not the “interpretation” of that criterion. Côté J. is of the view that screening out frivolous or clearly unfounded applications is not the “*criterion* adopted by the legislature”, but only “one of the *purposes* of the authorization process” (at para. 206), whereas Gascon J. states quite clearly — and rightly — that it “is sufficient” that J.J.’s application be “neither untenable nor frivolous” (at para. 163).

[62] Despite what certain jurists would prefer (see, for example, *Whirpool Canada v. Gaudette*, 2018 QCCA 1206, at para. 29 (in *obiter*); C. Marseille, “Le danger d’abaisser le seuil d’autorisation en matière d’actions collectives — Perspectives d’un avocat de la défense”, in C. Piché, ed., *The Class Action Effect*

(2018), 247, at pp. 252-53), it is in my opinion not advisable for this Court to [TRANSLATION] “reinforce” the authorization process or otherwise “revisit” its decisions in *Infineon* and *Vivendi*, which, I would add, can be said to have been endorsed by the Quebec legislature when the new *C.C.P.* came into force on January 1, 2016 (see *Commentaires de la ministre de la Justice*, at p. 420: [TRANSLATION] “[Article 575] restates the former law”). I agree with my colleague Côté J., however, that the burden of establishing an “arguable case”, although not a heavy one, “does exist”, and “the applicant must meet it”: Côté J.’s reasons, at para. 205, citing *Sofio*, at para. 24. This means that the authorization process must not be reduced to “a mere formality”: Côté J.’s reasons, at para. 206. But I agree with the Court of Appeal that in the instant case, J.J. has met the evidentiary and the legal threshold requirements under art. 575(2) *C.C.P.*, as I will now show.

(b) *Application of the Law to the Facts of the Case*

[63] In this case, the Oratory submits that it cannot be held liable solely because it owns a place where assaults are alleged to have been committed: A.F.O., at paras. 107-10. However, this reflects a misunderstanding of J.J.’s allegations against the Oratory. As this Court put it in *Infineon*, at para. 80, J.J.’s “allegations . . . must be fully and well understood”. Contrary to what the dissenting Court of Appeal judge suggested on this point (at paras. 128, 132 and 136), J.J.’s personal cause of action against the Oratory is not based on a supposed “absolute” (i.e. *no-fault*) liability arising *solely* from the fact that the Oratory *is* the owner of a place where sexual

assaults were allegedly committed. Rather, it is based on liability for the Oratory's *direct fault* in relation to assaults allegedly committed at that place. Such a cause of action necessarily implies that the Oratory's *directors* are alleged to have committed a fault attributable to the Oratory by failing to put a stop to the sexual abuse or, worse, by covering it up. In sexual abuse cases, direct fault can, moreover, take different forms: breach of a duty to report or to protect, or failure to do what was needed to prevent or put a stop to the abuse (see, *inter alia*, Langevin and Des Rosiers, at pp. 165-208). In the case at bar, the relevant allegations are set out at paras. 3.33 to 3.38 of the application. The dissenting Court of Appeal judge characterized them as [TRANSLATION] "general (and non-factual) accusations": para. 134. I understand that it could be tempting to conclude that the allegations in J.J.'s application are vague, general or imprecise: see, for example, *Alex Couture*, at paras. 31-32.

[64] However, the seeming vagueness, generality or imprecision of the allegations must be assessed in light of the context of J.J.'s application and the evidence presented in support of it. That context involves incidents that occurred many years ago, when J.J. was still a child. As I mentioned above, the fact that nothing was reported at the time of the events explains, at least in part, why no "concrete", "specific" or "tangible" allegations of fact are made in the application itself in support of J.J.'s argument that the Oratory knew about the alleged sexual assaults on children. What is more, the allegations of fault against the Oratory are not being made "in the abstract": they are grounded in the underlying factual framework, which consists of allegations that multiple victims were sexually assaulted at the

Oratory on a regular basis over a period of many years. This *in itself* is “suspect”, and makes it “possible” that there is a fault that can be attributed to the Oratory. Sexual assault has *always* been a fault that automatically causes serious injury: Langevin and Des Rosiers, at p. 166; *Centre de la communauté sourde du Montréal métropolitain v. Institut Raymond-Dewar*, 2012 QCCS 1146, at paras. 75-76. In addition, J.J.’s seemingly general allegations against the Oratory are supported in the case at bar by “some evidence” within the meaning of *Infineon*: para. 134.

[65] Let me explain.

[66] The Oratory is not *only* the owner of a [TRANSLATION] “pre-eminent place of worship . . . associate[d] with the Congregation”: Gascon J.’s reasons, at para. 177. It is true that, according to the preamble to the 1916 Act, the Oratory was incorporated “to assure the permanent maintenance of the [chapel known as St. Joseph’s Oratory] and to allow the extension of its sphere of action”: A.R.O., vol. II, at p. 29. However, s. 1 of that Act clearly provides that the Oratory was also incorporated “for the purpose of promoting the Roman Catholic faith and the welfare of souls by the propagation of the devotion to St. Joseph”; see also the preamble to the 1916 Act. As I mentioned above, the information statement for the Oratory in the enterprise register from 2013 indicates that the Oratory is a “church” within the meaning of s. 1(c) of the *Religious Corporations Act*, that is, a “group of persons who form a religious body”: see A.R.O., vol. II, at p. 23. And s. 5 b. of the 1916 Act provides that the Oratory may “[a]pppear before the courts, and prosecute or defend

any action or proceeding”. Section 5 d. adds that the Oratory may also “[a]ccept, acquire and hold . . . for the purposes and use of the corporation, moveable and immoveable property”, while s.7 provides that rents and revenues from its immovable property must be spent “in the accomplishment of religious, charitable and educational works”. In considering similar provisions in *Bennett*, this Court categorically *rejected* the argument that the powers and activities of an episcopal corporation are confined “to holding property”: para. 9.

[67] The organization and management of masses are, without a doubt, “religious . . . works” (s. 7 of the 1916 Act) of central importance for which the Oratory, as a “church”, was responsible in accordance with its mission of “promoting the Roman Catholic faith and the welfare of souls by the propagation of the devotion to St. Joseph” (preamble to and s. 1 of the 1916 Act):

Catholic theology and culture is firmly structured around the belief that the Mass, or Eucharist, is the only acceptable sacrifice to God, having replaced all forms of sacrifice that preceded it. The notion of sacrifice presumes a belief that there remains a need for intercession and advocacy before God. The Mass is the center of Catholicism. The priest is essential to the Mass for without the priest there can be no Mass and without the Mass, there could be no Catholicism [Emphasis added.]

(Benkert and Doyle article (2008), A.R.O., vol. II, at p. 44)

[68] J.J. served mass at the Oratory: para. 3.12 of the application. He was allegedly assaulted there by [TRANSLATION] “Father Bernard, a member of the Congregation . . . who had an office at [the] Oratory [and] frequently asked J.J. to go into his office for confession after serving mass”: para. 3.14 of the application.

Although Father Bernard did not engage in his activities with children “under the authority”⁵ of the Oratory, he necessarily did so *with the consent* of the Oratory, which had made him one of the *essential* players in one of the *central* activities — mass — for which the Oratory was responsible and had also made an office on its property available to him so that he could [TRANSLATION] “confess” the altar boys: R.F.O., at para. 12. With respect, it is absolutely impossible for me to find at this stage that an argument that the Oratory may have breached its duty to protect *its* altar boys, who were allegedly assaulted *at the Oratory* in the course of activities *for which the Oratory* was responsible, is “frivolous”, “clearly unfounded” or “untenable”. “Some evidence” has in fact been presented at this stage that fully supports the argument that the Oratory, or more specifically its directors, knew or ought to have known about the assaults on children that are alleged to have been committed at the Oratory by members of the Congregation in the course of activities for which the Oratory was responsible, given that *at the time of the events*, the Oratory’s directors were themselves *all* members of the Congregation.

[69] As I explained above, the table of victims sets out [TRANSLATION] “specific, tangible” facts that in themselves support J.J.’s claim that the Congregation knew about the alleged assaults on children by its members. There are several pieces of evidence, including the number of assaults reported in the table of victims, the number of religious members involved and the length of the period covered by the

⁵ As I will explain briefly below, at para. 76, however, I do not completely rule out the possibility that the trial judge will find the Oratory liable for the act of another person in what could be likened to a liability based on a subordinate/principal relationship. Contrary to the comments of both the dissenting Court of Appeal judge and my colleague Gascon J., it *is* in fact alleged that the Oratory was the “principal” of Father Bernard: para. 3.38 of the application.

reports of abuse, that, in combination, support an argument, at the authorization stage, that it might be possible at the trial on the merits to draw from them an *inference* that the Congregation *knew* or *could not have been unaware* that some of its members were assaulting children: C.A. reasons, at paras. 59-60 and 83-86. Regarding, more specifically, what members of the Congregation *acting as directors of the Oratory* knew, it should be reiterated that five victims who have already come forward allege that they were assaulted at the Oratory, over a period of nearly 12 years, by three or four members of the Congregation (Father Bernard, Brother C.H. and/or Brother Hamelin, and Father Brault). As well, it should be borne in mind that *other* victims could come forward in the course of the proceedings:

[TRANSLATION] . . . If a class action is to be brought against an institution attended by multiple persons for acts committed over a long period of time, it seems to us that the possibly high number of potential victims, although unknown at the beginning of the proceedings, fully justifies the bringing of a class action. It may well be that only one victim comes forward and that this victim decides to bring a class action in his or her own name and on behalf of all the other victims. If a teacher or a priest assaulted the victim over a period of one year, and if he worked at the institution for several years, is it not logical to conclude that other children may have suffered the same fate? It matters little in our opinion whether 5, 10, 50 or 100 victims join the class action once it has been authorized. Even though this number cannot be determined at the outset, a class action should be authorized in order to make justice more accessible to victims of sexual violence, who already have to overcome great difficulties in bringing their individual actions. Some Canadian courts have even found that the class action can help the victims, who are particularly vulnerable.

(Langevin and Des Rosiers, at p. 369)

[70] I must stress here that 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. [TRANSLATION] “is the difference between the agent’s conduct and the abstract, objective conduct of a person who is reasonable, prudent and diligent”: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 21, quoting J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, at p. 171 (emphasis added). 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:

Religious institutions have been found to be in breach of a duty to take reasonable care in tort where they have failed to establish proper supervision and rules of appropriate conduct, failed to investigate complaints, and failed to offer counselling; the institution need not have actual knowledge about any employees, volunteers or alleged incidents, rather need only have or ought to have in contemplation the potential for improper conduct in relation to vulnerable persons. [Emphasis added.]

(Ogilvie, at p. 335.)

[71] Furthermore, as I explained above, the DVD of the *Enquête* program attests to the systemic nature of the alleged sexual abuse by members of the Congregation in *various* institutions. It also supports the claim that the Congregation’s officers knew about the sexual abuse that is alleged to have occurred *at other places* in addition to Collège Notre-Dame (at minute 24, as I mentioned

above, a speaker refers to [TRANSLATION] “one or another of the institutions managed by Holy Cross”). The fact that the DVD does not explicitly mention the Oratory — apart from a statement at the very beginning that the Congregation founded the Oratory — is not a bar to authorizing the institution of a class action against it. In *Infineon*, the Court held, for example, that the institution of a class action could be authorized on the basis of documents that showed that the appellants had participated in a price-fixing scheme with *global* repercussions, even though none of those documents expressly mentioned illegal activities *in Quebec*: see *inter alia* paras. 92 and 134.

[72] In short, J.J.’s “legal syllogism” in relation to the Oratory can be summarized as follows. The Oratory is not *solely* an owner, and J.J.’s personal cause of action against the Oratory is not based *solely* on the fact that the Oratory *is* the owner of a place where assaults allegedly occurred. Rather, his personal cause of action against the Oratory is founded on the Oratory’s *direct* liability for assaults that are alleged to have been committed *at that place* by a member of the Congregation *whom the Oratory* had made one of the *essential* players in one of the *central* activities for which *the Oratory* was responsible. In addition, the Oratory, or more specifically its directors, knew or ought to have known about the assaults on children that are alleged to have been committed at that place by members of the Congregation, given that *at the time of the events*, the Oratory’s directors were themselves *all* members of the Congregation. In other words, the Congregation is

hidden behind the Oratory, and this is definitely something that may be taken into consideration in law in order to impute direct liability to the Oratory:

A corporation is certainly a person, but a very obedient person, slavishly doing all that its directors wish it to do.

When determining whether a corporation has directly or indirectly committed fraud or failed to comply with its statutory or contractual obligations, reality is taken into account: there is no veil which prevents the identity of the true authors of the decision to take action from being determined. This is why most statutory penal provisions make directors and officers who participated in the corporate decision personally liable for the resultant act or omission. In criminal and penal law the Courts have developed the *alter ego* doctrine which we will examine in Chapter 26.

In the same way, in civil obligations, when determining the existence of fraudulent or malicious intent instigated either by the corporation, someone acting in concert with it or under its instructions, there is no “veil” to prevent a Court from going to the source of the intention, by taking into consideration the identity and motives of those who made the decision in question and the relationships between them, and attributing the intention, motives and relationships to one or more corporations controlled by them. [Emphasis added.]

(P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at p. 1-67)

[73] In this sense, I am in complete agreement with the Court of Appeal that [TRANSLATION] “all the allegations and evidence that can apply to the Congregation can also apply to the Oratory”: para. 113. With respect, it seems to me that the reasons of my colleague Gascon J., who would authorize the institution of a class action against the Congregation but not against the Oratory, have certain inherent contradictions. The “various exhibits” on which the Court of Appeal relied in authorizing the institution of a class action against both the Congregation *and* the

Oratory concern *both* these entities: Gascon J.’s reasons, at para. 159; see also para. 173 of his reasons, in which he enumerates the evidence filed in support of J.J.’s application against *both* these entities. Like Corporation Jean-Brillant *and* the Congregation, the Oratory *and* the Congregation also have one or more “officers in common” as well as having establishments at the same addresses: Gascon J.’s reasons, at para. 160. The Court of Appeal did not lift the corporate veil of the Oratory either; it merely noted that the Oratory’s affairs [TRANSLATION] “were managed in whole or in part by the Congregation’s members” (at para. 111; see also paras. 14, 22 and 64) and that it could be maintained, at the authorization stage, that the Oratory should be held liable for assaults allegedly committed at the Oratory, given the “context specific to the facts of this case”: Gascon J.’s reasons, at para. 162.

[74] My colleague Gascon J. tries to show *how* J.J.’s cause of action against the Oratory differs in nature or in its validity from his cause of action against the Congregation. With respect, I do not find his arguments convincing. In my view, we must instead recognize that the allegations made against the Oratory *and* those made against the Congregation in J.J.’s application and the exhibits filed in support of it simply *cannot* be distinguished in any way that would be legally *relevant*.

[75] When all is said and done, the difference my colleague sees between the Oratory and the Congregation is based *solely* on the fact (a) that the allegations in the application with respect to canon law mention the Congregation *only* and (b) that the DVD of the *Enquête* program does not *specifically* refer to the assaults allegedly

committed by members of the Congregation at the Oratory (reasons of Gascon J., at para. 175; see also para. 172).

[76] However, although the allegations in the application with respect to canon law do refer *only* to the Congregation, this does not justify the different outcome my colleague arrives at in the Oratory's case. Those allegations are in fact relevant *even* to the Oratory, given that they relate to the authority of officers of the religious community known as the Congregation of Holy Cross over its members. Not only were the directors of the Oratory all *members* of the Congregation, but some of them may even have been *officers* of the Congregation, and therefore in positions of authority (and able to exercise control) over the members of the Congregation who worked at the Oratory or engaged in activities with children there: information statement for the Oratory in the enterprise register (2013), A.R.O., vol. II, at p. 24; information statements for the Congregation in the enterprise register (2015) and (2014) and information statement for Corporation Jean-Brillant in the enterprise register (2014), A.R.C., at pp. 134, 141 and 146.

[77] Similarly, while it is true that the DVD of the *Enquête* program does not *specifically* refer to the assaults allegedly committed by members of the Congregation at the Oratory, it should be borne in mind that, as I mentioned above, the DVD does refer to assaults allegedly committed in [TRANSLATION] "one or another of the institutions managed by Holy Cross". My colleague adopts, on the one hand, but without saying so clearly, the assessment of the Superior Court judge, who

erroneously concluded that the DVD is [TRANSLATION] “of no assistance for the purposes of this proceeding [*against the Congregation*]” (at para. 111) on the basis that it deals at length with sexual assaults committed *at Collège Notre-Dame*. But on the other hand, my colleague also rejects the Superior Court judge’s assessment on this same point, as he expresses the opinion that the DVD *reinforces* J.J.’s cause of action *against the Congregation*, but not against the Oratory: Gascon J.’s reasons, at para. 176. With respect, it must, on the contrary, be concluded that, if the DVD of the *Enquête* program is of any assistance for the purposes of authorization of the institution of the proposed class action — and like my colleague, I am effectively of the view that it *is* — the reason is that it supports J.J.’s “legal syllogism” to the effect that the Congregation *and the various institutions it controls or that it controlled at the time of the events* (such as Collège Notre-Dame *or the Oratory*) are liable for the alleged sexual abuse of children by members of the Congregation.

[78] In fact, if it were absolutely necessary to engage, as my colleague does, in an exercise of comparing the relative strengths of J.J.’s causes of action against the Oratory and against the Congregation, it seems to me that I would have to find that J.J. has a *sounder* cause of action against the Oratory than against the Congregation (i.e., against the appellant “Province canadienne de la Congrégation de Sainte-Croix”). As my colleague rightly points out at para. 162 of his reasons, “the Congregation’s corporate structure” will have to be reviewed exhaustively “at trial”, where the question of *the basis on which* the Congregation can be held liable for acts allegedly committed *before it was incorporated* will of course come up again.

Moreover, my colleague Côté J. concludes that this flaw in J.J.'s cause of action against the Congregation is so clear as to justify *not* authorizing the institution of the class action against that entity. Although I do not agree with my colleague's conclusion in this regard, I would point out here that J.J.'s cause of action against the Oratory has *no* such flaw. The Oratory, which is one of the many *faces* of the religious community known as the Congregation of Holy Cross, was incorporated in 1916 *and therefore existed at the time of the events*. It is entirely possible that the trial judge will conclude that no legal principle would justify holding the Congregation liable for acts allegedly committed *before it was incorporated*, and that conclusion would be *fatal* to the claims for compensation of J.J. and other victims of sexual assaults that are alleged to have been committed at the Oratory if, as my colleague Gascon J. suggests, the institution of the class action against the latter entity were not authorized.

[79] In concluding on the condition of sufficiency of the alleged facts, I will simply reiterate that, if any doubt remains on the issue of whether the evidentiary and the legal threshold requirements under art. 575(2) *C.C.P.* are met, the applicant, J.J., should in principle be given the benefit of that doubt: C.A. reasons, at para. 78; see also *Harmegnies*, at para. 46; *Charles*, at para. 43; *Adams*, at para. 23; Finn (2016), at p. 53; Lafond (2006), at pp. 115-16. As Kasirer J.A. of the Quebec Court of Appeal so aptly put it in *Sibiga*, which was rendered in 2016, at para. 51, "courts should err on the side of caution and authorise the action where there is doubt as to whether the standard has been met".

(4) Fact That Only the Oratory Is Being Sued Together With the Congregation

[80] Finally, the Oratory submits that J.J.'s action against it is inconsistent, as no other owner of a place where assaults were allegedly committed by members of the Congregation is being sued. My colleague Gascon J. seems to agree with this argument (at para. 177), just as the dissenting Court of Appeal judge (at para. 130) and the Superior Court judge (at paras. 129-35) did before him. With respect, this proposition seems to me to have no basis in law. The fact that other defendants *could possibly have* been sued *but were not* cannot release the Oratory from *its* liability for assaults allegedly committed at the Oratory. Moreover, in extracontractual civil liability,⁶ the obligation to make reparation for injury is solidary: art. 1526 *C.C.Q.* The creditor's action therefore need not be instituted against all the co-debtors, as the creditor may, on the contrary, "apply . . . to any one of the co-debtors at his option": art. 1528 *C.C.Q.*

[81] In any event, the finding of liability being sought in the Oratory's case is not based solely on its being the owner of a place where assaults were allegedly committed. Rather, J.J.'s personal cause of action against the Oratory is based on liability for the Oratory's own direct fault, and in this respect, the fact that the Oratory was controlled by members of the Congregation *at the time of the events* is relevant. At the hearing on May 6, 2015 before the Superior Court judge, counsel for J.J. explained that [TRANSLATION] "[t]he Oratory is being sued essentially because the

⁶ J.J.'s action is [TRANSLATION] "[a]n action in extracontractual civil liability and in punitive damages": para. 2 of the application.

Oratory is clearly under the control of Holy Cross”: oral argument of Mr. Gareau dated May 6, 2015, A.R.O., vol. I, at p. 157. The record does not show whether other potential defendants were controlled in the same way by members of the Congregation *at the time of the events*.⁷ École Notre-Dame-des-Neiges, for example, where J.J. also alleges that he was assaulted, was *at the time of the events* run by the Commission des écoles catholiques de Montréal, not by the Congregation: oral argument of Mr. Gareau dated May 6, 2015, A.R.O., vol. I, at p. 158.

[82] Moreover, contrary to the assertions of the Oratory, the dissenting Court of Appeal judge and the Superior Court judge, the fact that only the Oratory is being sued together with the Congregation at the authorization stage is in my view consistent with the fact that [TRANSLATION] “it is the individual situation of the appointed person that must be considered at this stage of the proceeding” in determining whether the condition of sufficiency of the alleged facts is met: *Option consommateurs v. Merck & Co. inc.*, 2013 QCCA 57, at paras. 20 and 24; *Sofio*, at para. 10; *Option consommateurs v. Fédération des caisses Desjardins du Québec*, 2010 QCCA 1416, at para. 9; *Lambert (Gestion Peggy)*, at para. 28. In the instant case, the “appointed person” is J.J., and he has a personal cause of action *only* against the Oratory and against the Congregation — and not against other potential defendants. It should be noted on this point that J.J.’s initial application (before it was amended), which is dated October 30, 2013 and was filed on November 21, 2013,

⁷ At the hearing on May 6, 2015 before the judge of the Superior Court, counsel for J.J., answering a question from the judge as to whether other institutions had been founded or were controlled by the Congregation, stated: [TRANSLATION] “It’s possible, Your Honour, I couldn’t say yes or no” (oral argument of Mr. Gareau dated May 6, 2015, A.R.O., vol. I, at p. 156).

predates this Court's judgment in *Bank of Montreal v. Marcotte*, which was rendered on September 19, 2014. It was not until then that it was clearly established in Quebec law that the representative plaintiff is not required to have a personal cause of action against each defendant: *Bank of Montreal v. Marcotte*, at paras. 37-47, rejecting the position adopted in *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349, and *Option consommateurs v. Novopharm Ltd.*, 2008 QCCA 949, [2008] R.J.Q. 1350; see, on this point, *Sibiga*, at paras. 37-40. In other words, given the state of the law that applied in Quebec when J.J. filed his initial application, it was not clear that a representative plaintiff could institute a class action against multiple defendants if he or she did not have a personal cause of action against each of them. In my opinion, it would be unfair today to penalize J.J. for choosing to sue only the defendants against which he has a personal cause of action, given that in doing so, he was simply complying with the law as it stood at the time when he filed his application. I would conclude by pointing out that the situation in the case at bar is hardly any different from the one in *Cornellier*, in which only Collège Notre-Dame was sued together with the Congregation even though the case concerned sexual abuse, by members of the Congregation, of children who had attended Collège Notre-Dame, Collège Saint-Césaire and École Notre-Dame de Pohénégamook.

III. Conclusion

[83] I would dismiss both appeals with costs to J.J.

English version of the reasons of Wagner C.J. and Gascon and Rowe JJ. delivered by

GASCON J. —

I. Overview

[84] This appeal concerns an action that victims seek to bring for damages for bodily injury resulting from their having been sexually abused by members of a religious community several decades ago. In Quebec, as elsewhere in Canada, such actions sometimes raise delicate questions with respect to the applicable prescriptive period and to the appropriate procedural vehicle. Those questions are central to this appeal.

[85] In 2013, the respondent, J.J., applied for authorization to institute a class action against the appellants, Province Canadienne de la Congrégation de Sainte-Croix (“Congregation”) and Oratoire Saint-Joseph du Mont-Royal (“Oratory”). He alleged that he had been sexually abused by two members, since deceased, of the Congregation. The assaults were alleged to have taken place more than 50 years ago when he was attending Notre-Dame-des-Neiges elementary school and when he was an altar boy at the Oratory.

[86] The class covered by J.J.’s application for authorization is vast. It is described as including all natural persons residing in Quebec who were sexually abused by members of the Congregation in any educational institution, residence or

summer camp or any other place in Quebec, including the Oratory. The class excludes any persons covered by a similar action previously instituted against the Congregation in which a settlement was reached. J.J. alleged that the appellants had been negligent in failing to act to put a stop to the abuse despite being aware of it. He explained that he had decided to bring his action after viewing a report on a systemic problem of sexual abuse in the Congregation in 2011.

[87] The Superior Court dismissed the application for authorization to institute the class action on the basis that it met none of the conditions provided for in the *Code of Civil Procedure*. The Court of Appeal set aside that judgment. It unanimously authorized the class action against the Congregation, and a majority authorized the class action against the Oratory. Both the Congregation and the Oratory appeal to this Court. They both argue, first, that J.J.'s action is clearly prescribed on the basis of a term for forfeiture (*délai de déchéance*) that now applies, pursuant to the second paragraph of art. 2926.1 of the *Civil Code of Québec* ("C.C.Q."), in a case in which the alleged assailants have died. The Congregation further submits that there is no legal relationship between J.J. and itself, given that it was constituted only in 2008, well after the alleged acts. Finally, the Oratory argues that the allegations in J.J.'s application for authorization are insufficient to support a cause of action in civil liability against it. In its view, the action cannot apply to it solely because certain of the alleged acts occurred on its property.

[88] I would dismiss the Congregation's appeal but would allow that of the Oratory. First, J.J.'s remedy is in my view neither forfeit nor clearly prescribed. The second paragraph of art. 2926.1 *C.C.Q.* continues the rules with respect to prescription that applied before the legislature enacted it in 2013. It does not establish a term for forfeiture. Moreover, the starting point for the period provided for in that paragraph is when the victim becomes aware that the injury suffered is attributable to the assault. In any event, that paragraph does not apply to an action that, like this one, does not involve the successions of the authors of the alleged acts.

[89] Second, I find that the class action against the Congregation should not be dismissed at the stage of the application for authorization. The purpose of J.J.'s action is to establish the Congregation's liability for acts of members of its religious community. It would be premature to deny the institution of the class action on the basis that the Congregation is not the entity that existed at the time of the alleged acts. The Congregation's argument based on there being no legal relationship between J.J. and itself does not alone suffice to justify characterizing the application as frivolous or untenable.

[90] The opposite is true where the class action against the Oratory is concerned, however. In its case, I find that, when all is said and done, J.J.'s application contains only vague and general allegations that are limited to identifying the Oratory as a place where some of the alleged abuse occurred. At the stage of the authorization of a class action, the applicant must show that he or she has an arguable

case in light of the facts and the applicable law. But given the allegations in J.J.'s application and the exhibits filed in support of it, the application sets out no specific fact that might support a cause of action in civil liability against the Oratory for the abuse in question on the basis either of its own direct fault or of the act of another person. That being the case, the conclusions of the application judge on this point should be restored.

II. Background

[91] J.J. attended Notre-Dame-des-Neiges elementary school in Montréal from 1951 to 1955. He alleges that for almost two years, Brother Soumis, one of his teachers and a member of the Congregation, sexually assaulted him once or twice a week by masturbating him in his office during detentions. At that time, J.J.'s family resided in housing belonging to the religious community that was located near the Oratory. Because of the proximity of his residence, J.J. would often go to the Oratory to serve mass. During those same years, Father Bernard, another member of the Congregation, allegedly invited J.J. a number of times to go to his office in the Oratory after mass for confession. On those occasions, he, too, is alleged to have sexually abused J.J. by masturbating him. Brother Soumis and Father Bernard, the men who assaulted J.J., died in November 2004 and January 2001, respectively.

[92] J.J. alleges that he kept silent about the assaults for several decades. He adds that they had a profound effect on him, both sexually and emotionally. He states in particular that he had many nightmares after these incidents and had flashbacks to

them, and that he did not have children because he feared that what had happened to him would also happen to them. In 2011, J.J. saw a report, broadcast on a public affairs program, on the subject of sexual assaults by members of the Congregation on minors who were pupils of Collège Notre-Dame du Sacré-Cœur, an institution located close to both Notre-Dame-des-Neiges school and the Oratory. At that point, J.J. opened up to his spouse for the first time about those traumatic incidents from his childhood.

[93] Two years later, in November 2013, J.J. filed his application for authorization to institute a class action in civil liability against the Congregation and the Oratory on the basis both of their direct fault and of the act of another person. He described the class covered by his action as follows:

[TRANSLATION] All natural persons residing in Quebec who were sexually abused by members of the Province canadienne de la Congrégation de Sainte-Croix in any educational institution, residence or summer camp or any other place in Quebec, as well as at the Oratoire Saint-Joseph du Mont-Royal, with the exception of persons who attended Collège Notre-Dame du Sacré-Cœur during the period from September 1, 1950 to July 1, 2001, Collège de Saint-Césaire during the period from September 1, 1950 to July 1, 1991, and Notre-Dame de Pohénégamook school during the period from January 1, 1959 to December 31, 1964.

(Re-amended motion for authorization to institute a class action and to be a representative plaintiff (“Re-amended Motion”), at para. 1)

[94] In his application, J.J. alleged that the appellants had not only failed to act to put a stop to sexual abuse by members of the Congregation, but had also discouraged victims from denouncing the abuse and had covered it up. He submitted

that the appellants were liable for the abuse, given that they had had control over their members' activities, but had nevertheless allowed the abuse to continue. He also alleged that the appellants were liable as principals of the religious community's brothers and fathers.

III. Judicial History

A. *Quebec Superior Court (2015 QCCS 3583)*

[95] The application judge denied J.J.'s application for authorization to institute a class action. He found that none of the four conditions set out in art. 575 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), were met.⁸ It can be seen from his reasons that he did not consider the question whether the remedy was forfeit or prescribed under the second paragraph of art. 2926.1 *C.C.Q.* In the view of the majority of the Court of Appeal, he did not do so because this ground involved a contentious issue of fact as to whether it had been impossible for J.J. to act.

[96] The application judge began by determining that J.J. had not shown that the contemplated action raised identical, similar or related issues of law or fact: art. 575(1) *C.C.P.* In the judge's opinion, the application concerned an indeterminate number of places and assailants, which meant that the applicable legal analysis would

⁸ Although the application judge's judgment was rendered under the former *Code of Civil Procedure*, CQLR, c. C-25, I will, like the Quebec Court of Appeal, be referring solely to the corresponding provisions of the new *Code of Civil Procedure*, which essentially restate the former law.

have to be repeated and that the facts specific to each of the situations would have to be assessed differently for each party.

[97] The judge then pointed out that the application set out no facts that explained why the action was being brought against the Congregation and the Oratory, nor did it set out any facts that supported the conclusion that these institutions had committed a fault against the members of the proposed class: art. 575(2) *C.C.P.* More specifically, he noted that the Congregation had been constituted only in January 2008, many years after the alleged events. As for the Oratory, the judge added that apart from the description of his assault in that place of worship, J.J. was alleging no fact that might lead to a conclusion that it had committed a fault. The judge stated that the application was [TRANSLATION] “practically silent regarding involvement on the Oratory’s part”: para. 137.

[98] Regarding the condition with respect to the composition of the class (art. 575(3) *C.C.P.*), the application judge found that the definition of the proposed class was too vague. In his view, it applied to many assailants who may have acted at an indeterminate number of places over a long period. Finally, the judge expressed the opinion that J.J. had not shown that he was in a position to properly represent the contemplated class: art. 575(4) *C.C.P.* The judge referred to, among other things, J.J.’s failure to show initiative in the initial stages of the action and his preference to minimize his contacts with the other members of the class.

B. *Quebec Court of Appeal (2017 QCCA 1460)*

[99] The Court of Appeal unanimously allowed J.J.'s appeal against the Congregation and authorized the institution of the class action against it. But the court was divided on the action against the Oratory, which the majority authorized.

[100] In the majority's view, the application judge had erred by adopting an overly restrictive interpretation of the conditions of art. 575 *C.C.P.* and by isolating them from the specific context of the case. On the first of those conditions, the majority concluded that J.J. had established at least one common issue that would favour the resolution of the litigation in a not-insignificant manner, namely the fact that the hierarchical structure and the relationship of subordination between the religious community and its members were relevant to the decision with respect to liability on the part of the Congregation and of the Oratory.

[101] The majority were also of the opinion that J.J.'s allegations and the exhibits filed in support of them justified the conclusions he was seeking of direct liability and liability for the act of another person: art. 575(2) *C.C.P.* They added that the proposed class action concerned members of a readily determinable religious community and that it would be premature to terminate the action solely because the Congregation was not the entity that existed at the time of the alleged events. The majority noted in this regard that the application judge had erred in limiting the significance of a table identifying the alleged victims, the institutions they had attended, the periods in which they had attended those institutions and the names of their assailants. On the subject of the Oratory, the majority stated that the allegations

and the exhibits filed in support of them justified a presumption that a close connection existed between the Oratory, on the one hand, and the Congregation and its members, on the other. It followed that the alleged facts and the evidence that could apply to the Congregation could also apply to the Oratory for the purposes of authorization.

[102] As for the third condition with respect to the composition of the class, the majority concluded that the table of victims sufficed at this stage to justify the broad composition being sought. Finally, they noted that the application judge had adopted an overly restrictive interpretation of the fourth condition, the purpose of which was to ensure that J.J. was in a position to properly represent the class members. J.J.'s commitment to the institution of the action satisfied the minimum threshold for acting as a representative plaintiff.

[103] In closing, the majority held that it would not be appropriate to rule definitively on the submission based on the second paragraph of art. 2926.1 *C.C.Q.* to the effect that the remedy was forfeit. In their view, that argument was a defence that would require an analysis of the evidence and would have to be considered at the trial on the merits. They found that it was not possible to conclude at the stage of the authorization that J.J.'s action was unquestionably prescribed.

[104] The dissenting judge, although concurring with the majority that the class action should be authorized against the Congregation, would have dismissed the appeal in respect of the Oratory. On that point, she agreed with the application judge

that the application for authorization was based only on vague and general allegations that set out no fact that would justify finding the Oratory liable. In the dissenting judge's view, merely alleging that sexual assaults had occurred on the Oratory's premises could not suffice to expose it to civil liability either for its own fault or as principal. This led her to find that the minimum threshold requirement for authorizing a class action had not been met.

IV. Issues

[105] In this Court, the appellants confine themselves to three arguments. The main argument relates to prescription and is common to the two appellants. They submit that the second paragraph of art. 2926.1 *C.C.Q.* establishes a term for forfeiture and not a simple prescriptive period. In other words, J.J.'s remedy is forfeit because his proceeding was instituted more than three years after the deaths of the men who allegedly assaulted him. It would be impossible for J.J. to seek a personal remedy, which means that he does not have an arguable case and cannot act as a representative plaintiff for the purposes of the proposed class action.

[106] The appellants' other two arguments concern very specific aspects of the class action as a procedural vehicle. The Congregation submits that there is no legal relationship between J.J. and itself and that the condition of art. 575(2) *C.C.P.* is therefore not met. As for the Oratory, it argues that the facts alleged by J.J. do not suffice to justify any cause of action in civil liability against it and that, as a result, the condition of art. 575(2) *C.C.P.* is not met in this regard either. The Oratory adds that a

commonality of issues has not been established with respect to it, which means that, in its case, the condition of art. 575(1) *C.C.P.* is also not met.

[107] In this Court, the appellants do not contest the conclusions of the majority of the Court of Appeal on the other aspects of the conditions set out in art. 575 *C.C.P.* I thus find it unnecessary to discuss them further in these reasons.

V. Analysis

A. *Conditions for Authorization and Standard for Intervention by a Court of Appeal in Respect of a Class Action*

[108] Article 575 *C.C.P.* sets out the four conditions that must all be met for the institution of a class action to be authorized. In *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, and *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court stated and reaffirmed the principles that must guide the court hearing the application for authorization in its analysis with respect to these conditions. Those principles are not at issue in the case at bar. I will review them briefly here, however.

[109] At the authorization stage, the court’s role is to screen applications: *Infineon*, at paras. 59 and 65; *Vivendi*, at para. 37. The court must ensure that the applicant meets both the evidentiary and the legal threshold requirements of the conditions set out in art. 575 *C.C.P.*, but must also bear in mind that the evidentiary

threshold that must be met in order to determine whether each of those conditions is satisfied is a low one at this preliminary stage: *Infineon*, at paras. 57 and 59. The court's decision is procedural in nature; the conditions for authorization must be interpreted and applied broadly (*Infineon*, at paras. 59-60 and 66; *Vivendi*, at para. 37). At this stage, the facts alleged in the application for authorization are assumed to be true: *Infineon*, at para. 67. The applicant's burden is one of demonstration and not the burden of proof that would generally apply in private law matters, that is, on a balance of probabilities: *Infineon*, at para. 61. It will suffice for the applicant to show an arguable case in light of the facts and the applicable law: *Infineon*, at paras. 61-67; *Vivendi*, at para. 37. As this Court observed in *Infineon*, various expressions have been used for this burden over the years, as it has, for example, been described as being to establish, in English, "a good colour of right" or "a *prima facie* case" and, in French, "*une apparence sérieuse de droit*": paras. 62-67. In short, the purpose of the court's screening exercise is to filter out frivolous applications and to ensure that parties are not being forced to defend against untenable claims: *Infineon*, at para. 61; *Vivendi*, at para. 37. If the court concludes that the applicant meets the conditions of art. 575 *C.C.P.*, it must then authorize the class action: *Vivendi*, at para. 37.

[110] That being said, although the applicant's burden is not onerous and what must be met is a minimum threshold, the fact remains that the allegations of fact in the application cannot be confined to generalities. For an arguable case to be

established, more than vague, general or imprecise allegations are required: *Infineon*, at para. 67.

[111] In addition to these principles, it should be mentioned that an appellate court must show deference to the application judge's findings with respect to these conditions: *Vivendi*, at para. 34. A court hearing an application for authorization to institute a class action has a significant discretion: *Vivendi*, at para. 33. As can be seen from the words of art. 575 *C.C.P.*, the court is to authorize the class action "if it is of the opinion that" the enumerated conditions are met. It is well established that an appellate court may not intervene and substitute its own analysis for that of the application judge unless the judge erred in law or his or her assessment with respect to one of the conditions of art. 575 *C.C.P.* is clearly wrong: *Vivendi*, at para. 34; *Infineon*, at para. 40. However, as this Court explained in *Vivendi*, the fact that an appellate court has identified such an error with respect to one condition does not give it "carte blanche" to reconsider all the other conditions that must be met; in such a case, the appellate court can substitute its own assessment for that condition only (para. 35).

B. *Scheme of Article 2926.1 C.C.Q.*

[112] The central question raised by the appellants in this Court concerns the nature, starting point and scope of the three-year period provided for in the second paragraph of art. 2926.1 *C.C.Q.* This article is new law. Enacted in 2013, it deals with

the applicable period for instituting an action for damages for bodily injury resulting, as in the instant case, from sexual assault (“a sexual aggression”):

An action for damages for bodily injury resulting from an act which could constitute a criminal offence is prescribed by 10 years from the date the victim becomes aware that the injury suffered is attributable to that act. However, the prescriptive period is 30 years if the injury results from a sexual aggression, violent behaviour suffered during childhood, or the violent behaviour of a spouse or former spouse.

If the victim or the author of the act dies, the prescriptive period, if not already expired, is reduced to three years and runs from the date of death.

L'action en réparation du préjudice corporel résultant d'un acte pouvant constituer une infraction criminelle se prescrit par 10 ans à compter du jour où la victime a connaissance que son préjudice est attribuable à cet acte. Ce délai est toutefois de 30 ans si le préjudice résulte d'une agression à caractère sexuel, de la violence subie pendant l'enfance, ou de la violence d'un conjoint ou d'un ancien conjoint.

En cas de décès de la victime ou de l'auteur de l'acte, le délai applicable, s'il n'est pas déjà écoulé, est ramené à trois ans et il court à compter du décès.

[113] The appellants submit in this regard that the second paragraph establishes a term for forfeiture rather than a prescriptive period. In their opinion, such a term cannot be interrupted or suspended. It begins to run on the date of death of the victim or the author of the alleged act, not on the date the victim becomes aware that his or her injury is attributable to the act, as provided for in the first paragraph. The appellants further argue that this 3-year term replaces the 10- and 30-year prescriptive periods provided for in the first paragraph for any action resulting from an act which could constitute a criminal offence, regardless of whether it involves the succession of the author of that act. Because J.J.'s action was brought more than three years after

the deaths of his two alleged assailants, therefore, his right of action was irreparably forfeit. The appellants conclude that the courts below erred in law in not dismissing the action on this basis. They should immediately, indeed of their own motion, have declared the remedy to be forfeit: art. 2878 *C.C.Q.*

[114] The Superior Court did not discuss this issue, and the parties made submissions on this point only in oral argument in the Court of Appeal. That court deferred argument on this issue to the trial on the merits, noting that although the prescription theory was arguable, J.J.'s action was not clearly prescribed on the face of the record. In this Court, all the parties agree that the nature, starting point and scope of the period provided for in the second paragraph of art. 2926.1 *C.C.Q.* need to be clarified at the stage of authorization of the class action in order, among other things, to determine whether it is a term that results in forfeiture of the remedy.

[115] In my view, the appellants' argument must fail. The second paragraph of art. 2926.1 *C.C.Q.* does not create a term for forfeiture. Article 2926.1 *C.C.Q.* is in its entirety an integral part of the scheme of prescription, and the second paragraph is no exception to that. The article provides for periods the lengths of which of course vary on the basis of certain conditions, namely the type of act in question and the death of the victim or the author of the act. However, the date the victim becomes aware that his or her injury is attributable to the act in question constitutes the starting point of each of the periods provided for in art. 2926.1 *C.C.Q.*, including that of the second paragraph. Finally, the reduction of the length of the period to three years that is

provided for in the second paragraph applies only to actions concerning the succession of the victim or of the author of the act, and not to those involving third parties whose liability is sought for their own fault or for the act or omission of another person.

[116] In this case, the result of the deaths of the men who allegedly assaulted J.J. was neither that his remedy against the Congregation and the Oratory was forfeit nor that his action against them was clearly prescribed. The starting point of the applicable period was the time when J.J. became aware of the connection between the assaults and his injury, not the date of death of Brother Soumis or Father Bernard. Exactly when he became aware of the connection and how this might have affected the applicable prescriptive period will be determined at the trial on the merits. At the authorization stage, despite the fact that the alleged acts occurred more than 30 years ago, J.J.'s allegation that he did not become aware of that connection until 2011 must be assumed to be true. Given that J.J.'s action does not appear to be prescribed on the face of the record, the Court of Appeal was right to conclude that this question should be answered definitively at trial. J.J.'s cause of action against the appellants cannot be characterized as frivolous or untenable on this ground alone.

(1) Nature and Starting Point of the Period Provided For in the Second Paragraph of Article 2926.1 C.C.Q.

[117] The first paragraph of art. 2926.1 C.C.Q. provides that an action for damages for bodily injury resulting from an act which could constitute a criminal

offence is prescribed by 10 years. That period becomes 30 years if the injury results from, among others, sexual assault or having suffered from violent behaviour during one's childhood. These periods of 10 and 30 years begin running on the dates the victims become aware that their injuries are attributable to the acts in question. It is well established, and is not at issue, that these periods are prescriptive periods.

[118] The French version of the second paragraph provides that if the victim or the author of the act dies, "*le délai applicable . . . est ramené à trois ans . . . à compter du décès*" (the English version reads "the prescriptive period . . . is reduced to three years . . . from the date of death"), provided that the period has not already expired. J.J. submits that this period, like the ones provided for in the first paragraph, is a prescriptive period. The appellants argue that it is instead a term for forfeiture that is distinct from the periods provided for in the first paragraph.

(a) *Origins of Article 2926.1 C.C.Q.*

[119] The Quebec legislature enacted art. 2926.1 *C.C.Q.* in 2013 in the context of the *Act to amend the Crime Victims Compensation Act, the Act to promote good citizenship and certain provisions of the Civil Code concerning prescription*, S.Q. 2013, c. 8 ("Act 8"). The purpose of that legislation was to facilitate access to civil justice for victims of acts that could constitute criminal offences by, in particular, amending certain rules with respect to prescription in cases involving such acts. Before art. 2926.1 was enacted, the existing general scheme of prescription applied in such situations. The applicable prescriptive period was the general law period of three

years (art. 2925 *C.C.Q.*), while art. 2904 *C.C.Q.* enabled a person to argue for the suspension of prescription on the basis that it had been impossible to act.

[120] Relying on, among other things, the principles laid down by this Court in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, the Quebec legislature stated that it was aware that the general scheme of prescription, and in particular the general law prescriptive period, did not make it possible to account for the experiences of sexual assault victims and for the specific nature of their injuries. Such individuals typically had to overcome significant psychological obstacles before they were able to bring civil proceedings and, what is more, the injury related to the assault could sometimes take years to emerge or to be associated with the assault. Often required, in order to counter claims of prescription raised against them, to argue that it had been impossible for them to act, victims then found themselves having to undergo a “trial within a trial” just to prove that they had not been in a position to bring an action before that time. These obstacles discouraged many victims from turning to the civil justice system in order to obtain damages for their injuries. The legislature wanted, among other things, to minimize these “trial within a trial” situations: National Assembly, Standing Committee on Institutions, “Étude détaillée du projet de loi n^o 22 — Loi modifiant la Loi sur l’indemnisation des victimes d’actes criminels”, *Journal des débats*, vol. 43, No. 47, 1st Sess., 40th Leg., May 7, 2013, at p. 5; see also F. Lévesque and C.-E. Wagner-Lapierre, “La réforme de la prescription civile en matière d’infraction criminelle: une occasion manquée pour les victimes de préjudice corporel” (2015), 49 *RJTUM* 685, at p. 710.

[121] To limit these difficulties, therefore, *Act 8* was enacted to modify the application of prescription to such actions in three ways. First, prescription would no longer run against minors in such situations: art. 2905 *C.C.Q.* Second, the prescriptive periods applicable to such actions would be extended from 3 years to 10 or 30 years: first para. of art. 2926.1 *C.C.Q.* Third, the prescriptive period would now run only from the time when the victim became aware of the connection between the assault and his or her injury: first para. of art. 2926.1 *C.C.Q.*

[122] Since the enactment of *Act 8*, no “trial within a trial” has been necessary, in sexual assault matters for example, before a person reaches the age of 48. Prescription no longer runs against minors in such cases; it therefore began to run, at the earliest, when the applicant attained the age of majority. It is only where the victim did not bring an action within 30 years of the date he or she attained the age of majority, or of the date of the assault, that it will be possible to raise the issue of when the victim became aware of the connection mentioned above and, where applicable, the further issue of whether it was impossible to act that could justify the suspension of prescription. *Act 8* constitutes a continuation of the existing scheme of prescription. As remedial legislation, it in fact enhances the former law in order to facilitate access to justice for victims of the acts to which it applies.

(b) *Terms for Forfeiture in Quebec Civil Law*

[123] The appellants argue that the second paragraph of art. 2926.1 *C.C.Q.* must be interpreted differently. In their view, if the author of the act (or the victim)

dies, this paragraph is instead a counterweight to the legislature's intention to favour access to justice for victims of the acts to which it applies by extending the prescriptive periods. They submit that the death of the author of the act (or the victim) raises public interests as a result of which such situations must not be dealt with in the same way as the other situations to which the first paragraph of art. 2926.1 *C.C.Q.* applies. The appellants advance two reasons in support of their argument. First, they stress that the death of one of the principal protagonists implies that it is that person's succession that must now institute or participate in the action. But the existence of a prescriptive period of 10 or 30 years — starting at the time the victim becomes aware of the connection between his or her injury and the assault — would introduce a serious degree of instability into the administration of successions. Second, they insist that should the author of the act or the victim (or even both of them) die, one of the principal protagonists (if not both of them) will then no longer be able to testify. Given the absence of testimony from the persons who were directly involved, the integrity of the adversarial process would therefore be compromised, which would have an adverse effect on the search for truth. For the appellants, the second paragraph of art. 2926.1 *C.C.Q.* represents a response to these concerns in that it departs from the scheme of prescription and limits the applicable period should one of the principal protagonists die to an invariable term of three years that cannot be interrupted or suspended and does not depend on when the victim became aware of the connection between his or her injury and the alleged act.

[124] In the appellants' opinion, the second paragraph has all the characteristics of a term for forfeiture. In addition to protecting higher public interests (stability of successions and the search for truth), the term begins to run upon the occurrence of a specific event that is predetermined and frozen in time (the death). Moreover, it is typically shorter than the period that would otherwise apply. The appellants conclude from this that the second paragraph sets out a term for forfeiture that represents an exception to the general scheme of prescription and to the mechanisms otherwise provided for in the article's first paragraph.

[125] I disagree. It is well established in Quebec civil law that the forfeiture of a remedy cannot be presumed: J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 1117; C. Gervais, *La prescription* (2009), at pp. 3 et seq.; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 1-1297. Indeed, art. 2878 *C.C.Q.* says so explicitly, as it states that forfeiture results only where expressly provided for in a text. And the Quebec academic literature confirms that, where there is a doubt or ambiguity as to whether a specified period that results in a debtor's discharge constitutes a term for forfeiture, it must be interpreted as a prescriptive period: Baudouin, Jobin and Vézina, at No. 1117.

[126] Thus, while it is agreed that the word "forfeiture" need not be used explicitly in order for a period to be characterized as a term for forfeiture, a conclusion that the general scheme of prescription does not apply nonetheless

requires clear, precise and unambiguous language: Baudouin, Jobin and Vézina, at No. 1117; *Roussel v. Créations Marcel Therrien inc.*, 2011 QCCA 496, [2011] R.J.Q. 555, at paras. 450 et seq.; *Global Credit & Collection inc. v. Rolland*, 2011 QCCA 2278, [2012] R.J.Q. 12, at para. 31; *Équipement Industriel Robert inc. v. 9061-2110 Québec inc. (Discover Transport)*, 2004 CanLII 10729 (Que. C.A.), at para. 40. I would add that in *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, this Court reiterated the well-established principle that the legislature is assumed not to have intended to change an existing scheme unless it has done so clearly and unambiguously: para. 29.

[127] Neither the words of the second paragraph of art. 2926.1 *C.C.Q.* nor its context or its underlying objectives lead to the conclusion that the Quebec legislature intended clearly, precisely and unambiguously to depart from the legal rule that existed before the enactment of *Act 8* by replacing it with a term for forfeiture that will apply should the author of the act die. I will say from the outset that there is no support for the appellants' position on this point in either the academic literature or the case law. The following discussion will show why this is so.

(c) *Words and Context of the Second Paragraph of Article 2926.1 C.C.Q.*

[128] The second paragraph of art. 2926.1 *C.C.Q.* contains neither an express term nor clear, precise and unambiguous language suggesting that the legislature intended to establish a term for forfeiture that would apply should the victim or the author of the act die. In fact, this provision contains no express and unequivocal

language relating to forfeiture. On the contrary, the French version of the second paragraph refers to the prescriptive periods in question in the first paragraph by means of the words “*le délai applicable . . . est ramené*”, while the term “prescriptive period” itself is used in the English version.

[129] The appellants argue in this respect that the shortness of the period provided for in the second paragraph of art. 2926.1 *C.C.Q.* is in fact in itself characteristic of a term for forfeiture. This argument does not withstand scrutiny. Not only does this characteristic not represent clear, precise and unambiguous language suggesting an intention on the legislature’s part to provide for a term for forfeiture, but the proposition that a three-year period is intrinsically short is in my view erroneous. By “reduc[ing]” the period in question to three years in the second paragraph, the legislature has simply restored the general law period that applies under art. 2925 *C.C.Q.* To argue that a period that corresponds to the general law prescriptive period is so short as to constitute a clear, precise and unambiguous indication that the legislature intended to depart from the application of the scheme of prescription by establishing a term for forfeiture quite simply does not hold water.

[130] The explanatory notes for *Act 8* — the legislation by which art. 2926.1 was enacted — confirm this interpretation. They refer exclusively to prescription and do not mention any “term for forfeiture” whatsoever. They even refer expressly to prescription in discussing the second paragraph:

In addition, this Act amends the *Civil Code* by extending the prescriptive period from three years to ten years in cases of civil liability where the act causing bodily injury could constitute a criminal offence. The prescriptive period is of 30 years when the injury results from a sexual aggression, violent behaviour suffered during childhood, or the violent behaviour of a spouse or former spouse. If the victim or the author of the act dies, the prescriptive period is reduced to three years and runs from the date of death.

This Act states the time from which the prescriptive period in such cases runs by setting it clearly, not from the time of the criminal act, but from the time the victim becomes aware that the injury suffered is attributable to that act. The prescriptive period applicable to these same actions does not run against a minor or a person of full age under curatorship or tutorship. [Emphasis added.]

[131] I would add that the consequential amendments to art. 2905 *C.C.Q.* enacted by *Act 8* — amendments pursuant to which prescription no longer runs against minors in such situations — are consistent with this. In the same explanatory notes, the legislature stressed that “[t]he prescriptive period applicable to these same actions does not run against a minor or a person of full age under curatorship or tutorship”. In the words “these same actions”, the legislature was referring indistinctly to all actions to which art. 2926.1 *C.C.Q.* applies. If the appellants’ argument were accepted, the effect would be that should the author of the act die, the term for forfeiture would start running even if the victim is still a minor. Yet such an interpretation would directly contradict the words of art. 2905 *C.C.Q.* It clearly cannot be argued that the legislature, which took the trouble to amend that article in order to provide that prescription *never* runs against a minor with respect to remedies he or she may have *against any person*, intended to impose, under the same *Act 8*, an invariable term for forfeiture that applies should the author of the act die.

[132] Lastly, it should be mentioned that the legislature added art. 2926.1 at a specific place within the framework of the *C.C.Q.* It introduced this article into Book Eight on prescription and the title concerning “Extinctive Prescription”. As this Court noted in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, “it cannot be assumed that . . . the provisions of the *Civil Code of Québec* [were placed] in one title or another indiscriminately or without a concern for coherence”: para. 15. The structure of the *C.C.Q.* is one indication of the legislature’s intention regarding the meaning to be given to a particular provision: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 328. To say that the legislature intended to introduce a term for forfeiture at this place would be to contradict these principles of interpretation established by this Court. To this date, no Quebec court has interpreted any of the periods that — like the ones in art. 2926.1 *C.C.Q.* — are provided for in the title on “Extinctive Prescription” as resulting in forfeiture of a remedy.

(d) *Objectives of Act 8 and Consequences of the Appellants’ Argument*

[133] Nor do the objectives underlying *Act 8* provide a more clear, precise and unambiguous indication that the legislature intended to establish a term for forfeiture in the second paragraph. I would note here that, in the course of the parliamentary debate, the Minister of Justice acknowledged that the purpose of the amendments to the book on prescription was to codify this Court’s decision in *M. (K.) v. M. (H.)*: *Journal des débats*, at p. 3. In that case, La Forest J. had cautioned legislatures against

the injustices that statutes of limitations may cause by allowing sexual abusers to go on with their lives without liability and granting them repose while the victims continue to suffer the consequences of the abusers' actions and remain psychologically unable to act: pp. 35-38 and 48. To find that the effect of the second paragraph of art. 2926.1 *C.C.Q.* is to establish a term for forfeiture would clearly frustrate this objective. This is eloquently illustrated by the consequences that would flow from the interpretation proposed by the appellants.

[134] If the second paragraph established a term for forfeiture as the appellants argue, a victim whose assailant died could thus no longer submit that it had been impossible for him or her to act, given that such a term cannot be suspended or interrupted. Yet before *Act 8* came into force, it was well established that all actions for damages for bodily injury were subject to the general law prescriptive period (art. 2925 *C.C.Q.*) regardless of whether one of the parties had died. That period could be suspended if it had been impossible for the victim to act: art. 2904 *C.C.Q.* It would be contrary to the very purpose of remedial legislation to change existing law in such a way as to lessen the protection it provides. Moreover, in the interpretation of legislation, it must be assumed that the legislature did not intend to change existing law unless it used clear and unambiguous language to that effect: *Heritage Capital*.

[135] In a similar vein, if the second paragraph established a term for forfeiture, the victim would have a maximum of three years from the date the author of the act died to institute an action, even if the injury had not yet appeared. In order to accept

the appellants' position, it would therefore have to be concluded that the legislature's intention was to change the existing law and that a victim's remedy may now be forfeit before it even arises. To find that the second paragraph creates a term for forfeiture would thus have consequences that are illogical or even absurd.

[136] But that is not all. Section 13 of *Act 8*, which is a transitional provision, states that “[t]he prescriptive periods provided for in article 2926.1 . . . apply to existing juridical situations taking into account the time already elapsed” and that “[t]he provisions of [that] article . . . concerning the starting point of prescriptive periods are declaratory”. If the appellants' argument were accepted, the death of the victim or the author of the act would be the starting point of an invariable term for forfeiture under the second paragraph of art. 2926.1 *C.C.Q.* Given that under the aforementioned s. 13, the periods and their starting point are of immediate application, the necessary conclusion would be that if a victim's assailant died before *Act 8* was enacted, his or her right of action would be retroactively forfeit three years after the assailant's death, even if the victim's action was not prescribed before that Act came into force.

[137] When all is said and done, the appellants are arguing that the legislature intended an action for damages for bodily injury that is attributable to an act which could constitute a criminal offence to be subject to stricter and more stringent rules than an action for damages for an injury that is not attributable to such an act. They submit that, if the debtor or creditor of an obligation has died, an action for damages

for bodily injury that is not attributable to a criminal offence is subject to the general law period, which can be interrupted or suspended and the starting point of which is the day the injury appeared: art. 2926 *C.C.Q.* In contrast, an action for damages for bodily injury that is attributable to a criminal offence is in their view subject to a three-year term for forfeiture that cannot be interrupted or suspended and whose starting point, which is declaratory according to the transitional provisions of *Act 8*, is the death of the victim or the assailant. And they argue that this is the case even if the victim's cause of action has not yet arisen, the victim's injury has not appeared or it is impossible for the victim to act. Such an interpretation of the second paragraph of art. 2926.1 *C.C.Q.* simply cannot be reconciled with the legislature's objective in enacting *Act 8*, namely to encourage judicial proceedings by facilitating access to justice for victims of the acts to which the paragraph applies.

(e) Starting Point of the Period Provided for in the Second Paragraph

[138] Against this backdrop, I am not persuaded by the appellants' argument that there is an inconsistency between, on the one hand, the objective of facilitating access to justice for assault victims and, on the other hand, the reduction of the applicable period to three years under the second paragraph. It is true that the second paragraph reflects the legislature's concern with what happens if the victim or the author of the act dies. And the amendments that affect the lengths of the periods and the starting point for prescription provided for in the first paragraph may indeed entail a risk that the death of one of the parties will create more uncertainty for heirs,

creditors or third parties as regards the extent of their rights in the property of the succession: *Journal des débats*, at pp. 7-9. Furthermore, the passage of time, which can be considerable given the periods specified in the first paragraph, may affect the integrity of the testimonial evidence and, as a result, the adversarial process that supports the truth-seeking goal on which our justice system is based in a case in which a key player is no longer there to testify: *Journal des débats*, at p. 9.

[139] It is true that, to address these concerns, the legislature chose to reduce the length of the applicable period in a situation in which one of the parties dies. But it cannot be inferred from this that the legislature intended that period to become a term for forfeiture. The second paragraph merely reduces the length of the period provided for in the first paragraph, but does not change its starting point, which remains the date the victim becomes aware of the connection between his or her injury and the alleged act.

[140] For victims of acts which could constitute criminal offences, the modification of the scheme of prescription that resulted from the enactment of art. 2926.1 *C.C.Q.* is an objective improvement over the situation that existed before then, including in circumstances in which the second paragraph applies. The period now runs only from the date the victim becomes aware of the connection between his or her injury and the assault, rather than from the date of the assault itself. The explanatory notes for *Act 8* are helpful in this regard, too. They refer to the time from which the period runs in the singular: “the time from which the prescriptive period in

such cases runs [is set] not from the time of the criminal act, but from the time the victim becomes aware that the injury suffered is attributable to that act". The legislature used the words "such cases" to refer to all actions for damages for bodily injury caused by an act which could constitute a criminal offence without distinguishing between situations to which the second paragraph applies (where one of the principal protagonists dies) and those to which the first paragraph applies (where both principal protagonists are living).

[141] The effect of the words "runs from the date of death" in the second paragraph is simply to cause the period provided for in that paragraph to apply instead of the one provided for in the first paragraph, not to establish a new starting point that differs from the one under the first paragraph. On the date when one of the parties dies, the applicable period for instituting an action, if it is already running, is "reduced" to three years. If, therefore, as of the date of death, less than 3 years is left in the 10- or 30-year prescriptive period under the first paragraph, the time remaining in that period does not change. If, however, the prescriptive period has not begun to run, the victim cannot rely on the 10- or 30-year period once he or she becomes aware of the connection between the assault and the injury, but must institute an action within a maximum of 3 years from that same starting point.

[142] It is clear from the record of the legislative debate that this is what this provision must be understood to mean. That record shows that the second paragraph does not introduce a new period: the death simply changes the period provided for in

the first paragraph by reducing it to three years. In commenting on the use of the word “reduced” in the second paragraph, the then Minister of Justice in fact stressed the importance of using it so as not to [TRANSLATION] “give the impression that this is a new period . . . but it’s not a new period, it’s the period that’s reduced”: *Journal des débats*, at p. 13 (emphasis added). In short, the length of the period changes when a party dies, but its starting point remains the same; it is still the victim’s becoming aware of the connection between his or her injury and the assault, and nothing else, that starts the clock ticking for prescription.

[143] The fact that the second paragraph applies if the victim dies as well as if the author of the act dies does not alter this interpretation of the applicable period. The objective of facilitating access to justice for victims of criminal offences by recognizing the psychological difficulties they face may be achieved in a different way where an action is instituted by the victim’s succession. It is not the succession as such that suffered the trauma and consequences of the assault. The succession generally does not have to overcome psychological obstacles as significant as those faced by the victim before being able to bring proceedings. From this perspective, the fact that the circumstances in which the second paragraph applies include the victim’s death as well as that of the author of the act does not diminish the objective of facilitating access to justice for victims of the acts to which the paragraph applies. It simply reflects the legislature’s concern to ensure a proper balancing of the interests affected by the lengthy prescriptive period that applies to an action for damages for bodily injury resulting from an act which could constitute a criminal offence. In

contrast to what the appellants suggest, this, too, does not constitute a clear, precise and unambiguous indication that the legislature intended to adopt an invariable term for forfeiture where the victim or the author of the act dies; quite the contrary.

[144] I would add the following on the starting point of the period provided for in the second paragraph. Because what that paragraph establishes is not a term for forfeiture but a prescriptive period, the reference to the death of the victim or the author of the act cannot be interpreted as providing for a starting point that is different from the one provided for in the first paragraph. It bears repeating that s. 13 of *Act 8* states that the provisions concerning the starting point of the prescriptive periods provided for in art. 2926.1 *C.C.Q.* are declaratory. Where legislation is declaratory, the presumption against construing it retrospectively is inapplicable: *Côté*, at p. 561; W. F. Craies, *Craies on Statute Law* (7th ed. 1971), by S. G. G. Edgar, at p. 395. This Court has described the effect of declaratory legislation as follows: “the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law”: *Régie de rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46, [2013] 3 S.C.R. 125, at para. 28. This means that the legislation can apply to events that occurred before it was enacted: *Côté*, at p. 561; Craies, at p. 395; *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345, at p. 370; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *Chambre des notaires du Québec v. Haltrecht*, [1992] R.J.Q. 947 (Que. C.A.). The fact that the article in question introduces a new rule changes nothing: if the legislature states expressly that the provision is declaratory, this cannot be ignored (*Canada Bread Company*, at

paras. 27-28; P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 248).

[145] If under the second paragraph the death of the victim or the author of the act were to constitute the starting point of the three-year prescriptive period, that different starting point from the one provided for in the first paragraph would then have to apply to existing situations. In practice, this would mean that the right of action of a victim whose assailant died more than three years before *Act 8* came into force would be extinguished retroactively. And because the date the victim became aware of the connection between the assault and his or her injury would be the starting point of the periods provided for in the first paragraph only, that date would be of no assistance to victims for the purpose of suspending or interrupting the applicable prescriptive period should the author of the act die. Such an outcome would in my view be incompatible with the objectives of remedial legislation that is actually intended to benefit victims of acts which could constitute criminal offences. I am of the opinion that an interpretation to the effect that the second paragraph does not establish a different starting point for the applicable prescriptive period from the one provided for in the first paragraph is more consistent with the words and the context of the provision as a whole, and also makes it possible to avert that outcome: *Kent v. The King*, [1924] S.C.R. 388, at p. 397; *Banque de Nouvelle-Écosse v. Cohen*, 1999 CanLII 13720 (Que. C.A.), at paras. 11-12; *Québec (Commission de la construction) v. Gastier inc.*, 1988 CanLII 13132 (Que. C.A.), at pp. 9-12; Côté, at

pp. 197 and 547-48; R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 807-8.

[146] In sum, the words of the second paragraph, its context and its underlying objectives all lead to the conclusion that the intention was to establish a prescriptive period just like the periods provided for in the first paragraph. The effect of the second paragraph is to shorten the periods established in the first paragraph should the victim or the author of the act die. The death of one of these people is simply a condition that changes the length of the period, not its starting point, in the same way that the type of act determines the length of the period that applies under the first paragraph. It is when the victim becomes aware of the connection between the assault and the injury that the periods provided for in the first and second paragraphs start to run. And none of them is a term for forfeiture.

(2) Scope of the Second Paragraph

[147] The appellants' final argument concerns the very scope of the second paragraph. They submit that the death of the victim or of the author of the act changes the prescriptive period applicable to all actions, of any kind, that result from the act committed by the author. Thus, the death of the author of the act reduces in the same way the length of the prescriptive period applicable to actions against third parties for their own fault or for the act or omission of another person. If an action against the author of the act becomes prescribed as a result of the author's death, then there ceases to be any basis for an action against such third parties as well. In short, in the

instant case, even if the second paragraph does not establish a term for forfeiture, J.J.'s action against the Congregation and the Oratory is, in all respects, prescribed by 3 years, not 30 years, from the date he became aware of the connection between the assaults and the injury resulting from them.

[148] This argument does not provide any greater support for a conclusion that J.J.'s action is now prescribed. As I mentioned above, the exact time when J.J. became aware of that connection will be shown by the evidence on the merits of the case. The same is true of the question whether it was impossible for him to act that might be raised in this regard. Moreover, in my view, this paragraph quite simply does not have such a scope. Here, too, the appellants' interpretation is inconsistent with the legislature's objective in enacting *Act 8*. The reduction of the prescriptive period provided for in the second paragraph applies only in relation to the succession of the victim or to that of the author of the act.

[149] Article 2926.1 *C.C.Q.* establishes the prescriptive periods that apply to actions for damages for bodily injury resulting from specific acts. It does not create rules of liability separate from the general rules set out in arts. 1457 and 1463 *C.C.Q.*, in Book Five on obligations. Actions for damages for a single injury must not be confused. The author of an act and a third party, including a principal, each have a distinct obligation to the victim, and the purpose of the remedies available to the victim is to make reparation for the injury caused by the breach of those distinct obligations. Under the general rules of civil liability, the victim's remedy against a

third party who is liable for his or her own fault is not dependent on the direct remedy against the author of the act that may have given rise to that fault. Similarly, a principal's liability for the act or omission of his or her subordinate does not depend on survival of the direct remedy against the subordinate.

[150] Of course, the issue generally does not arise under arts. 1457 and 1463 *C.C.Q.*, given that the general law prescriptive period then applies in all cases: art. 2925 *C.C.Q.* As a general rule, the period applicable to such actions begins to run at the same time; the injury is common and, under art. 2926 *C.C.Q.*, prescription runs from the day the injury appears. But under both art. 2926 and art. 2926.1 *C.C.Q.*, the principle remains the same: prescription is determined for each action individually.

[151] In my view, the appellants' argument reflects a conceptual confusion between, first, the rules with respect to obligations that govern the actions to which art. 2926.1 *C.C.Q.* applies and, second, the prescriptive period applicable to such actions. The fact that the victim's action against the author of the act may be prescribed as a result of the author's death does not mean that there ceases to be any basis for an action against third parties for their own fault or for the act or omission of another person. The liability of third parties or principals against whom proceedings are brought is distinct from that of the author of the act even if the resulting injury is common.

[152] In reducing the prescriptive period to three years under the second paragraph of art. 2926.1 *C.C.Q.* if the victim or the author of the act dies, the

legislature was concerned solely with actions involving the succession of the author of the alleged act or that of the victim. The appellants' argument that the victim no longer has any action against a third party for that party's own fault once the action against the author of the act becomes prescribed would not only be contrary to *Act 8*'s objective of facilitating access to justice for assault victims, but is also not supported by the objectives of the second paragraph themselves. If the intention were that the victim's action against living third parties be prescribed, that would do nothing to ensure the stability of successions, because no succession would be involved in such a situation. Nor would it prevent evidence from becoming stale, protect the integrity of the adversarial process or safeguard the search for truth, given that the parties concerned are present to testify. On the other hand, concluding that the victim's action against living third parties — against another living person who had also assaulted the victim, for example — is prescribed because the victim's action against the succession of the author of the act is prescribed would clearly frustrate the purpose of facilitating access to civil justice for assault victims. Such a conclusion would allow parties who may be at fault to go on with their lives without liability and grant them repose on the sole basis that the author of the act has died.

[153] On this point, too, the record of the legislative debate confirms the legislature's intention. When the bill that led to the enactment of *Act 8* was introduced, the Minister of Justice made that intention clear:

[TRANSLATION] And finally it is provided, to prevent actions involving successions, while . . . that is, to limit actions involving successions, it is

provided that the period is reduced to three years where the victim or the person who caused the injury dies, and that it runs from the date of death.

(Journal des débats, at p. 3 (emphasis added))

The comments of the member who introduced the amendments relating to prescription and the *C.C.Q.* were along the same lines:

[TRANSLATION] The purpose of the amendment is to provide for a limit so that, at some point in time, successions will no longer have to manage anything

. . .

That question is not at all . . . and it is not at all my aim or my intention, in any way whatsoever, to minimize or undermine this essential work that must be done with respect to victims. It was solely in the context of discussing a suit involving a succession

(Journal des débats, at pp. 8-9 (emphasis added))

[154] The second paragraph applies only to actions involving the succession of the victim or of the author of the act, not to all actions that relate directly or indirectly to the fault committed by the author. The legislature did not intend the second paragraph to apply to an action against a third party that still exists for its own fault or for the act of another person. The fact that there may be different periods for such actions simply shows that the legislature intended to protect the rights of victims of criminal offences who are especially vulnerable and to balance that objective against the importance of protecting the stability of successions in a limited number of cases.

(3) Conclusion on the Second Paragraph of Article 2926.1 C.C.Q.

[155] To summarize, one of the legislature's objectives in enacting *Act 8* was to help sexual assault victims by facilitating their access to justice. To that end, the legislature lengthened the prescriptive periods and changed the point at which they started to run. The second paragraph of art. 2926.1 *C.C.Q.* was an integral part of that reform. Nothing in the words of that paragraph, in its context or in its underlying objectives indicates clearly, precisely and unambiguously that the legislature intended, should the author of the act die, to impose a term for forfeiture or to provide for a starting point other than the date the victim becomes aware of the connection between the act in question and the injury he or she has sustained as a result of it. The reduction in the length of the applicable period that is provided for in that paragraph does not apply to an action like the one instituted by J.J. against liable parties other than the succession of the author of the act. That being the case, J.J.'s remedy is not forfeit, let alone clearly prescribed, on the face of the application; there is no reason to refuse to authorize the class action on this basis.

C. *Class Action Against the Congregation*

[156] In addition to this main argument based on the second paragraph of art. 2926.1 *C.C.Q.*, the Congregation submits that there is no legal relationship between J.J. and itself. It argues that it cannot be held liable for faults allegedly committed in connection with incidents that occurred before it was constituted in 2008, and that the Court of Appeal erred in substituting its own analysis on this point

for that of the application judge, who had held that the colour of right condition set out in art. 575(2) *C.C.P.* was not satisfied.

[157] In my view, the Court of Appeal was correct in holding unanimously that the application judge had applied the condition set out in art. 575(2) *C.C.P.* too strictly in his analysis regarding the existence of a legal relationship. Given the allegations and the exhibits filed in support of them, his assessment with respect to this condition was clearly wrong in light of the principles developed by this Court.

[158] It is important to note that the Congregation is not challenging the Court of Appeal's other conclusions to the effect that the allegations in the application support a cause of action in liability on the basis of a direct fault it is alleged to have committed, and of the act of another person. The Congregation argues only that there is no legal relationship between J.J. and itself. On this specific point, the application judge based his analysis on two exhibits filed by J.J.: the information statement for the Congregation in the enterprise register and a table of alleged victims showing the institutions they attended, the periods in which they attended them and the names of those who assaulted them (Sup. Ct. reasons, at paras. 91-92; C.A. reasons, at para. 28). He found that J.J. had not established an arguable case against the Congregation, because all of the alleged sexual abuse had occurred before it was constituted in 2008: paras. 91-92.

[159] I agree with the Court of Appeal that, on the contrary, the allegations and the exhibits filed in support of them by J.J., when considered as a whole, establish at

the very least an arguable case against the Congregation as regards the legal relationship in question. I also agree that, by determining the probative value of those various exhibits, the application judge overstepped the bounds of his screening role: C.A. reasons, at para. 79; Sup. Ct. reasons, at paras. 56-57.

[160] The Court of Appeal properly noted that, in addition to the exhibits relied on by the application judge, J.J. had filed the information statement for Corporation Jean-Brillant in the enterprise register. That exhibit shows that, at the time of the alleged incidents, the members of the Holy Cross (Sainte-Croix) religious community were represented by a corporation known as “Les frères de Sainte-Croix”. That corporation was constituted in 1947 and continued in 2008, when its name was changed to “Corporation Jean-Brillant”. The information statement for the Congregation indicates that it was constituted in 2008. However, as the Court of Appeal noted, a number of the Congregation’s establishments have used the appellation “Sainte-Croix” in one form or another over the years in such names as “Congrégation de Sainte-Croix”, “La Province canadienne des frères de Sainte-Croix”, “La Province canadienne des Pères de Sainte-Croix”, “Les Frères de Sainte-Croix” and “Les Pères de Sainte-Croix”. The information statements also show that Corporation Jean-Brillant and the Congregation have six officers in common and have the same domicile.

[161] In his application, J.J. seeks a finding that the Congregation is liable for sexual abuse by members of the Holy Cross religious community. It can be seen from

the table of alleged victims that all of the alleged assailants were brothers or fathers belonging to that community. According to the Congregation's information statement, its principal sector of activity is precisely the organization, administration and maintenance of a religious congregation. As the Court of Appeal noted, the Congregation has not argued that those alleged assailants might have been part of a religious community other than the one it represents: para. 80.

[162] The Congregation's argument that the Court of Appeal essentially lifted the corporate veil in order to authorize the class action is not persuasive. This case concerns a fact situation in which two entities constituted under the *Religious Corporations Act*, CQLR, c. C-71, Corporation Jean-Brillant and the Congregation, both represent the members of the same religious community. It was in this context specific to the facts of this case that the Court of Appeal made a point of stating that a full review of the Congregation's corporate structure would have to be conducted at trial in light of a situation that it had rightly found to be confused. At no time did the Court of Appeal suggest that lifting the corporate veil is justified or necessary in the instant case. As it properly noted, it will be for the parties to address the Congregation's corporate structure at the trial on the merits and to make whatever complete submissions they consider appropriate at that time: para. 77.

[163] At the authorization stage, J.J. has to establish only that he has an arguable case in light of the alleged facts and the applicable law. I agree with the Court of Appeal that this criterion is satisfied on the issue of the alleged legal

relationship between the Congregation and J.J. In light of the allegations and the exhibits filed in support of them, the application for authorization is neither untenable nor frivolous. That is sufficient.

[164] I would add that the Congregation's argument on this particular point is surprising. As can be seen above, J.J.'s proceeding is not the only such proceeding brought against the Congregation by victims of sexual abuse in connection with incidents that occurred before it was constituted. Another application for authorization to institute a class action was filed with the Superior Court in 2009 in relation to alleged sexual abuse, by members of the Congregation, of minors who had attended three educational institutions between the 1950s and 2001. Before the application for authorization was heard, the parties entered into a settlement agreement under which the Congregation agreed to take up the interest of other entities, including Corporation Jean-Brillant, in relation to their acts and undertook to pay a substantial maximum amount to the class members.

[165] On proceeding with the application for authorization to institute a class action for the purpose of approving the settlement agreement, the Superior Court considered the conditions for authorization, including colour of right: *Cornellier v. Province canadienne de la Congrégation de Ste-Croix*, 2011 QCCS 6670, at paras. 9-24 (CanLII). In its judgment, it found that all of those conditions were satisfied and that the institution of the class action could therefore be authorized for the purpose of approving the settlement. In a second judgment, it then homologated

the liquidation of the compensation process: *Cornellier v. Province canadienne de la Congrégation de Ste-Croix*, 2013 QCCS 3385.

[166] The fact that the Congregation chose, in the settlement agreement in that case, to take up the interest of Corporation Jean-Brillant [TRANSLATION] “without prejudice and without any admission” of its own liability is not determinative in the instant case. It does not diminish the relevance of the application judge’s conclusions — in a context that was analogous in every respect to the one in the case at bar — to the effect that the conditions for authorization, including colour of right, were satisfied: C.A. reasons, at para. 76. The Congregation would like the courts to look the other way and ignore this reality despite those past judgments of the Superior Court. Once again, this seems to me to be very far from being a cause of action that is frivolous, untenable or not arguable.

D. *Class Action Against the Oratory*

[167] J.J.’s case against the Oratory raises a set of problems in relation to the class action as a procedural vehicle that are distinct from the ones that apply to the Congregation. And the Court of Appeal was divided on this issue.

[168] The Oratory argues that the facts alleged in J.J.’s application do not support a cause of action in liability on the basis of direct fault or of the act of another person and that, in light of the allegations and the exhibits filed in support of them, he is seeking to have the Oratory held liable solely because some of the sexual abuse by

members of the Congregation is alleged to have occurred on premises owned by the Oratory. The Oratory submits that such allegations do not in themselves justify the conclusions being sought against it, which means that the condition of art. 575(2) *C.C.P.* is not met.

[169] In their discussion on J.J.'s action against the Oratory, the majority of the Court of Appeal expressed the view that, at the authorization stage, the allegations in the application and the exhibits filed in support of them made it [TRANSLATION] "easy to presume that a close connection" existed between the Congregation, the Oratory and the members of the religious community in question: para. 112. And because of this close connection that could in their opinion be presumed to exist, the majority concluded that, at this stage, any allegation or evidence that could apply to the Congregation could therefore also apply to the Oratory: para. 113. The dissenting judge was of the view that the application contained no allegation that could support the Oratory's liability for its own direct fault or for a fault committed by one of its subordinates: paras. 128-37.

[170] I agree with the dissenting Court of Appeal judge. The allegations in J.J.'s application and the exhibits filed in support of them do not support a cause of action in liability against the Oratory, an entity distinct from the Congregation, whether on the basis of its own direct fault or of the act of another person. In the Oratory's case, there are no facts, either alleged or found in the exhibits, that support a rigorous deductive reasoning that involves more than mere assumptions and

speculation. When all is said and done, J.J. has done nothing more than identify a physical place belonging to the Oratory (Father Bernard's office) as the place at which some of the alleged assaults occurred. In my view, that is not enough. In light of this conclusion, the effect of which is that the condition of art. 575(2) *C.C.P.* is not met, and although I disagree with the application judge's view that the shortcomings of J.J.'s action against the Oratory also apply to his action against the Congregation, I find that the Court of Appeal was not justified in intervening on this issue. The Superior Court's conclusion on dismissing the action against the Oratory should therefore be restored. As a result, it is not necessary to consider the Oratory's other argument concerning the commonality of issues: art. 575(1) *C.C.P.* If any one of the conditions of art. 575 *C.C.P.* is not met, the action must be dismissed.

[171] Although this Court stated in *Infineon* and in *Vivendi* that the evidentiary threshold requirement is low at the stage of authorizing a class action, there is nonetheless a minimum threshold, and it must be met. To discharge the burden of establishing an arguable case, an applicant must allege specific, tangible facts that support his or her cause of action and the legal syllogism being proposed. As this Court pointed out in *Infineon*, even though this threshold requirement is "a relatively low bar", the fact remains that, to meet it, "mere assertions are insufficient without some form of factual underpinning": para. 134. And while the exhibits filed in support of the assertions in the application can be relied on to show that there is an arguable case, the allegations must not merely be vague, general and imprecise: paras. 67, 94 and 134. In a civil liability context, this means that the applicant must

allege facts that are sufficient and provide a certain factual underpinning that shows how it can be argued that a fault has been committed or that liability has arisen: *Infineon*, at para. 80. That is what is lacking in J.J.'s action against the Oratory.

[172] I note that the issue of the sufficiency of the allegations concerns the Oratory only. The Court of Appeal clearly came to the unanimous conclusion that J.J. has an arguable case against the Congregation, and that conclusion was not challenged in this Court (except on the narrow question of the existence of a legal relationship, which I have already discussed and rejected). In its analysis, the Court of Appeal referred to a number of allegations and exhibits in arriving at its conclusion with respect to the Congregation, but those allegations and exhibits include no reference to the Oratory's actions. For example, J.J. relies on principles of canon law in support of his action, but he details his allegations of fault in this regard in relation to the Congregation only, and not to the Oratory. As for the public affairs program report that is central to the allegations of J.J.'s action, it focused on acts of the Congregation and its members, and not of the Oratory.

[173] As the dissenting Court of Appeal judge indicated quite bluntly, it must be understood that in this case, regardless of any effort that might be expended to try to make up for the shortcomings of J.J.'s application, it ultimately says little in this regard. In addition, the only exhibits he filed in support of the allegations are extremely limited. They can be summed up as follows: (1) the information statements in the enterprise register for the Congregation, Corporation Jean-Brillant and the

Oratory, and the Oratory's private incorporating statute; (2) a table of alleged victims; (3) two general documents relating to canon law; (4) a general article (in which neither of the appellants is named) on the impact of duress exerted by clergy members to discourage victims from reporting their assailants; and (5) the 2011 public affairs program report that led to the proceeding. And that is all.

[174] As a result, in the allegations set out in the application and the exhibits filed in support of them that concern the direct fault alleged against the Oratory, J.J. confines himself to generalities, without providing any details. The following are the relevant paragraphs of the application:

[TRANSLATION]

- 3.33 The respondents allowed members of the Congregation of Holy Cross to sexually abuse minor children in public schools, in orphanages, at St. Joseph's Oratory and in other places;
- 3.34 The respondents subjected the victims to mental, religious and psychological duress by discouraging them from reporting the sexual abuse by members of the Congregation of Holy Cross;
 - 3.34.1 To illustrate the impact of this type of duress, we are filing an article by Marianne Benkert and Thomas P. Doyle entitled "Religious Duress and Its Impact on Victims of Clergy Sexual Abuse", which was published on November 27, 2008 (filed as **Exhibit R-3**);
- 3.35 The respondents were aware of the sexual abuse by members of the Congregation of Holy Cross . . . but nevertheless hushed it up, to the detriment of the minor children who were the victims of that abuse;
 - 3.35.1 To illustrate these practices, we are filing the account given by a former brother on the *Enquête* program broadcast on September 30, 2010 (filed as **Exhibit R-4**);

- 3.36 The respondents knowingly and consciously chose to ignore the issue of sexual abuse of minor children by members of the Congregation of Holy Cross;
- 3.37 By covering up those sexual assaults, the respondents placed their own interests above those of the minor children, in violation of their mental, spiritual and physical integrity, which justifies an award of punitive damages to the applicant and the members of the class described in paragraph 1 of this application;
- 3.38 As principals, the respondents are liable for the sexual abuse, by members of the Congregation of Holy Cross, of the applicant and the members of the class described in paragraph 1 of this application; [Bold in original.]

[175] As the dissenting Court of Appeal judge observed, these are general and non-factual accusations. These allegations consist essentially of conclusions of fact without any factual underpinning, of legal arguments, or of opinions. In the Oratory's case, unlike that of the Congregation, no other allegation in the application (such as those relating to canon law) and none of the exhibits filed in support of the allegations (such as the television report that led to the proceeding) lend credence to these general comments. They are general allegations that quite simply do not contain the level of detail that one would expect of allegations forming the basis for an action in civil liability. More importantly, they have no factual underpinning.

[176] Thus, neither the application nor the exhibits explain how these allegations can apply against the Oratory. There are no facts, either alleged or found in the exhibits, that illustrate how the Oratory's acts or omissions allowed the assaults to occur or facilitated them. Nor are there any facts, either alleged or found in the exhibits, that support the allegation that a representative or employee of the Oratory tried to conceal the assaults. J.J. refers in this regard to the general article mentioned

above on the impact of duress exerted by clergy members to discourage victims from reporting their assailants. However, the article in question does not mention the Oratory. Likewise, the television report on which J.J. relies to show that the Oratory knew about the alleged assaults concerned only the Congregation and its members. In this regard, the fact that the Oratory is a monument built by the Congregation's members or that Brother André is associated with it adds nothing that can support the syllogism needed to substantiate the direct fault alleged against the Oratory.

[177] The table of victims to which J.J. refers also sheds little light on this issue. That table is limited to identifying various institutions as places where brothers and fathers belonging to the Congregation allegedly committed assaults. This does not support the claim that the Oratory committed a fault. I note that the Congregation is itself being sued for the acts allegedly committed by its members on premises belonging to those institutions, including the Oratory. What is more, the Oratory is the only one of the identified institutions that J.J. is suing directly. It may be the pre-eminent place of worship that some people associate with the Congregation, but that is certainly not a sufficient basis for taking a different approach to the analysis with respect to the legal syllogism J.J. must establish. The applicant must establish an arguable case against each of the entities being sued. Although the conditions for authorization, including the one set out in art. 575(2) *C.C.P.*, must be interpreted flexibly and applied broadly, a court cannot go so far as to presume the existence of an element that is essential to the establishment of an arguable case.

[178] Nor does J.J.'s argument that any allegation made or evidence adduced against the Congregation can also apply to the Oratory because the Congregation, [TRANSLATION] "through some of its members, helped found the Oratory" establish the necessary legal syllogism in this case: para. 3.3 of the Re-amended Motion. Section 2 of the Oratory's incorporating statute simply provides that its affairs are to be managed by five members of the "Congregation of the Holy Cross": *An Act to incorporate "St. Joseph's Oratory of Mount Royal"*, S.Q. 1916, c. 90. The fact that the Congregation is a religious community or that the Oratory is a religious society does not mean that the analysis regarding this allegation and this section can be dealt with differently for purposes of the application of the condition set out in art. 575(2) *C.C.P.*

[179] On the basis of this allegation and this exhibit, the majority of the Court of Appeal emphasized that the Oratory's affairs were managed in whole or in part by members of the Congregation: paras. 22 and 111. This was what led the majority to conclude that, at the authorization stage, it was [TRANSLATION] "easy to presume that a close connection exists between the Congregation, the Oratory and the religious concerned": para. 112.

[180] With respect, I am of the view that the majority of the Court of Appeal could not find an arguable case against the Oratory on such a tenuous basis. Section 2 indicates only that members of the Holy Cross religious community are to sit on the Oratory's board of directors. Unless something is read into the allegations in the

application or into the exhibits filed in support of them that is not in fact there, there is no indication that the Oratory is actually under the control of members of the religious community. And even if that were the case, it would not be sufficient in itself to establish an arguable case with respect to the Oratory's liability absent specific and tangible allegations of negligence on the Oratory's part or of the existence of a relationship of subordination between it and the members of that religious community. The dissenting judge aptly said the following in this regard:

[TRANSLATION] Nor can the mere fact that the Oratory is managed by members of the Congregation establish any fault committed by the Oratory against those who were sexually assaulted by members of the Congregation. The Oratory rightly argues that it is a separate entity whose mission is to operate and maintain that place of worship. It cannot be liable for the actions of members of the Congregation over whom it has no authority. [para. 137.]

[181] I agree. This cannot be a sufficient basis for imputing to the Oratory all of the faults raised against the Congregation in those allegations. I myself do not believe that it can be asserted on so limited a basis that the Congregation lies hidden behind the Oratory or that the Oratory is a component of the religious community to such an extent that whatever J.J. attributes to the Congregation can be imputed to the Oratory. Nor, I would add, is it the case that, because the Congregation might have to answer for its members' acts and because certain of its members were or are directors of the Oratory, it can be concluded that what applies to the Congregation applies equally to the Oratory. I fail to see the logic behind this deductive reasoning.

[182] In this regard, I note that even if the allegations in J.J.’s application with respect to canon law and to the television report that led to the proceeding can justify the existence of a cause of action on the basis of direct liability against the Congregation in that they support the argument that the Congregation’s officers knew or should have known about the alleged abuse, nothing to that effect can be found in relation to the Oratory. Instead, we are left to our own devices and can only speculate as to the basis on which it would be directly liable. This is the exact opposite of what an applicant must do at the stage of authorization of a class action, as he or she must present a legal syllogism that constitutes [TRANSLATION] “rigorous deductive reasoning that presupposes no implied extraneous proposition”: *A v. Frères du Sacré-Coeur*, 2017 QCCS 5394, at para. 31 (CanLII).

[183] J.J. is also asking the courts to find that the Oratory is liable, as principal, for the alleged sexual abuse by members of the Congregation. To support the legal syllogism required in order to justify a finding of liability for the act of another person, he had to allege, at a minimum, that members of the Congregation were subordinates of the Oratory who had committed faults in the performance of their duties: art. 1463 *C.C.Q.* A subordinate is a person who acts for and under the direction of another: Baudouin, Deslauriers and Moore, at No. 1-844. One of the elements that are essential to the establishment of such a form of liability is the existence of a relationship of subordination between the principal and the subordinate. It is accepted that the most important criterion to be met for the purpose of this determination is control, supervision and direction by the principal in relation to the

subordinate and his or her activities: Baudouin, Deslauriers and Moore, at No. 1-844. There is quite simply no factual support for such a determination either in J.J.'s allegations or in the exhibits filed in support of them.

[184] Paragraphs 3.11 to 3.17 of the application are the only ones that deal directly with the Oratory. In them, J.J. alleges only that he was sexually abused by Father Bernard, a member of the Congregation, in the priest's office on the Oratory's property. The mere fact that an office was made available to a member of the Congregation on premises belonging to the Oratory does not lead to the conclusion that the Oratory was the principal in relation to that member. It is important not to confuse the physical location with the legal relationship that is essential to finding that a relationship of principal and subordinate exists. As the dissenting judge rightly noted, no employee of the Oratory is identified in J.J.'s application as having been involved in or having caused the alleged sexual abuse. As well, J.J. stated in his examination that he had nothing to say against the chaplain who had been in charge of the altar boys in the Oratory's chapel. I would add that none of the exhibits that have been filed provide a form of factual underpinning from this point of view either.

[185] As this Court noted in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, Quebec civil procedure is primarily statute-based, and the procedure for class actions is no exception: para. 18. Under art. 575(2) *C.C.P.*, every applicant is required to allege facts that appear to justify the conclusions being sought. Where this condition is not met, the court must refuse to authorize a class action. If the proposed

class action against the Oratory were authorized on the basis of the allegations made in J.J.'s application and the limited exhibits he presented in this regard, the effect would be to lower the minimum threshold discussed by this Court in *Infineon* and *Vivendi* to almost nothing, so much so that the condition set out in art. 575(2) *C.C.P.* would become irrelevant. The obligation to make more than vague, general or imprecise allegations remains, and it must retain its full meaning and significance.

[186] In this regard, J.J. cites the Quebec Court of Appeal's decision in *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, and argues that an unduly literal interpretation is inappropriate and that it is instead necessary to [TRANSLATION] "read between the lines" of his application: para. 33 (CanLII). The passages from *Asselin* on which J.J. relies do not have the meaning he would give them. Although, as this Court held in *Infineon* and *Vivendi*, the conditions for authorization, including the sufficiency of the alleged facts — which are assumed to be true — must be interpreted and applied broadly, where allegations are vague, general and imprecise, a judge can neither presume the existence of something that they do not contain nor infer something that could have been included in them.

VI. Conclusion

[187] The second paragraph of art. 2926.1 *C.C.Q.* does not depart from the rules of prescription or establish a term for forfeiture. The starting point for the periods provided for in both paragraphs of art. 2926.1 *C.C.Q.* is the date the victim becomes aware of the connection between the act in question and his or her injury. If

the author of the act dies, the reduction of the period provided for in the second paragraph does not apply to an action against a third party that still exists for that party's own fault or for the act or omission of another person. At the authorization stage, J.J.'s application for a class action is therefore neither forfeit nor clearly prescribed.

[188] Given that the Court of Appeal was justified in intervening because of the application judge's overly restrictive interpretation of the conditions for authorization, including with respect to the alleged existence of a legal relationship between J.J. and the Congregation, I would dismiss the Congregation's appeal with costs throughout.

[189] However, despite the generous approach advocated by this Court to the conditions for authorizing a class action, the vague, general and imprecise allegations in J.J.'s application are not sufficient to establish an arguable case against the Oratory. I would therefore allow the Oratory's appeal and dismiss the application for authorization against it, without costs given that it has waived them.

English version of the reasons delivered by

CÔTÉ J. —

I. Overview

[190] The respondent, J.J., proposes to institute a class action against the appellants, Province canadienne de la Congrégation de Sainte-Croix (“Province canadienne”) and Oratoire Saint-Joseph du Mont-Royal (“Oratory”), based on sexual aggressions committed against him and other victims while they were children. In my reasons, to avoid any confusion, I will use the term “Province canadienne” rather than “Congregation” in order to clearly distinguish the appellant Province canadienne de la Congrégation de Sainte-Croix — the legal entity against which the application for authorization was brought — from the religious community known as the Congrégation de Sainte-Croix (Congregation of Holy Cross).

[191] The proposed class action is broad in scope: a time span of nearly 80 years, 20 or so different institutions and about 40 victims who have allegedly already come forward. To institute a class action, the respondent first had to obtain authorization from a court. The purpose of the authorization stage is, in part, to ensure that the courts, and of course defendants, are not forced to devote substantial resources to actions that are often unwieldy and complex, sometimes ill-conceived and ultimately untenable. In the present case, the application judge refused to authorize the class action, but the Court of Appeal set aside that decision and granted authorization.

[192] I agree with my colleague Gascon J. that the Oratory’s appeal should be allowed. Like him, I am of the view that the allegations in the application for authorization are too vague, general and imprecise to form the basis for an arguable

case and thus satisfy the condition in art. 575(2) of the *Code of Civil Procedure*, CQLR, c. C-25.01 (“*C.C.P.*”). At the very least, the application judge’s determinations in this regard were not clearly wrong, such that the Court of Appeal’s intervention was unwarranted. I note that my colleague Brown J. seems to fault the application judge for the brevity of his reasons with respect to the Oratory (para. 9). However, it is difficult to criticize the judge for being succinct given the almost complete absence of specific allegations concerning the Oratory in the application for authorization. Like the application judge, I point out that the application is [TRANSLATION] “practically silent regarding involvement on the Oratory’s part” (para. 137). As illustrated by my colleague Gascon J.’s reasons, the insufficiency of the facts alleged is in itself dispositive of the Oratory’s appeal.

[193] That being said, I would, unlike my colleagues, allow Province canadienne’s appeal. In my opinion, its second ground of appeal has merit: J.J. has not shown that there is any legal relationship between Province canadienne and himself. In fact, the evidence adduced by the respondent indicates that Province canadienne, as a legal person, did not exist at the time of the alleged events. The basis on which it might be found liable cannot be inferred from any of the allegations. In the circumstances, it was certainly open to the application judge to conclude that there was no arguable case. With respect, the Court of Appeal overstepped its role by basing its intervention on speculation and assumptions that had no foundation in the allegations set out in the application or, for that matter, in the evidence filed in support of it. The application judge’s decision should therefore be restored. As in the

case of the Oratory, the class action should not have been authorized against Province canadienne.

[194] However, I cannot fully accept the appellants' position on their first ground of appeal, as it is not clear that J.J.'s right of action is forfeited or prescribed under the second paragraph of art. 2926.1 of the *Civil Code of Québec* ("C.C.Q."). Whether the period introduced by that paragraph is a term for forfeiture (*délai de déchéance*) or a prescriptive period, it would have begun to run only from the coming into force of the provision, not retroactively from the date of death of J.J.'s alleged aggressors. It would indeed be unlikely that the legislature intended, without saying so clearly, to suddenly extinguish the right of action of a victim whose aggressor had died more than three years before the legislation came into force but whose remedy was not yet prescribed at that time.

[195] That being said, and with respect, I am not entirely in agreement with the majority's interpretation of art. 2926.1 C.C.Q. I will therefore make some comments on this subject in order to prompt the legislature to clarify its intention. Essentially, my view is that the death of the author of the act or the victim marks the starting point of the period set out in the second paragraph. It is not simply an event that shortens the period applicable under the first paragraph. This conclusion is dictated by the wording of the second paragraph, which states that the period "runs from the date of death". However, the appellants have not persuaded me that the legislature *expressly* provided for the forfeiture of any action for damages for bodily injury resulting from

sexual aggression a maximum of three years after the death of the author of the act or the victim. The period in question therefore remains governed by the general rules of prescription, which means that it can, subject to certain limitations, be suspended or interrupted. Moreover, this shortened period applies to all actions arising from sexual aggression, whether the action is brought against the author of the alleged act or against a third party. This interpretation makes it possible to achieve one of the legislature's objectives, that is, to avoid the erosion of evidence in order to maintain the integrity of the adversarial process.

[196] In summary, I will essentially deal with two issues: (i) the absence of allegations concerning the legal relationship between J.J. and Province canadienne; and (ii) the nature, starting point, scope and temporal effect of the period set out in the second paragraph of art. 2926.1 *C.C.Q.* First, however, I will expand on a few points relating to the scheme for authorizing a class action, and specifically the condition of sufficiency of the facts alleged set out in art. 575(2) *C.C.P.*

II. Analysis

A. *Process for Authorizing a Class Action*

(1) General Principles

[197] The new *Code of Civil Procedure* describes the class action as a “special procedur[e]”. What is unique about this procedural vehicle is that it enables a person

who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class (art. 571 *C.C.P.*); this is an exception to the rule that no one may plead for another person (art. 23 *C.C.P.*). Moreover, a class action pursues not only the objective of facilitating access to justice in order to compensate victims, but also that of bringing about socioeconomic changes by punishing certain behaviour that is considered harmful (see S. Finn, *Recours singulier et collectif: Redéfinir le recours collectif comme procédure particulière* (2011), at pp. 44-49 and 169-71; *Vivendi Canada Inc. v. Dell’aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 1). In many respects, a class action “takes place outside the framework of the traditional duel between a single plaintiff and a single defendant” (*Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, at para. 42).

[198] Because of the “special” nature of a class action, the legislature has provided that such an action may not be instituted without prior authorization from a court (art. 574 *C.C.P.*). Authorization is granted if the application meets four cumulative conditions relating to (i) commonality, (ii) the sufficiency of the facts alleged, (iii) the composition of the class and (iv) the applicant’s ability to properly represent the class members (art. 575 *C.C.P.*).

[199] This Court has favoured a flexible and generous interpretation of the conditions for authorization of a class action (*Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at para. 60; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 22). This approach is

justified to some extent by the access to justice objective that underlies class actions. However, the authorization mechanism must not be reduced to a mere formality. The conditions for authorization continue to play an important role, including by ensuring that class actions actually benefit litigants and do not impose a disproportionate burden on the judicial system. This is aptly stated by S. Finn:

[I]t is difficult to understand how judicial economy would be served if courts were to favour an almost pro forma approach to authorization applications. An authorized class action does not dissolve into the ether; it proceeds to the merits. And if the class action proceeds to the merits with significant defects, it will be up to the judge of first instance to contend with those defects over a period of years, unless the case is settled, discontinued, or annulled.

(*Class Actions in Québec: Notes for Non-Residents* (2nd ed. 2018), at p. 87)

[200] It is helpful to recall the objectives of the authorization process: to protect the interests of potential class members who would otherwise have no say in the litigation; to prevent defendants from being forced to invest significant resources to contest large-scale, time-consuming actions that have only a slight chance of success; and, finally, to prevent such actions from monopolizing the judicial system to the detriment of other litigants' actions (see, for example, V. Aïmar, "L'autorisation de l'action collective: raisons d'être, application et changements à venir", in C. Piché, ed., *L'effet de l'action collective* (2018), at pp. 151-57; C. Marseille, "Le danger d'abaisser le seuil d'autorisation en matière d'actions collectives — Perspectives d'un avocat de la défense", in C. Piché, ed., *L'effet de l'action collective* (2018), at pp. 253-56, citing P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice*

pour les consommateurs (1996), at pp. 258 and 349; *Sofio v. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, at para. 26 (CanLII); *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349, at para. 39; Marseille, at p. 258; D. Jutras, “À propos de l’opportunité du recours collectif”, in *Colloque sur les recours collectifs 2007* (2007), at p. 28). These objectives have not lost any of their relevance.

[201] Under the *Code of Civil Procedure*, the applicant bears the burden of showing that the application meets the conditions for authorization. I disagree with the statement made by my colleague Brown J. — and also by the Court of Appeal — that any “doubt” in this regard must be resolved in favour of the applicant (paras. 42 and 79). That principle amounts to reversing the burden that the legislature has chosen to impose on the applicant (see A. Durocher and C. Marseille, “Autorisation d’exercer un recours collectif”, in *Jurisclasseur Québec — Collection de droit civil — Procédure civile II* (loose-leaf), by P.-C. Lafond, ed., fasc. 21, at para. 33). It is true that the conditions must be applied flexibly, but authorization must be denied if the judge is not satisfied that they are met. Of course, denial of authorization does not prevent the applicant, or any other victim, from asserting his or her rights individually.

[202] Finally, it must be remembered that art. 575 *C.C.P.* confers “significant discretion” on the judge who has to determine whether the conditions for authorization are met (*Vivendi*, at para. 33). Judges of first instance are in the best

position to perform this task. They are also the ones who will have to manage the class action once it is authorized. An appellate court must therefore defer to the judge's findings and intervene only if the judge erred in law or if the judge's assessment of one of the conditions is "clearly wrong" (*ibid.*, at para. 34). It is not enough for the appellate court to note its disagreement with the application of any of the criteria. Unless it identifies an actual error of law, it must explain exactly how the judge's assessment is *clearly* wrong. Otherwise, it will only pay lip service to "deference". Furthermore, the fact that an appellate court identifies an error in relation to one condition does not authorize it to reassess all of the conditions (*ibid.*, at para. 35).

(2) Sufficiency of the Facts Alleged

[203] Province canadienne's appeal is based on the condition of sufficiency of the facts alleged set out in art. 575(2) *C.C.P.* I am substantially in agreement with my colleague Gascon J.'s interpretation of the applicable criterion (paras. 108-11, 171, 182 and 185-86). Essentially, our disagreement lies in the application of that criterion with respect to Province canadienne. While I believe that his discussion properly summarizes this Court's case law, I would elaborate on certain points in order to clearly explain my position on Province canadienne's appeal and to respond to some of the propositions made by my colleague Brown J.

[204] Under art. 575(2) *C.C.P.*, the judge must ensure that "the facts alleged appear to justify the conclusions sought". This condition is assessed in light of the

individual cause of action of the applicant (or, as the case may be, the designated person) (*Sofio*, at para. 10; *Option Consommateurs v. Fédération des caisses Desjardins du Québec*, 2010 QCCA 1416, at para. 9 (CanLII)). A class action is not a patchwork quilt: a judicial application cannot be based on the fault committed against one potential member combined with the injury suffered by another. As the majority of this Court noted in *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 52, “[a] class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings”. Although at the authorization stage the facts alleged with respect to members other than the applicant are relevant, and indeed necessary, to establish the composition of the class (arts. 574 and 575(3) *C.C.P.*), they are not sufficient on their own to show that the conclusions sought are justified within the meaning of art. 575(2) *C.C.P.*

[205] This Court has held that the applicant must allege sufficient facts to establish an “arguable case”, that is, a “good colour of right” (*Vivendi*, at para. 37; *Infineon*, at paras. 65 and 67; *Longueuil (City)*, at para. 23; *Comité régional des usagers des transports en commun de Québec v. Québec Urban Community Transit Commission*, [1981] 1 S.C.R. 424, at p. 429). It is true that this threshold is “a low one” (*Infineon*, at para. 59), but it does exist, and the applicant must meet it (*Sofio*, at para. 24).

[206] In this regard, I agree with my colleague Gascon J. (para. 185) that the courts must be careful not to lower the “relatively low standard” described by the

Court in *Infineon* (para. 89) and to make it a mere formality. In particular, it should be remembered that the application judge's role is not limited to screening out frivolous or clearly unfounded applications. Screening out such applications is certainly one of the *purposes* of the authorization process, but this is not the *criterion* adopted by the legislature (see *Infineon*, at paras. 61 and 65). Article 575 *C.C.P.* states that a judge authorizes a class action only if the facts alleged appear to justify the conclusions sought and, of course, if the other conditions are met (*Vivendi*, at para. 37). The burden on the applicant is therefore more onerous than simply establishing that the application is not frivolous or clearly unfounded (see P.-C. Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at pp. 133-34). In my view, these two criteria must not be confused. The legislature expressly adopted the concept of a frivolous or clearly unfounded pleading in the provisions under which sanctions are imposed for abuse of procedure (art. 51 *C.C.P.*), but not at the stage of authorizing a class action. This legislative choice must be respected.

[207] To clear up any ambiguity, I note that my interpretation of art. 575(2) *C.C.P.* is entirely in keeping with the principles laid down in *Infineon*. In my opinion, a selective reading of that judgment must be avoided. It is true, as my colleague Brown J. notes (para. 56), that this Court stated in *Infineon* that a court's role is "merely to filter out frivolous motions", but we cannot disregard the end of the same sentence, where this Court stated that a court must "grant those that meet the evidentiary and legal threshold requirements of art. 1003" of the former *Code of Civil*

Procedure, CQLR, c. C-25 (now art. 572 *C.C.P.*) (para. 61). On this point, the Court in *Infineon* referred to *Comité régional des usagers des transports en commun de Québec*, in which it was stated that an application judge must “reject entirely any frivolous or manifestly improper action, and authorize only those in which the facts alleged disclose a good colour of right” (p. 429; cited in *Infineon*, at para. 62; emphasis added). Therefore, while a court must of course screen out frivolous or clearly unfounded applications from the outset, the criterion applicable to the condition set out in art. 575(2) *C.C.P.* is separate and, above all, more stringent. At the risk of repeating myself, the burden on the applicant is to show an “arguable case”, which is equivalent to a good colour of right, a *prima facie* case or, in French, “*une apparence sérieuse de droit*” (*Infineon*, at paras. 64-65, citing, among others, *Longueuil (City)*, at para. 23). This is also how my colleague Gascon J. defines the applicable criterion (para. 109).

[208] For an application to establish an “arguable case”, and thus for the conclusions sought to appear to be justified, the application judge must be able to infer the proposed legal syllogism from the facts alleged (see, for example, *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437, [2005] R.J.Q. 1367, at paras. 29 and 35; *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, at para. 36 (CanLII); *Union des consommateurs v. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243, at para. 88). The legal syllogism must be [TRANSLATION] “clear, complete and rigorous” (S. E. Finn, *L’action collective au Québec* (2016), at p. 173), because even at the authorization stage, “the class action mechanism cannot be used

to make up for the absence of one of the constituent elements of the cause of action” (*Bou Malhab*, at para. 52). As Professor Lafond writes, [TRANSLATION] “since legal arguments are not assumed to be correct, they need to be demonstrated in order to show the soundness of the legal syllogism” (Lafond (2006), at p. 132; emphasis added). Provencher J. provided an excellent summary of the applicable law in *A v. Frères du Sacré-Coeur*, 2017 QCCS 5394:

[TRANSLATION] The courts have determined that the legal syllogism proposed by an applicant must be clear and must not involve vague possibilities, inferences or assumptions. It must constitute rigorous deductive reasoning that presupposes no implied extraneous proposition. [Emphasis added; para. 31 (CanLII)]

[209] Consideration of the legal syllogism sometimes requires the court to decide a pure question of law at the authorization stage (*Trudel v. Banque Toronto-Dominion*, 2007 QCCA 413, at paras. 2-3 (CanLII); *Toure v. Brault & Martineau inc.*, 2014 QCCA 1577, at para. 42 (CanLII); *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433, at para. 12 (CanLII); *Groupe d’action d’investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923, at para. 33 (CanLII); *Fortier v. Meubles Léon ltée*, 2014 QCCA 195, at paras. 89-91 (CanLII); for an example, see also *Infineon*, at paras. 107-17). Where such a question can be decided without weighing the evidence and where the outcome of the case depends on it, I believe that it is very much in the interests of justice — and consistent with the guiding principle of proportionality — for the court to deal with the question at the authorization stage. Otherwise, it would be necessary to wait for an exception to dismiss to be raised on

the merits after the class action is authorized, which would result in a needless waste of resources and effort, both for the parties and for the judicial system (see Finn, *L'action collective au Québec*, at p. 170). This is in fact the reason for which, in the instant case, the Court is ruling on the interpretation of art. 2926.1 *C.C.Q.* at this stage.

[210] In assessing the legal syllogism in light of the facts alleged, the application judge must refrain from weighing the evidence and thereby intruding into the sphere of the trial judge (*Infineon*, at para. 68). The facts alleged are, in principle, assumed to be true as long as they are sufficiently specific and concrete to make it possible for the defendants to know the allegations against them and for the court to assess the quality of the legal syllogism (see *Infineon*, at para. 67; *Toure*, at para. 38; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, at para. 52 (CanLII)). However, facts that are clearly contradicted by reliable evidence cannot be assumed to be true (*Bell Mobilité*, at para. 38; *Charles v. Boiron Canada inc.*, 2016 QCCA 1716, at para. 43 (CanLII); Finn, *Class Actions in Québec: Notes for Non-Residents*, at p. 21).

[211] Moreover, vague, general or imprecise allegations — as well as mere statements of a legal nature, opinions or assumptions — cannot suffice to establish an “arguable case” (*Infineon*, at paras. 67 and 127; *Bell Mobilité*, at paras. 37-38; Finn, *Class Actions in Québec: Notes for Non-Residents*, at p. 21). As this Court stated in *Infineon*, “mere assertions are insufficient without some form of factual underpinning” (para. 134). It is true that the evidence adduced at the authorization

stage can sometimes compensate for a *lack of precision* in the facts alleged, but no evidence can cure the *absence* of specific factual allegations regarding an essential element of the cause of action. In this regard, to the extent that my colleague Brown J.'s reasons suggest that the evidence adduced could, on its own, establish an arguable case even though the application for authorization contains only very vague, general and imprecise allegations, I disagree. The actual wording of art. 575(2) *C.C.P.* indicates that authorization must be based on the “facts alleged”. This means that the applicant cannot simply make generic assertions like “the respondent committed a fault that caused an injury”, adduce some evidence and then leave it to the judge to sift through the evidence to find the elements required to establish an arguable case.

[212] In addition, the application judge should not rely on mere speculation to make up for the shortcomings of a poorly crafted application. I agree with my colleague Gascon J. that where allegations are vague, general or imprecise, “a judge can neither presume the existence of something that they do not contain nor infer something that could have been included in them” (para. 186). In my view, it is not the application judge’s role to [TRANSLATION] “read between the lines” of the pleading, as Bich J.A. put it in *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, at para. 33 (CanLII). The judge should unquestionably avoid an overly strict and literal reading of the application, but should nonetheless confine himself or herself to the facts actually alleged in the application, without trying to complete them (see Finn, *Class Actions in Québec: Notes for Non-Residents*, at p. 86;

see also *Sofio*, at para. 25). In saying this, I am not, of course, expressing any opinion on the merits of the decision in *Asselin*, which is still the subject of an application for leave to appeal to this Court.

[213] I will conclude on the interpretation of art. 575(2) *C.C.P.* simply by adding that — contrary to what is suggested by the Court of Appeal’s reasons — the applicable criterion for determining whether the condition has been met does not vary depending on the specific context of the case (see paras. 18, 48, 52 and 92). In each case, the facts alleged must disclose an arguable case that rests on a clear, complete and rigorous legal syllogism. At most, the application judge must be mindful of the evidentiary difficulties that some cases present at the authorization stage, that is, prior to pre-trial examinations and the disclosure of evidence.

B. *Absence of an Arguable Case Against Province Canadienne*

[214] With all due respect for my colleagues’ contrary view, I fail to see how the application judge’s assessment of the sufficiency of the facts alleged (art. 575(2) *C.C.P.*) was “clearly wrong” in relation to Province canadienne. On the basis of the application and supporting exhibits, it was certainly open to the judge to conclude, as he did, that the facts alleged disclosed no cause of action — no legal relationship — between J.J. and Province canadienne. This is, in fact, the inevitable conclusion, unless of course one “presume[s] the existence of something that they do not contain” or “infer[s] something that could have been included in them”, as my colleague Gascon J. states in relation to the Oratory (para. 186). In my view, the Court of

Appeal erred in reversing the application judge's decision and in trying itself to remedy, on the basis of pure speculation, the obvious shortcomings of the application for authorization.

[215] The application judge began by properly noting that [TRANSLATION] “[i]t is a basic rule that a person instituting an action must sue the right person in order to have any hope of success” (para. 88). He then found that the respondent had not shown that his application complied with this principle and that, as a result, the conclusions sought against Province canadienne did not appear to be justified (paras. 89-98). The application judge's conclusions regarding the absence of a legal relationship were based not on an improper assessment of the probative value of the exhibits filed, but rather on the insufficiency of the facts alleged and on reliable, uncontradicted evidence adduced by the respondent himself. In my view, there was no error in the judge's approach or reasoning, at least on this point.

[216] The respondent's allegations against Province canadienne relate to events that date back to the 1950s. Specifically, J.J. alleges that two members of Province canadienne aggressed him repeatedly between 1951 and 1955, while he was a student at the Notre-Dame-des-Neiges school and an altar boy at the Oratory. As well, the list of potential victims filed by the respondent refers to sexual aggressions that allegedly occurred in the 1940s. According to the allegations, Province canadienne was aware at the time that some of its members were committing such acts and knowingly ignored them and covered them up.

[217] But as the application judge noted, the evidence adduced by the respondent himself clearly establishes that Province canadienne, as a distinct legal person, did not exist at the time of the alleged events. It was constituted on January 1, 2008 under the *Religious Corporations Act*, CQLR, c. C-71 (“*R.C.A.*”), and has not been amalgamated or continued. These uncontested facts appear in the information statement for a legal person found in the enterprise register, to which the application for authorization refers directly (para. 3.1). The incidents related to J.J.’s personal action — the only ones relevant to establishing an arguable case under art. 575(2) *C.C.P.* — therefore allegedly occurred half a century before Province canadienne was constituted. What is more, J.J.’s two alleged aggressors died in 2001 and 2004 and thus were never members of Province canadienne. Finally, the list of potential victims refers to incidents that allegedly occurred no later than the 1980s.

[218] Even if the facts are assumed to be true and the evidence adduced is considered, the application for authorization does not indicate the basis on which Province canadienne could be liable — whether for its own fault or for that of another person — for acts or omissions that occurred before it was constituted. The legal syllogism is flawed or clearly incomplete, if not absent. There are two possibilities: either J.J. sued the wrong defendant, or he failed to allege certain facts that were essential to establishing the basis for his cause of action. In either case, the application judge had no choice but to conclude, as he did, that the respondent had not met his burden of demonstrating an arguable case under art. 575(2) *C.C.P.*

[219] On this point, the Court of Appeal’s decision does not show that the application judge’s assessment was clearly wrong; quite the contrary. The Court of Appeal justified its intervention by stating that, even though Province canadienne was constituted in 2008, it was merely the instrument of a religious community that had itself existed at the time of the alleged acts (paras. 72-73). The Court of Appeal assumed that, at that time, this community had acted through *another* legal person, Corporation Jean-Brillant, which had been constituted on May 10, 1947 (para. 73). Essentially, the Court of Appeal conflated a religious community having no juridical personality with two distinct legal persons, Province canadienne and Corporation Jean-Brillant. It seems to have assumed that, from a legal standpoint, they were a single entity, without regard for the applicable rules concerning legal persons. Thus, in 2008, the officers of the religious community purportedly [TRANSLATION] “decided on a *de facto* basis to abandon Corporation Jean-Brillant and to be constituted under the name Province canadienne de la Congrégation de Sainte-Croix” (para. 75). According to the Court of Appeal, that decision to [TRANSLATION] “do *business* using a different legal personality from the one that had served as its flagship until then” could not make the “delictual nature of its fault” cease to exist (para. 72; emphasis in original). In my view, these mere speculative statements cannot, on their own, establish the basis for a cause of action against Province canadienne, even at the authorization stage.

[220] To begin with, Province canadienne is a *legal person*. As a result, the *C.C.Q.* recognizes it as possessing a distinct juridical personality, including in

relation to its members (arts. 298 and 309), and as having its own patrimony (art. 302). The *R.C.A.* sets out the rules applicable to the constitution and operation of a religious corporation and states that Part III of the *Companies Act*, CQLR, c. C-38, also applies, with the necessary modifications, to such a corporation. The information statement in the enterprise register indicates that the objects of Province canadienne are to organize, administer and maintain a religious congregation, which are the objects referred to in s. 2 of the *R.C.A.* In s. 1 of that statute, the word “congregation” is defined as a “group of religious” who are members of a religious community.

[221] Further, the fact that Province canadienne has a religious mission does not allow its juridical personality to be disregarded. I acknowledge that the evidence tends to show that Province canadienne is one of the legal vehicles of a religious community, the Holy Cross community, and that the history of that community dates back to well before 2008 (see, for example, the report broadcast on the *Enquête* program and the *Act to incorporate “St. Joseph’s Oratory of Mount Royal”*, S.Q. 1916, c. 90, which refers to the “Congregation of the Holy Cross”). However, such a connection to the Holy Cross community would not make Province canadienne liable *per se* for acts and omissions committed before it was constituted by members of that community or by other legal entities that may have been connected to that community. In addition, s. 16 of the *R.C.A.* specifically establishes a continuance mechanism by which a religious corporation can succeed a corporation that has been dissolved and thus become seized with that corporation’s rights, property and obligations. Section 8 of the *R.C.A.* also refers to the amalgamation provisions of the

Companies Act, which provide for the transfer of debts, contracts, liabilities and duties to a new amalgamated entity (s. 18(6)). Finally, s. 2 of the *R.C.A.* contemplates the possibility that a single religious community will constitute a number of distinct and autonomous corporations for various purposes, without the corporations having the same juridical personality or the same patrimony (see, by analogy, *A v. Frères du Sacré-Cœur*, 2017 QCCS 5394, at para. 37).

[222] The application for authorization contains no allegation from which it might be inferred that Province canadienne is the product of a continuance or of an amalgamation with an entity that could itself be liable for the acts or omissions alleged against Province canadienne by the respondent. In fact, as I have mentioned, there is reliable, uncontested evidence that clearly suggests the contrary. To sum up, the mere fact that Province canadienne was constituted under the *R.C.A.* — as opposed, for example, to the *Business Corporations Act*, CQLR, c. S-31.1 — does not make it responsible for the debts, contracts, liabilities and duties of other entities that may have been connected to the Holy Cross religious community in the past. On this point, I disagree with Brown J. insofar as he suggests that the juridical personality of religious corporations differs in nature from that of legal persons with secular purposes (para. 51).

[223] As for the Court of Appeal’s statement that the Holy Cross religious community decided [TRANSLATION] “on a *de facto* basis to abandon” Corporation Jean-Brillant (para. 75), this is merely an assumption that has no basis whatsoever in

the facts alleged in the application or, for that matter, in the exhibits filed in support of it. I note that the application for authorization says practically nothing about the appellants' corporate identity — apart from three very general statements (paras. 3.1-3.3) — and nothing at all about their possible connections with other entities. This is surprising and, in my view, illustrates the shortcomings of the proposed class action. By way of comparison, the amended application for authorization in *A v. Frères du Sacré-Cœur*, 2017 QCCS 5394, another case dealing with sexual aggression allegations involving religious institutions, contained 25 detailed allegations concerning the corporate history of the community concerned.

[224] In the present case, the application itself states nothing about Corporation Jean-Brillant and obviously includes no factual allegations concerning its corporate history and its connections with Province canadienne. The only references to Corporation Jean-Brillant in the record are found in an information statement from the enterprise register. That document indicates that Corporation Jean-Brillant was constituted in 1947, that its purposes are religion and teaching, that it used the name “Les Frères de Sainte-Croix” until January 7, 2008 and that it still existed when the application for authorization was filed in November 2013. Moreover, on September 3, 2014, it had the same address and some of the same directors as Province canadienne. As a whole, this evidence undeniably suggests that the two corporations are connected not only with each other, but also more broadly with the Holy Cross religious community. However, there is nothing to indicate that the religious community abandoned Corporation Jean-Brillant and that all that remains of that

corporation is an empty shell. In this respect, the Court of Appeal’s reasoning does not involve “more than mere assumptions and speculation”, as my colleague Gascon J. puts it (para. 170).

[225] What is more, even if it is assumed that Province canadienne and Corporation Jean-Brillant were in fact alter egos — which would presuppose that one had [TRANSLATION] “no separate directing mind”, to the point of being the “puppet of the other” — this alone would be insufficient to disregard their distinct juridical personalities and treat them as a single person (P. Martel, in collaboration with G. A. Lebel and L. Martel, *La corporation sans but lucratif au Québec* (loose-leaf), at pp. 3-24 and 3-25). In this sense, the fact that the two corporations may have been constituted by the same members or by the same religious community would not in itself be of any legal consequence. The same is true of the “abandonment” of one in favour of the other. Moreover, contrary to what Brown J.’s reasons suggest, the number of employees or establishments of these corporations would not in itself demonstrate abandonment (para. 2). Paul Martel accurately summarizes the exceptional circumstances in which the corporate veil can be lifted under art. 317 *C.C.Q.*:

[TRANSLATION] Article 317 [*C.C.Q.*] states that the fraud, abuse of right or contravention of public order must be “dissembled” by the juridical personality of the legal person, which involves an element of secrecy, concealment, scheming or manipulation by the person or persons wishing to invoke that personality.

(*La corporation sans but lucratif au Québec*, at p. 3-24)

Nothing is wrong in and of itself with a corporation being an *alter ego*. The corporate veil may be lifted only when the *alter ego* is used for the prohibited purposes set out in article 317. Case law confirms that, in the absence of fraud, the identity of a corporation, even an *alter ego*, will be respected.

(*Business Corporations in Canada*, vol. 1 (loose-leaf), at pp. 1-97 and 1-98; see also, for example, *Domaine de l'Orée des bois La Plaine inc. v. Garon*, 2012 QCCA 269, at para. 9 (CanLII); *Brasserie Labatt ltée v. Lanoue*, 1999 CanLII 13784 (C.A.), at pp. 9-12; *Coutu v. Québec (Commission des droits de la personne)*, 1998 CanLII 13100 (C.A.), at pp. 14-18)

[226] In this regard, I cannot agree with my colleague Gascon J. that “[a]t no time” did the Court of Appeal suggest “that lifting the corporate veil is justified or necessary in the instant case” (para. 162). In my view, this is precisely what it suggested by stating that the religious community’s decision to [TRANSLATION] “do *business* using a different legal personality” could not make its fault “cease to exist”. It goes without saying that the fault does not cease to exist. But for the liability of one legal entity to be imputed to another, their juridical personalities must in fact be disregarded.

[227] In the case at bar, however, J.J. is simply not alleging any fact relating to fraud, abuse of right or contravention of public order that could possibly justify disregarding or ignoring Province canadienne’s juridical personality in this way and conflating its patrimony with that of other entities that may be connected with the Holy Cross religious community, including Corporation Jean-Brillant. Even if it is assumed that the evidence adduced at the authorization stage can in principle compensate for the absence of allegations, which it obviously cannot, the exhibits

filed in the instant case do not support such a legal syllogism based on the lifting of the corporate veil.

[228] I would also note that it is by no means clear that the respondent could have relied on art. 317 *C.C.Q.* to establish a cause of action against Province canadienne, even if his pleading is assumed to contain allegations of fraud, abuse of right or contravention of public order. Article 317 *C.C.Q.* is not an independent source of civil liability. According to one interpretation, this provision simply serves to preserve the legal relationship with the persons that are truly liable when they try to evade liability by hiding behind the corporate veil of a legal person (see, for example, Martel, *Business Corporations in Canada*, at pp. 1-85 and 1-86; R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at paras. 244-46; J. Turgeon, “Le Code civil du Québec, les personnes morales, l’article 317 *C.c.Q.* et la levée de l’immunité des administrateurs, des dirigeants et des actionnaires” (2005), 65 *R. du B.* 105, at pp. 139-43). In the case at bar, however, Province canadienne could not have taken part in the alleged acts and omissions and, for this reason, be liable for them, given that it did not exist at the relevant time. But there is no need for me to make a definitive ruling on the scope of art. 317 *C.C.Q.* in light of my conclusion that the facts alleged in the application clearly do not meet the requirements of that article and therefore cannot provide any basis for relying on it.

[229] Before concluding on this point, I will make one last comment regarding the Court of Appeal’s statement that the juridical personality of Province canadienne

raises only a [TRANSLATION] “potential enforcement problem” (para. 78). With respect, because of the fact that Province canadienne has a distinct juridical personality, it is not *liable* for acts or omissions that occurred before it was constituted and, as a result, it cannot be ordered to make reparation for the alleged injury. An enforcement problem could have arisen if the respondent had instituted an action against a legal entity *that existed at the time of the events* but had since divested itself of its assets. In such a case, Paulian actions could, for example, have been considered. However, that is not the situation before us.

[230] The courts have reiterated on numerous occasions that a class action cannot be authorized in relation to a defendant solely on the basis of its close connections with other entities (see, for example, *A v. Frères du Sacré-Cœur*, 2017 QCCS 5394, at paras. 37-55; *Option Consommateurs v. Fédération des caisses Desjardins du Québec*, at paras. 23-32 (CanLII); *Deraspe v. Zinc électrolytique du Canada ltée*, 2014 QCCS 1182, at paras. 85-108 (CanLII), *aff’d* 2014 QCCA 2266, at paras. 6-8 (CanLII); leave to appeal denied, [2015] 2 S.C.R. vi; *Labranche v. Énergie éolienne des Moulins, s.e.c.*, 2016 QCCS 1479, at paras. 82-98, application for leave to appeal dismissed, 2016 QCCA 1879). The outcome should be the same in the present case, especially since the facts alleged in the application for authorization do not indicate any connections between Province canadienne and other entities that may be connected with the Holy Cross religious community — with the notable exception of the Oratory, of course.

[231] Contrary to what is suggested by the Court of Appeal's reasons (para. 77), we are not dealing with a complex corporate structure involving a [TRANSLATION] "confused" factual situation. If this had been the case, it would have been necessary to leave it to the trial judge to determine the specific liability of each of the related entities after thoroughly reviewing the evidence (see, for example, *Option Consommateurs v. LG Chem Ltd.*, 2017 QCCS 3569, at para. 22 (CanLII)). However, that is not what is at issue here. If there is any confusion in the instant case, it is simply because the facts alleged do not make it possible to infer from the application a clear, complete and rigorous legal syllogism capable of meeting the low threshold applicable at the authorization stage.

[232] Furthermore, I attach little legal significance to Province canadienne's decision to [TRANSLATION] "take up the defence of other entities (including Corporation Jean-Brillant) for their actions" in another case relating to sexual aggressions (*Cornellier v. Province canadienne de la Congrégation de Ste-Croix*, 2013 QCCS 3385, at para. 4 (CanLII); emphasis added). First of all, the settlement reached in that case was clearly entered into [TRANSLATION] "without prejudice and without any admission" of liability by Province canadienne (*ibid.*). That settlement also suggests that, if faults were committed, "other entities" than Province canadienne are liable for them, as the application judge noted (paras. 97-98). At most, I acknowledge that the settlement reached in *Cornellier* tends to confirm the closeness between Province canadienne and other entities connected with the Holy Cross community. But relying on this fact alone to authorize the class action would have an

obvious pernicious effect: it would discourage any person from taking up another's defence for fear that the courts would later use this as a pretext for disregarding the person's distinct juridical personality.

[233] Similarly, the fact that the Superior Court authorized the class action against Province canadienne in *Cornellier*, solely for the purposes of the settlement (*Cornellier v. Province canadienne de la Congrégation de Ste-Croix*, 2011 QCCS 6670, at para. 5 (CanLII)), does not establish that there is a legal relationship between J.J. and Province canadienne. First, by definition, generally, an authorization judgment contains no findings of fact or of mixed fact and law against the defendants (L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (2nd ed. 2017), at p. 2468). It simply reflects a discretionary assessment of the conditions for authorization in light of the application as filed. As a result, such a judgment does not limit a court's discretion in a subsequent case. Second, in *Cornellier* specifically, the application for authorization was not contested. In view of the settlement that had been reached, the application judge simply stated, essentially as a matter of form, that [TRANSLATION] “[t]he Court is of the opinion that the legal syllogism proposed in the action is sound and discloses the requisite colour of right” (para. 17). An “analysis” as laconic as that could not be binding on the application judge in the present case.

[234] In sum, it is my view that the facts alleged in the application, even when supported by the evidence adduced, do not make it possible to infer a clear, complete

and rigorous legal syllogism that could engage the liability of Province canadienne. The respondent has simply not demonstrated the existence of the legal relationship that is essential to his cause of action or, consequently, an arguable case. At the very least, I do not see how the application judge's assessment in this regard was clearly wrong.

[235] I therefore conclude that the Court of Appeal's intervention was unwarranted and that the application judge's decision dismissing the application for authorization in relation to Province canadienne should be restored, just as in relation to the Oratory. In light of this conclusion, I find it unnecessary to decide in this appeal whether the facts alleged by the respondent with respect to direct fault or the act or omission of another person would otherwise have been sufficient if he had been able to establish a legal relationship between himself and Province canadienne (or if the action had been brought against another legal entity).

[236] Finally, with regard to the Oratory, I have, of course, read my colleague Brown J.'s reasons concerning some of the other conditions for authorization in art. 575 *C.C.P.* I do not consider it useful to respond to those reasons. However, my silence does not mean that I agree with them.

C. Period Provided for in the Second Paragraph of Article 2926.1 C.C.Q.

[237] With respect to the grounds of appeal based on the second paragraph of art. 2926.1 *C.C.Q.*, it is my view that the meaning of this provision is not nearly as

clear as the majority's reasons suggest. On this point, I think it will be useful to indicate where my interpretation differs from that of the majority, if only to prompt the legislature to clarify its intention as regards the periods applicable to actions arising from sexual aggression. In particular, I will discuss the following points:

- i) While I entertain doubts about whether a term for forfeiture has been created, I am of the view that the death of the victim or the author of the act is a starting point that differs from the one provided for in the first paragraph.
 - ii) The period provided for in the second paragraph can still be suspended, except as a result of lack of awareness of the connection between the alleged act and the injury suffered.
 - iii) In my opinion, the shortened period provided for in the second paragraph applies to all the actions concerned, whether they are brought against the author of the act, his or her succession or a third party.
 - iv) The period provided for in the second paragraph of art. 2926.1 *C.C.Q.*, whether it is a prescriptive period or a term for forfeiture, would not have extinguished the respondent's right of action retroactively.
- (1) Starting Point and Nature of the Period Provided for in the Second Paragraph

[238] Article 2926.1 *C.C.Q.*, particularly its second paragraph, raises a number of interpretative difficulties. I agree with the appellants that there are certain indicia that, in the second paragraph, the legislature provides for the forfeiture of any action for damages for bodily injury resulting from sexual aggression a maximum of three years after the death of the author of the act or the victim. In my view, however, if this was the legislature's intention, it did not express it in a sufficiently precise, clear and unambiguous manner, and for this reason, the doubt should be resolved in favour of the applicant. Subject to one exception which I will explain below, it should be concluded that the period under the second paragraph is a prescriptive period to which the general rules on suspension and interruption apply.

[239] Before I deal more specifically with the interpretation of the second paragraph of art. 2926.1 *C.C.Q.*, it will be helpful to look at the rationale for extinctive prescription and forfeiture in Quebec civil law and at the distinctions between the two concepts.

(a) *Extinctive Prescription and Forfeiture in Quebec Law*

[240] Article 2921 *C.C.Q.* defines extinctive prescription as “a means of extinguishing a right owing to its non-use or of pleading a peremptory exception to an action”. Article 2878 *C.C.Q.*, for its part, formally recognizes the concept of forfeiture of a remedy, but without defining it. Briefly, forfeiture presupposes the existence of a strict time limit that cannot be extended under any circumstances. Therefore, unlike prescription, a term for forfeiture cannot be suspended or

interrupted. A court must, of its own motion, declare a remedy forfeited, and forfeiture cannot be waived by the parties (see, for example, *Alexandre v. Dufour*, [2005] R.J.Q. 1 (C.A.), at para. 31; *Pierre-Louis v. Québec (Ville de)*, 2008 QCCA 1687, [2008] R.J.Q. 2063, at para. 39, citing Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — un mouvement de société* (1993), at p. 1838; F. Lévesque, “Renouveau doctrinal en droit de la prescription” (2011), 52 *C. de D.* 315, at p. 327). In addition, the expiry of such a time limit necessarily precludes the right of action from being exercised because it extinguishes the claim itself, such that its holder can no longer even raise it as an exception (see, for example, *Andreou v. Agence du revenu du Québec*, 2018 QCCA 695, at para. 10 (CanLII); *Roussel v. Créations Marcel Therrien inc.*, 2011 QCCA 496, [2011] R.J.Q. 555, at para. 47, citing J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin and N. Vézina, at para. 1086).

[241] At first glance, extinctive prescription and forfeiture seem to have the same objectives (see *Pierre-Louis v. Québec (Ville de)*, at para. 41, citing Baudouin and Jobin, at para. 1086; see also *Global Credit & Collection Inc. v. Rolland*, 2011 QCCA 2278, [2012] R.J.Q. 12, at para. 26). For example, prescription is designed to “introduce security into legal relations” and to permit [TRANSLATION] “a consolidation of the rights of the parties and those of third parties”, which helps to maintain the vitality of economic exchanges (see *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at para. 48; *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29, [2017] 1 S.C.R. 575, at para. 10; J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed.

2013), by P.-G. Jobin and N. Vézina, at para. 1113). Prescription also promotes the fairness of trials by preventing the erosion of evidence that is essential to the ultimate aim of civil proceedings: to seek and to ascertain the truth (*Gauthier*, at para. 48; see also *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at para. 24). These various objectives relating to the stability of legal relations and the integrity of the adversarial process are necessarily capable of underlying not only prescriptive periods, but also certain terms for forfeiture.

[242] However, this does not mean that the objectives of extinctive prescription and forfeiture are exactly the same. In my view, the fundamental difference between the two types of periods lies in the fact that prescription is based first and foremost on [TRANSLATION] “the idea of sanctioning failure to act by a person who has a right to exercise” (J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at para. 1-1320; see also *Guindon*, at para. 10; *Gauthier*, at paras. 48 and 67; H. Mazeaud et al., *Leçons de droit civil* (8th ed. 1986), t. 2, vol. 1, *Obligations: Théorie générale*, at pp. 1207-08). It follows that mechanisms like suspension and interruption mitigate the rigours of prescription. Where a delay does not result from the plaintiff’s lack of diligence — because the plaintiff was, for example, unable to act or to waive the exercise of his or her right — the objectives relating to the stability of legal relations and the integrity of the adversarial process will yield to another public policy concern: access to justice (*Gauthier*, at para. 67).

[243] By contrast, forfeiture is not based on lack of diligence by the holder of the right. According to French authors Planiol and Ripert, a term for forfeiture, unlike a prescriptive period, is not intended to [TRANSLATION] “sanction negligence”, but is meant to “quickly put an end, for all purposes, to the possibility of performing” a particular act (M. Planiol and G. Ripert, *Traité pratique de droit civil français* (2nd ed. 1954), at p. 819; cited, for example, in *Global Credit & Collection Inc.*, at para. 28; see also *Andreou*, at para. 11; Mazeaud et al., at p. 1208). Its effect on the right in question is therefore absolute.

[244] Forfeiture is exceptional in nature: it automatically entails the loss of a right even though its holder has done nothing wrong. This is no doubt why the legislature enacted an interpretative provision, the second paragraph of art. 2878 C.C.Q., which states that “forfeiture is never presumed; it results only where expressly provided for in a text” (see J. McCann, *Prescriptions extinctives et fins de non-recevoir* (2011), at p. 107). As the Court of Appeal wrote in *Global Credit & Collection Inc.*, [TRANSLATION] “[a]lthough the courts do not require that the word ‘forfeiture’ be used in a provision establishing a time period, it must nonetheless be apparent from the wording that the legislature’s intention is to create a term for forfeiture, as reflected in precise, clear and unambiguous language” (para. 31; emphasis added). I agree. Although no set formula is necessary, a term for forfeiture can be found to exist only where the legislature has spoken in a precise, clear and unambiguous manner. Where there is any doubt about the nature of a period, it must

be concluded that the period is one of extinctive prescription, and the general rules of prescription set out in the *Civil Code* will apply.

(b) *Second Paragraph of Article 2926.1 C.C.Q.*

[245] In my view, the appellants have established that the death marks a different starting point for the three-year period in addition to providing at least one strong indication that the legislature intended to introduce a term for forfeiture in the second paragraph of art. 2926.1 *C.C.Q.*

[246] Before I consider the wording, context and purpose of the second paragraph of art. 2926.1 *C.C.Q.* (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Interpretation Act*, CQLR, c. I-16, ss. 41 and 41.1), it will be helpful to reproduce the entirety of that article enacted in 2013:

L'action en réparation du préjudice corporel résultant d'un acte pouvant constituer une infraction criminelle se prescrit par 10 ans à compter du jour où la victime a connaissance que son préjudice est attribuable à cet acte. Ce délai est toutefois de 30 ans si le préjudice résulte d'une agression à caractère sexuel, de la violence subie pendant l'enfance, ou de la violence d'un conjoint ou d'un ancien conjoint.

En cas de décès de la victime ou de l'auteur de l'acte, le délai applicable, s'il n'est pas déjà

An action for damages for bodily injury resulting from an act which could constitute a criminal offence is prescribed by 10 years from the date the victim becomes aware that the injury suffered is attributable to that act. However, the prescriptive period is 30 years if the injury results from a sexual aggression, violent behaviour suffered during childhood, or the violent behaviour of a spouse or former spouse.

If the victim or the author of the act dies, the prescriptive period, if not already expired, is reduced

écoulé, est ramené à trois ans et il
court à compter du décès.

to three years and runs from the
date of death.

[247] I will not repeat my colleague’s explanation of the origins of this provision, the context in which it was enacted or the mechanics of the provision. I will simply note that the first paragraph has the effect of, first, expressly codifying the judge-made rule that prescription does not run against a victim of sexual aggression who is not aware of the connection between that act and the injury suffered and, second, lengthening the prescriptive period to 30 years. However, the second paragraph provides for a three-year period that runs from the date of death of the victim or the author of the act. That is the period at issue in this case.

[248] In my view, the death of the victim or the author of the act marks a starting point that differs from the one provided for in the first paragraph. This interpretation seems to be dictated by the wording of the second paragraph, which states that the shortened period “runs from the date of death”. The wording is clear and explicit on this point. As a result, I cannot agree with my colleague that “it is still the victim’s becoming aware of the connection between his or her injury and the assault, and nothing else, that starts the clock ticking for prescription” (Gascon J.’s reasons, at para. 142).

[249] It cannot be found from the wording of the second paragraph that the death simply has the effect of shortening the 10- or 30-year period provided for in the first paragraph. In the first paragraph, the legislature uses the words “is prescribed . . .

from the date the victim becomes aware . . .”. In the second paragraph, it states that the period “runs from the date of death”. These expressions are equivalent, and they both indicate the starting point for prescription. In the neighbouring provisions in the title on Extinctive Prescription, the legislature in fact uses the words “runs from” several times to indicate the starting point for prescription (see, for example, arts. 2926, 2927 and 2932 *C.C.Q.*). It is a well-established principle of interpretation that words used by the legislature are presumed to have the same meaning throughout the same statute (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 61). I see no reason to disregard this presumption of consistency, especially where the words in question appear in provisions that relate to the same area of the law and are found in the same title of the *Civil Code*. In particular, the fact that the explanatory notes for the bill refer to only one starting point — the one under the first paragraph — is, in my view, not sufficient to give the words “from the date of death” anything other than their usual meaning.

[250] I also note that the few decisions and academic texts discussing art. 2926.1 *C.C.Q.* have generally treated the second paragraph as establishing a different starting point (see, for example, *Proulx v. Desbiens*, 2014 QCCS 4417, at para. 18 (CanLII); *A v. Frères du Sacré-Coeur*, 2017 QCCS 34, at para. 42 (CanLII); G. Cotnam, “Chronique — La prescription en matière d’actes criminels et d’agressions sexuelles: la question est-elle réellement close?” (2014), *Repères*, at p. 3 (online); S. Fortier-Dumais, “La prescription”, in *Collection de droit de l’École du*

Barreau, vol. 5, *Responsabilité* (2018-19), 251, at p. 268). This is hardly surprising: this interpretation is the one dictated by the wording of the provision.

[251] This interpretation is also the one that I consider the most coherent. If the death was not a new starting point but simply had the effect of shortening the period, an action *by the victim's succession* might be imprescriptible in some circumstances. This would be the case, for example, where the succession is aware of the aggression — and therefore of the right of action — but the victim, before dying, was not aware that the injury he or she suffered was attributable to that act. My colleague's logic suggests that, in such a case, the victim's succession could, in principle, bring an action and argue that the victim was never able to make the connection between the aggression and the injury due to his or her psychological state. As a result, prescription would never have begun to run, nor could it ever begin to run. There is nothing to indicate that this was what the legislature intended. As the minister responsible for the bill observed during the parliamentary debate, [TRANSLATION] “this is a huge step away from the current situation, without going as far as imprescriptibility” (Quebec, National Assembly, Standing Committee on Institutions, “Étude détaillée du projet de loi n° 22 — Loi modifiant la Loi sur l'indemnisation des victimes d'actes criminels”, *Journal des débats*, vol. 43, No. 47, 1st Sess., 40th Leg., May 7, 2013 (“Étude détaillée”), at pp. 20 and 32; emphasis added; see also E. Lambert, “Commentaire sur l'article 2926.1 C.c.Q.”, in *Commentaires sur le Code civil du Québec (DCQ)* (2014), at para. 575).

[252] In my view, the solution the legislature seems to have chosen is a three-year period that runs from the date of death of the victim or the author of the act, regardless of whether, before that date, the victim made the connection between the act and the injury suffered. However, if the 30-year period provided for in the first paragraph has already begun to run, that period is simply “reduced” to 3 years (or less, depending on how much time has already passed).

[253] I agree with the appellants that the wording of the second paragraph provides at least one strong indication of forfeiture. The period that is reduced to three years is linked to a specific, objective fact that is fixed in time, namely the death of the victim or the author of the act (see Lévesque, at p. 325). That event is in itself unrelated to the basis of the victim’s right of action and to the victim’s inability to make the connection between the alleged act and the injury suffered. In this sense, the wording tends to indicate that the period in question, unlike a period of extinctive prescriptive, is not intended to sanction the victim’s negligence (see *Andreou*, at para. 11). Indeed, in *A v. Frères du Sacré-Cœur*, 2017 QCCS 34, Provencher J. noted — without ruling definitively on the question — that the period established by the second paragraph seems to apply regardless of the victim’s situation:

[TRANSLATION] Here, the wording of article 2926.1 para. 2 C.C.Q. seems to leave little room for any analysis of the victim’s situation where the aggressor has been deceased for more than three years. If the person who committed the sexual aggression dies, the applicable period is reduced to three years and runs from the date of death. [Emphasis added; para. 41]

[254] It is interesting to draw a parallel with the similar rule in common law. This Court has affirmed that the discoverability rule does not apply “when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party’s knowledge or the basis of the cause of action” (*Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 24; emphasis added).

[255] It is true that, in Quebec civil law, the fact that a period is linked to a date of death is not in itself a definite indication of forfeiture. As the respondent points out, art. 2928 *C.C.Q.* states that “[a]n application by a surviving spouse to have the compensatory allowance determined is prescribed by one year from the death of his spouse”. The *Commentaires du ministre de la Justice* (p. 1837) confirm — as do the actual words of the provision, for that matter — that this is a *prescriptive* period.

[256] Nonetheless, if the wording of the second paragraph of art. 2926.1 *C.C.Q.* provided *no* indication that the legislature intended to establish a prescriptive period, I would be inclined to think that the link to the date of death — that is, to a specific, objective fact that is fixed in time and unrelated to the basis of the victim’s right of action and to the victim’s inability to make the connection between the alleged act and the injury suffered — constitutes a sufficient reference to forfeiture.

[257] However, given the wording of the second paragraph, it is difficult to argue that it makes no reference to prescription. I note, as my colleague does, that the French version refers to the “*délai applicable*”, which is the 10- or 30-year *prescriptive* period under the first paragraph. The English version is even more

explicit: “the prescriptive period, if not already expired, is reduced to three years”. These textual indicia are perhaps not conclusive, since it could still be argued that the *nature* of the applicable period *changes* from the date of death, but at the very least they create some ambiguity. Moreover, I agree with my colleague that it is not irrelevant that the provision in question is in the title concerning Extinctive Prescription in the book on Prescription (see Lévesque, at p. 324). Although that book includes art. 2878 *C.C.Q.*, which sets out the rule on the forfeiture of a remedy, the appellants have identified *no* other term for forfeiture in that book. In short, even though in some respects the wording of the second paragraph suggests a term for forfeiture, it cannot be concluded from either the wording or the context of that provision that the legislature expressed an intention to create such a term in a sufficiently precise, clear and unambiguous manner.

[258] As for the purpose of the second paragraph of art. 2926.1 *C.C.Q.*, the inclusion of a shortened period that runs from the date of death of the victim or the author of the act is consistent with the general objectives of prescription and forfeiture: first, to ensure the stability of legal relations — particularly successions — and second, to promote the fairness of trials by preventing the erosion of essential evidence. The legislature’s choice to impose a shortened period where the victim dies, and not only where the author of the act dies, shows that these issues were of great importance to it.

[259] In fact, it is clear from the parliamentary record that the legislature was concerned that lengthening the periods to 30 years would result in uncertainty for heirs, [TRANSLATION] “battles between successions” and evidentiary difficulties (see, for example, *Étude détaillée*, at pp. 7-9). Although parliamentary debates have only limited weight in the interpretation of legislation (see, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, at para. 35; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 47), they are nonetheless relevant in identifying the purpose of a provision. In the instant case, the following exchange between the minister responsible for the bill and two members of the official opposition is particularly instructive:

[TRANSLATION] Mr. St-Arnaud: Well, on the last point, my understanding is that the aim was to prevent it from being a battle between successions at some point. At some point, we say: Yes, the succession of either person can take action, but at some point, we wanted to draw a line at some point, so we wouldn't end up at some point with battles between successions over events So that was kind of the idea, to limit such

Ms. St-Pierre: But I have a quick question about that. If it's the author of the act and Let's take the cases that have really made headlines, sex crimes in the Catholic Church. And the author of the act has been dead for 10 years. The victim has nonetheless been the victim of a crime. And at that point, if it has been more than three years since the aggressor or, well, the person who committed the crime died, this means that there is no more remedy, yet that victim is just as injured as another victim whose aggressor is still alive.

The Chair (Mr. Therrien): Minister.

Mr. St-Arnaud: Well, that is a good question. In my understanding, it was indeed to limit A remedy is still A remedy is available, it's available for three years. But the goal was to draw a line at some point. In fact, the period is reduced to the one currently in the Code. It's currently three years in the Code.

...

Mr. St-Arnaud: If a crime has been committed, prescription does not run. It begins to run once the person is 18 years old. It runs, without any need for specific proof, for a period of 20 or perhaps 30 years, and after that it may continue There may still be a remedy, as long as it's shown that the victim has just become aware of the injury suffered and that the causal connection can be proved.

If the aggressor dies, a remedy is still available, but only If the aggressor dies when the person is 45 years old, well, a remedy is still available, but then we say, at some point, three years later, I was going to say the book is closed, but a line is drawn at some point. In other words, the period is reduced to the prescriptive period currently in the Code. At present — it's important to keep this in mind — the period for this type of remedy is three years in all circumstances.

...

Mr. Ouimet (Fabre): . . . Of course, we must not lose sight of one thing. In the case of death, there is someone who no longer participates in the trial and whose perspective is now missing. That person's version of the facts is no longer available, and this has the potential Care must be taken not to assume that the person making a claim is entitled to compensation, because this makes the entire trial pointless. So there must be rules that provide for remedies but that don't result in an automatic award against the person being sued. I would therefore urge caution. It is important not to devise a system in which it is clear that the person making a claim is entitled to compensation, because we can very well resume . . . we won't go to the trouble of amending the Code of Civil Procedure, as the Minister said, we will cast it aside. So care must be taken.

(Étude détaillée, at pp. 7-8; in this regard, see *A v. Frères du Sacré-Cœur*, 2017 QCCS 34, at para. 42; Lambert (2014), at para. 595)

[260] It therefore seems that the legislature was seeking a compromise between objectives that were largely contradictory: facilitating access to justice for victims, certainly, but at the same time ensuring that [TRANSLATION] “a line is drawn at some point”, as the then Minister of Justice put it. Clearly, the legislature intended to lengthen the prescriptive periods generally while ensuring that the heirs of the author

of the act would not have to face legal proceedings years or even decades after the author's death, despite the difficulty of adducing any evidence in defence.

[261] With respect, the majority's interpretation of the second paragraph of art. 2926.1 *C.C.Q.* is difficult to reconcile with these objectives. It is true that, after three years at most following the death of the victim or the author of the act, it would become necessary for the plaintiff to prove when the victim became aware of the connection between the alleged act and the injury suffered. But this does not amount to "drawing a line", given that actions might still be brought decades later. Indeed, Frédéric Lévesque and Claudie-Émilie Wagner-Lapierre are of the view that such an interpretation [TRANSLATION] "seems to make the second paragraph completely pointless, when its purpose is in fact to prevent the possibility that a person will be sued for wrongful acts committed a long time ago by a deceased ancestor" ("La réforme de la prescription civile en matière d'infraction criminelle: une occasion manquée pour les victimes de préjudice corporel" (2015), 49 *RJTUM* 685, at pp. 700-01). I would not go so far as to say that the majority's interpretation deprives the second paragraph of any effect, but it can hardly be said that the majority's interpretation truly makes it possible to achieve what appear to be the legislature's objectives, that is, ensuring the stability of successions and the integrity of the adversarial process.

[262] In my view, the wording, context and purpose of art. 2926.1 *C.C.Q.* suggest rather that the period established by the second paragraph runs from the date

of death of either the victim or the author of the act, even if the victim did not yet make the connection between the alleged act and the injury suffered. In other words, the death marks a different starting point, which is substituted for the one in the first paragraph, that is, the date the victim becomes aware that the injury suffered is attributable to the alleged act.

[263] However, despite certain indicia to this effect, I am not prepared to conclude that the legislature necessarily intended to establish a term for forfeiture. First, its concerns about the stability of legal relations, particularly successions, and the preservation of evidence are not uniquely associated with forfeiture. As I mentioned above, the same concerns underlie prescription. Second, as a result of the requirement codified in art. 2878 *C.C.Q.* that forfeiture be “expressly provided for in a text”, the purpose of a provision, however clear it may be, cannot on its own support a finding of forfeiture. For the reasons already given, I have doubts about whether there is such express language. Ultimately, if the legislature believes that the objectives relating to the stability of successions and the preservation of evidence must take precedence in all circumstances, it is for the legislature to provide for this expressly.

(2) Suspension of the Period Provided for in the Second Paragraph

[264] Absent an express provision to the contrary, the general provisions dealing with the suspension of prescription — including the provision on impossibility in fact to act (art. 2904 *C.C.Q.*) and the provisions concerning minors

and protected persons of full age (art. 2905 *C.C.Q.*) — apply to the period provided for in the second paragraph of art. 2926.1 *C.C.Q.* Indeed, in *Proulx v. Desbiens*, a sexual aggression case in which the author of the alleged act had died, the Quebec Superior Court relied on art. 2904 *C.C.Q.* to suspend the period provided for in the second paragraph of art. 2926.1 *C.C.Q.*:

[TRANSLATION] The Court notes that the second paragraph of the article deals only with the start of the prescriptive period and make no reference to any change to the other principles affecting prescription, including article 2904. Thus, there seems to be no textual justification for excluding them. [Emphasis added; para. 18 (CanLII)]

[265] With regard more specifically to impossibility in fact to act, the period established by the second paragraph of art. 2926.1 *C.C.Q.* may be suspended if, for example, the victim is in a state of unconsciousness, is unaware of and could not reasonably have known of the aggressor's identity or death, or is in a psychological state of fear caused by the aggressor's fault (see, for example, *Gauthier*, at para. 67; Baudouin, Deslauriers and Moore, at para. 1-1332; C. Gervais, *La prescription* (2009), at pp. 159-66). In each case, the plaintiff must prove on a balance of probabilities that it was impossible, and not simply difficult, for him or her to act in a timely manner (*Catudal v. Borduas*, 2006 QCCA 1090, [2006] R.J.Q. 2052, at para. 72; Gervais, at p. 160; McCann, at pp. 156-57).

[266] However, given that the second paragraph of art. 2926.1 *C.C.Q.* sets a different starting point for prescription, separate from the one established by the first paragraph, it seems to me that lack of awareness of the connection between the

alleged act and the injury suffered cannot suspend the period provided for in the second paragraph. The opposite interpretation would frustrate the legislature's intention that the period run from the date of death, and no longer from the date the victim becomes aware of the connection. The plaintiff could essentially bypass the starting point expressly provided for in the second paragraph by arguing that lack of awareness of the connection was the reason why it was impossible in fact to act within the meaning of art. 2904 *C.C.Q.*

[267] The legislature must be considered — it seems — to have specified that lack of awareness of the connection between a sexual aggression and the injury suffered is not, strictly speaking, a cause of impossibility in fact to act and therefore does not *suspend* prescription; rather, it is relevant to the *starting point* for prescription. In so doing, the legislature ended a longstanding judicial and academic debate (in this regard, see *P.L. v. J.L.*, 2011 QCCA 1233, [2011] R.J.Q. 1274, at paras. 36-66; *S.C. v. Archevêque catholique romain de Québec*, 2009 QCCA 1349, [2009] R.J.Q. 1970, at paras. 72 and 133-38; *Christensen v. Roman Catholic Archbishop of Québec*, 2010 SCC 44, [2010] 2 S.C.R. 694, at para. 2; Baudouin, Deslauriers and Moore, at para. 1-1320; McCann, at pp. 130 and 144; Gervais, at pp. 107-10 and 155; Lévesque, at p. 322). Up to that point, it had been unclear whether that lack of awareness of one of the essential elements of the right of action meant that the starting point for prescription was postponed to the date the victim became aware of the connection, rather than being the date of the aggression or the day the injury appeared for the first time (art. 2880 para. 2 and art. 2926 *C.C.Q.*), or

whether that lack of awareness instead amounted to impossibility in fact to act that suspended the prescriptive period (art. 2904 *C.C.Q.*). The first paragraph of art. 2926.1 *C.C.Q.* settles the matter by making the date the victim becomes aware of the connection a starting point for prescription. This is the declaratory, or interpretative, effect of the first paragraph of art. 2926.1 *C.C.Q.*, as provided for in s. 13 of the *Act to amend the Crime Victims Compensation Act, the Act to promote good citizenship and certain provisions of the Civil Code concerning prescription*, S.Q. 2013, c. 8 (“amending Act”) (on this point, see also the explanatory notes for that Act).

[268] As a matter of consistency, if awareness of the connection between the alleged act and the injury suffered is what marks the starting point for prescription in the cases provided for in the first paragraph of art. 2926.1 *C.C.Q.*, then lack of awareness of that connection does not constitute impossibility in fact to act under art. 2904 *C.C.Q.* and thus can no longer have the effect of suspending prescription. In other words, by codifying awareness of the connection as the starting point for prescription, the legislature at the same time excluded it from the scope of impossibility in fact to act. As I have said, however, the other causes of impossibility in fact to act under art. 2904 *C.C.Q.* can still be raised, as I am not persuaded that the legislature expressed itself in a sufficiently precise, clear and unambiguous manner to create a term for forfeiture. The circumstances in which an action arising from sexual aggression can be brought more than three years after the death of the victim or the

author of the act are therefore circumscribed considerably, but not eliminated completely.

[269] I readily acknowledge that this interpretation is not entirely satisfactory. For instance, a victim could rely on the suspension provided for in art. 2904 *C.C.Q.* if he or she were able to prove psychological fear, which is a form of impossibility in fact to act, but not if the victim's psychological state prevented him or her from becoming aware of the connection between the aggression and the injury suffered, because that lack of awareness of an element of civil liability would be relevant to the starting point for prescription but not to the suspension of prescription. However, in my view, a different interpretation would require rewriting part of the provision and disregarding the inherent tension between the legislature's objectives. It seems to me that the legislature proposed a compromise, no doubt an imperfect one, to address the unique problems raised by actions arising from sexual aggression, which are often instituted many years after the fact. If this interpretation seems unduly harsh toward victims or if, on the contrary, the legislature did in fact intend to introduce a term for forfeiture, as the appellants argue, I would urge it to step in and clarify its intention.

(3) Scope of the Second Paragraph

[270] Finally, unlike the majority, I am not prepared to conclude that the shortened period under the second paragraph of art. 2926.1 *C.C.Q.* applies only to an action against the author of the act. The wording of the provision draws no distinction

between the author of the act and third parties who might also be liable for their own fault or for the act or omission of another person.

[271] In my view, there is only one period (30 years or 3 years, as the case may be) for all actions for damages for bodily injury resulting from sexual aggression. The second paragraph provides that the “prescriptive period” for such actions is reduced to three years and runs from the date of death of the victim or the author of the act. My colleague’s interpretation essentially has the effect of adding the words “in relation to the succession of the author of the act” to the second paragraph.

[272] The legislature is, of course, free to establish periods that differ according to the identity of the parties, but no such intention is reflected in the wording of art. 2926.1 *C.C.Q.* In this context, it must be assumed that the legislature did not intend to impose, for example, different periods for the direct fault of the author of the act and for liability for the act or omission of another person. Like the appellants, I am also of the view that the legislature would have spoken more clearly if it had intended to deprive certain parties of the right to implead other solidary debtors (art. 1529 *C.C.Q.*) by establishing different periods. Indeed, my colleague Gascon J. points this out in his reasons (para. 125): the legislature is assumed not to have intended to depart from general legal principles unless it has expressed that intention clearly (see P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 538-41).

[273] To conclude otherwise would be to disregard one of the objectives of the second paragraph. I agree that the objective of preserving the stability of successions is not relevant where an action is brought against a legal person, as in the present case. However, my colleague acknowledges that the provision also seeks to preserve the value of evidence by ensuring, as far as possible, that there is some proximity in time to the alleged aggression. This objective is relevant in relation to all defendants, since the plaintiff will always be required to prove the aggression (before establishing, for example, that a third party is at fault or is liable for the act or omission of another person). It is true that evidentiary difficulties may arise from the moment the victim or the author of the act dies, since the testimony of these individuals is generally central in cases involving sexual aggression. Nevertheless, the more time that passes, the more difficult it becomes to compensate for the absence of one of the main witnesses. Louise Langevin clearly explains the importance of prescription in ensuring the integrity of the adversarial process:

[TRANSLATION] . . . [P]rescriptive periods seek to limit the erosive effect of time on memory and on the value of evidence. For example, evidence, including evidence in corroboration, may disappear over the years, or witnesses may die. Prescriptive periods help to prevent such situations and thus improve the administration of justice The defendant must therefore be notified as soon as possible if he or she is being sued. Finally, the defendant may be surprised by the plaintiff's late action and may not have retained any evidence

(“Suspension de la prescription: à l'impossible nul n'est tenu” (1996), 56 *R. du B.* 265, at p. 271)

[274] In short, the second paragraph of art. 2926.1 *C.C.Q.* applies to all actions for damages for bodily injury resulting from sexual aggression. Its purpose is to

address the legislature's concerns about the preservation of evidence and, more broadly, the integrity of the adversarial process. However, as I have explained, victims (or their successions) are still entitled to prove that it was impossible in fact for them to act, although this cannot be done by relying on lack of awareness of the connection between the alleged act and the injury.

(4) Temporal Effect of the Starting Point Set on the Date of Death

[275] In the case at bar, the appellants have been unable to persuade me that J.J.'s right of action was necessarily extinguished with the deaths of his alleged aggressors in 2001 and 2004. It is important to remember that the introduction of a new period, in cases where it would already be expired before even taking effect, would be considered to have retroactive effect if the application of the new legislation resulted in the extinction of an existing right of action (P.-A. Côté and D. Jutras, *Le droit transitoire: Sources annotées* (loose-leaf), at para. 2.192). However, the legislature is presumed not to have intended to deprive any person of such a right simply by changing the period applicable to an action (*Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 265-67). Such an intention must be clearly expressed (*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 71; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paras. 48-49). This is not the case here.

[276] In my view, s. 13 of the amending Act gives retroactive effect only to the starting point for prescription provided for in the first paragraph of art. 2926.1 C.C.Q., that is, the date the victim becomes aware of the connection between the alleged act and the injury suffered. Only the first paragraph of this provision applies to the time before it came into force. In contrast, the starting point under the second paragraph, the date of death, does not have retroactive effect, regardless of whether the period is a term for forfeiture or a prescriptive period. For ease of reference, I will reproduce s. 13:

Les délais de prescription prévus à l'article 2926.1 du Code civil, édicté par l'article 7 de la présente loi, sont applicables aux situations juridiques en cours en tenant compte du temps déjà écoulé.

The prescriptive periods provided for in article 2926.1 of the Civil Code, enacted by section 7, apply to existing juridical situations taking into account the time already elapsed.

Les dispositions de ce même article 2926.1 du Code civil qui concernent le point de départ du délai de prescription sont déclaratoires.

The provisions of article 2926.1 of the Civil Code concerning the starting point of prescriptive periods are declaratory.

[277] First of all, the amending Act specifically mentions only prescription and contains no transitional provision that could apply to the starting point of a *term for forfeiture*. Absent such a provision, it should be assumed that the legislature did not intend, if it had introduced a term for forfeiture, to retroactively eliminate a right of action that existed when the Act came into force (see *Banque de Nouvelle-Écosse v. Cohen*, 1999 CanLII 13720 (Que. CA), at pp. 11-12; *Québec (Commission de la construction) v. Gastier inc.*, 1998 CanLII 13132 (Que. CA), at pp. 9-12; Côté, at

p. 197; R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 807-08).

[278] The same is also true if the second paragraph of art. 2926.1 *C.C.Q.* simply provides for a prescriptive period. In my view, s. 13 of the amending Act does not give it any retroactive effect, because the new starting point set on the date of death is not declaratory in nature. The legislature did not clearly express an intention to give retroactive effect to *every* starting point for prescription provided for in the amending Act. Rather, it stated that the provisions in question are “declaratory”. The terms “declaratory” and “retroactive” are not synonymous. Indeed, s. 50 of the *Interpretation Act* distinguishes them, at least implicitly (see also *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667).

[279] By definition, a declaratory provision (sometimes called an “interpretative” provision) is meant to settle or clarify the meaning or effect of *existing* law (see *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46, [2013] 3 S.C.R. 125, at paras. 26-27; *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345, at pp. 367-68; Côté, at p. 551; Sullivan, at pp. 745 and 777; P. Roubier, *Le droit transitoire: Conflits de lois dans le temps* (2nd ed. 1993), at p. 245; J. Ghestin and G. Goubeaux, *Traité de droit civil: Introduction générale* (3rd ed. 1990), at para. 349; W. F. Craies, *Craies on Legislation: A Practitioner’s Guide to the Nature, Process, Effect and Interpretation of Legislation* (11th ed. 2017), by D. Greenberg, at para. 1.8.1). In enacting a declaratory provision, the legislature is, in

a sense, performing a judicial function by interpreting its own legislation or the common law (see Côté, at p. 562). The reason why a statute that is declaratory in nature generally has retroactive effect is because the interpretation it imposes is deemed to have always been an integral part of the law in question (*Canada Bread Company Ltd.*, at para. 28; Côté, at p. 561; Sullivan, at p. 682; Ghestin and Goubeaux, at paras. 350-52). This is why, as stated in the classic text *Craies on Statute Law*, “[w]here an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable” (W. F. Craies, *On Statute Law* (7th ed. 1971), by S. G. G. Edgar, at p. 395; cited in Côté, at p. 561; emphasis added). It therefore appears from the academic literature that the presumption against retroactivity will be rebutted only where the statute is “in its nature” declaratory. In other words, a declaratory provision has retroactive effect insofar as it interprets existing law in the way that a judicial decision would — sometimes by altering its meaning or effect. However, it is still necessary that there be existing law to interpret.

[280] In the instant case, the provision setting the starting point on the date of death can hardly be characterized as “declaratory” given that it is entirely *new* law that is not meant to settle or clarify existing law. Until the second paragraph of art. 2926.1 *C.C.Q.* came into force, death was, of course, never a starting point for prescription in actions arising from sexual aggression. By comparison, the first paragraph simply confirms a judicial interpretation that made awareness of the connection between the alleged act and the injury suffered the starting point for the prescriptive period. Only this starting point is meant to be “declaratory” under s. 13 of

the amending Act and, in my view, only this starting point was intended by the legislature to have retroactive effect.

[281] If there is any doubt in this regard, the interpretation that limits the scope of provisions that are explicitly retroactive or declaratory is to be preferred: “[Y]ou ought not to give a larger retrospective operation to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant” (*Reid v. Reid* (1886), 31 Ch. D. 402, per Bowen L.J., at p. 409; cited in *Kent v. The King*, [1924] S.C.R. 388, at p. 397; Côté, at pp. 547-48; emphasis added). In other words, even where the presumption against retroactivity is expressly excluded, a second principle requires that the retroactive effect of provisions be narrowly construed. These two principles of statutory interpretation are closely related, of course, but they are nevertheless distinct.

[282] In the case at bar, it is clear that s. 13 of the amending Act gives retroactive effect to the starting point provided for in the first paragraph, which is in its nature declaratory, but the same is not true of the new starting point established by the second paragraph. In any event, it would be unlikely that the legislature intended, without saying so more clearly, to suddenly and irrevocably extinguish the right of action of victims whose aggressors had died more than three years before the amending Act came into force.

[283] Accordingly, regardless of whether the period under the second paragraph of art. 2926.1 *C.C.Q.* is a term for forfeiture or a prescriptive period, it

would not have begun to run, in relation to existing juridical situations, before the coming into force of the amending Act. This interpretation is consistent with the transitional rule proposed by Roubier where a change is made to the starting point for prescription (p. 301); the Quebec legislature in fact drew on that rule in enacting s. 6 of the *Act respecting the implementation of the reform of the Civil Code*, CQLR, c. CCQ-1992 (see Côté, at pp. 197, 201 and 208-09; Côté and Jutras, at paras. 2.192-2.193). Under this interpretation, the introduction of a new starting point set on the date of death would not affect J.J.'s right of action in the instant case.

[284] In concluding on this point, I would note that the majority's interpretation of the second paragraph of art. 2926.1 *C.C.Q.* is based in part on the premise that any other approach would have the effect of suddenly extinguishing the remedy of J.J. and other potential victims in the same situation (Gascon J.'s reasons, at paras. 136 and 145). This is simply not the case.

III. Conclusion

[285] In the result, I agree with Province canadienne and the Oratory that the Court of Appeal's intervention was unwarranted with respect to the condition of sufficiency of the facts alleged set out in art. 575(2) *C.C.P.* The application judge's decision dismissing the application for authorization to institute a class action should therefore be restored in relation to both Province canadienne and the Oratory.

[286] However, the appellants have not persuaded me that the period established by the second paragraph of art. 2926.1 *C.C.Q.* is a term for forfeiture, although I am of the view that the provision makes the date of death the starting point for prescription and that its scope is not limited to the author of the act.

[287] For these reasons, I would allow the appeal of Province canadienne and the Oratory, without costs given that they have waived them.

Appeals dismissed with costs, WAGNER C.J. and GASCON and ROWE JJ. dissenting in part and CÔTÉ J. dissenting.

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