Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

LES COURAGEUSES

Applicant
(Respondent)

- and -

GILBERT ROZON

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT LES COURAGEUSES

PART I – OVERVIEW

A. This case raises important issues that deserve the attention of this Court

1. It is an unfortunate reality that this country's legal institutions have often failed to protect survivors of sexual violence and harassment.

2. The Applicant, Les Courageuses, seeks leave to appeal from a split decision of the Quebec Court of Appeal,[1] in which the majority (Hamilton and Vauclair, JJA) overturned Superior Court Justice Donald Bisson's decision to authorize a class action[2] on behalf of numerous women and minor-age girls who were sexually abused or harassed by the Respondent,[3] one of the most powerful, influential and well-known public figures in the Quebec entertainment industry.

3. This case is the first of its kind, and raises a legal question that has never before been decided by this Court: can a class action for sexual assault ever proceed in Quebec against an individual perpetrator alone?

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[1] *Rozon c. Les Courageuses*, 2020 QCCA 5 ("**QCCA Decision**").
[2] *Les Courageuses c. Rozon*, 2018 QCCS 2089 ("**QCCS Decision**"), at paras. 128-130.
[3] The QCCS Decision defines the class as: "Toutes les personnes agressées et/ou harcelées sexuellement par Gilbert Rozon" (the "**Class**"), *ibid*., at para. 130.

4. In Quebec, several sexual abuse class actions have been authorized against an individual abuser *and* an enabling organization. As Justice Bisson recognized, the class action has proven to be the only effective procedural vehicle for survivors to seek recourse in the face of institutional, systemic, or serial abuse.[4] Yet without this Court's intervention, the Court of Appeal's decision is likely to bar any future class action against an individual perpetrator of sexual violence.

5. While the majority of the Court of Appeal ("**Majority**") acknowledged the novelty of the issue raised by the proposed class action,[5] its analysis of the "identical similar or related issues of law or fact"[6] requirement in the context of civil sexual assault proceedings is fundamentally flawed. As the Honourable Dominique Bélanger J.A. recognized in her compelling dissent, the claims of survivors alleging sexual abuse by the same sexual predator in a similar context are manifestly related.[7]

6. In overturning the lower court's judgment, the Majority declared that other legal means remained available to the Respondent's victims.[8] First, the mere existence of other mechanisms for redress is irrelevant to the test for authorization in Quebec.[9] Second, and with respect, any alternative legal means that the Majority may have imagined to be available are illusory in practice.

7. Justice Bisson correctly noted the drastic consequences associated with barring a class action of this nature:

> Dans le passé, le véhicule procédural de l'action collective a démontré son efficacité dans les dossiers d'agressions sexuelles, puisqu'il a permis à des centaines de victimes d'avoir accès à la justice au Québec. Si la demanderesse n'était pas autorisée à intenter la présente action collective, il est fort probable que de très nombreuses victimes seraient privées de l'exercice de leurs droits en justice.[10]

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[4] *Ibid*, at para. 126; see also *Centre de la communauté sourde du Montréal métropolitain c. Institut Raymond-Dewar*, 2012 QCCS 1146 ("**CCSMM**"), at para. 123.
[5] QCCA Decision, *supra* note 1, at para. 81.
[6] Article 575(1) *C.C.P.*
[7] QCCA Decision, *supra* note 1, at para. 37.
[8] *Ibid*., at para. 119 (per Hamilton JA).
[9] QCCS Decision, *supra* note 2, at para. 82; QCCA Decision, *ibid*., at para. 23 (per Bélanger JA).
[10] QCCS Decision, *ibid*., at para. 126. [Emphasis added]

8. In an era where survivors of sexual assault, harassment and abuse have finally begun to speak out in unprecedented numbers,[11] the Majority's decision is bound to create legal uncertainty, discourage survivors from coming forward, and deprive them of any true avenue of justice.

9. The movement for survivors of sexual violence is global. Though Quebec's class action regime is distinct in several respects,[12] it is inevitable that courts throughout the country will be seized with similar proceedings seeking to hold powerful abusers to account. By distorting the criteria for authorization, the Majority shielded the Respondent from the consequences of his actions and issued a decision that will be used to protect other serial abusers from accountability before the courts.

10. The Majority also committed serious errors in its application of settled law regarding the authorization stage of class actions in Quebec. These legal errors undermine the force of Supreme Court precedent and compromise access to justice for some of society's most vulnerable individuals.

11. This case, and the novel legal questions raised by the decisions below, are of fundamental public importance and deserve the considered attention of this Court.[13]

B. The Applicant's Claim

12. As of the date of filing of the Application for Authorization to Institute a Class Action ("**Application**"), there were already twenty known members of the class, undoubtedly representing only the tip of the iceberg,[14] and the Application alleged the following facts deemed to be true:

a. The Respondent repeatedly abused his position of power to prey upon numerous women and minor-age girls in his circle of influence over the course of decades;[15]

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[11] See e.g., Statistics Canada, *Police-reported sexual assaults in Canada before and after #MeToo*, 2016 and 2017 (2018), cited with approval in *R.* v. *Goldfinch*, 2019 SCC 38 ("***Goldfinch***"), BOA, Tab 1.
[12] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 ("***J.J.***"), at para. 44; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 ("***Vivendi***"), at paras. 48, 53, 57.
[13] *Supreme Court Act*, RSC, 1985, c. S-26, s. 40(1).
[14] Application, at para. 2.22.
[15] *Ibid*, at para. 2.5.

b. The Respondent is a sexual predator and he employed a similar *modus operandi* in order to systematically carry out that abuse;[16]

c. Among the Respondent's victims was the Applicant's designated member, Patricia Tulasne, who was raped by the Respondent following a theatre event;[17]

d. The Respondent relied on the expectation that Ms. Tulasne and his other victims would be too afraid, too ashamed and too embarrassed to disclose the abuse they suffered or to seek justice;[18]

e. For years, this is precisely what happened; every member of the class suffered the consequences of his abuse in silence, unable to act. This changed only once the #MeToo movement triggered certain brave survivors to finally speak out and then to seek justice.[19]

C. QCCS Decision (Bisson J.)

13. In March 2018, Justice Bisson dismissed a motion by the Respondent to strike the allegation from the Application that he is a sexual predator.[20] Justice Bisson decided that this characterization was a factual allegation integral to the proposition alleged by the Applicant that the Respondent's assaults did not occur randomly; rather, they followed a pattern or *modus operandi.*[21]

14. In May 2018, Justice Bisson determined that the criteria for authorization of a class action claiming compensatory and punitive damages against the Respondent were met, and authorized Les Courageuses, a non-profit devoted to advocating for the rights of victims of sexual violence, to represent the class.

15. Justice Bisson meticulously analyzed the factual allegations in the Application, carefully considered and addressed each of the Respondent's arguments, and applied the legal principles this Court has instructed judges to apply at the authorization stage.

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[16] *Ibid*., at paras. 2.6, 2.13, 2.15, 2.50, 5.2; Exhibit R-7; *Les Courageuses c. Rozon*, 2018 QCCS 969 ("**Judgment on Motion to Strike Allegations**"), at paras. 39-41.
[17] Application, at paras. 2.23 to 2.33.
[18] *Ibid*, at paras. 2.6, 2.14.
[19] *Ibid*, at paras. 2.35 to 2.48.
[20] Judgment on Motion to Strike Allegations, *supra* note 16, at para. 74.
[21] *Ibid*, at paras. 39-41.

16. With respect to Article 575(1) *C.C.P.*, Justice Bisson concluded that the members' claims raised a number of identical, similar or related issues of law and fact that, in his opinion, would affect the outcome of the class action in more than an insignificant manner. Although only one such issue suffices for authorization of a class action,[22] Justice Bisson identified nine common issues,[23] relating to:

a. **Fault:** whether, as a sexual predator, the Respondent engaged in a pattern of behaviour by systematically abusing his position of power in order to sexually assault and harass women and girls in his circle of influence;

b. **Prescription:** whether there are common long-term consequences to sexual assault which impeded the class members' ability to seek justice within the prescriptive period;

c. **Damages:** the types of harms that are common to survivors of sexual assault and harassment; whether experiencing sexual assault or harassment gives rise to damages in and of itself;

d. **Punitive damages:** whether the Defendant unlawfully and intentionally infringed the class members' rights to security, inviolability, and dignity; whether punitive damages were available as a result; and the collective value of those damages.

17. Justice Bisson saw no principled reason to distinguish this case from Court of Appeal and Superior Court precedent in which sexual abuse class actions against institutions have consistently been authorized — including in cases where an individual abuser was also named.[24]

D. QCCA Decision (per Hamilton and Vauclair J.J.A., Bélanger J.A. dissenting)

18. The Majority substituted its opinion for that of Justice Bisson, plainly overstepping its role at the authorization stage. In effect, it concluded that a class action instituted against an individual abuser alone can never raise the common issues necessary to satisfy the test for authorization.[25]

19. The Majority opined that the common issues identified by Justice Bisson concerning fault and prescription, while common to all Class members, were too insignificant (*négligeable*) to

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[22] *Vivendi*, *supra* note 12, at para. 58.
[23] QCCS Decision, *supra* note 2, at para. 131.
[24] *Ibid*., at para. 10.
[25] QCCA Decision, *supra* note 1, at paras. 64, 81, 90-117 (per Hamilton JA).

justify authorization of the class action.[26] It considered that the issues concerning compensatory and punitive damages were entirely individual.[27]

20. The Majority opinion was rendered only seven months after the landmark ruling in *L'Oratoire Saint‑Joseph du Mont-Royal* v. *J.J.*[28] in which this Court decided that Article 575(1) *C.C.P.* had been met in a sexual abuse class action instituted on behalf of victims of numerous different abusers, employing different *modus operandi*, in a variety of institutions throughout Quebec.

21. In the case at bar, the Majority nonetheless decided that this same requirement had not been met in respect of a class comprising individuals abused by the same sexual predator, employing a similar *modus operandi* in order to abuse similarly situated women and girls in his circle of influence, causing all of them serious injuries of a similar nature, and imposing similar barriers to justice within the prescriptive period.

22. Moreover, despite this Court's assertion in *J.J.* that a class action in damages for sexual abuse 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",[29] the Majority's decision entails that a sexual abuse survivor has no right to institute a class action against the *principal* party responsible for the damages suffered — the abuser himself.

23. The Majority's decision thus leads to the unjust and absurd result that sexual abuse survivors can only proceed by way of a class action if their abuser did not have the status and power to abuse multiple people without the complicity of some organization, and that organization still exists.

24. Justice Bélanger would have affirmed Justice Bisson's decision and authorized the class action. In her dissent, she agreed that the Applicant met all conditions for authorization, including the identical, similar or related issues requirement under Article 575(1) *C.C.P.*[30]

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[26] *Ibid*, at paras. 90-98 (fault) and 99-107 (prescription).
[27] *Ibid*, at paras. 108-111 (damages) and 112-117 (punitive damages).
[28] *J.J.*, *supra* note 12.
[29] Art. 1528 *C.C.Q.*; *J.J.*, *ibid.*, at para. 80.
[30] QCCA Decision, *supra* note 1, at para. 34 (per Bélanger JA).

25. Justice Bélanger acknowledged that the case was unprecedented.[31] However, applying jurisprudence from this Court and the Court of Appeal - as well as seven other authorization decisions in sexual abuse class actions from Quebec[32] - she affirmed that all four categories of common issues identified by Justice Bisson in the case at bar could be treated collectively:

> L'expérience québécoise démontre que les agressions sexuelles, les dommages causés par ces gestes, l'atteinte intentionnelle à l'intégrité et à la dignité des membres du groupe, de même que la question de la prescription (quant aux paramètres applicables) sont des questions pouvant être traitées collectivement.[33]

26. Justice Bélanger also recognized that the systematic nature of the Respondent's abuse of his power and influence is a central and fundamental aspect of the case which would be difficult to prove on an individual basis.[34] As she explained:

> En bref, si la preuve démontre que l'appelant a systématiquement et de manière répétée agressé sexuellement plusieurs filles ou femmes, dans des circonstances similaires, en abusant de sa position de pouvoir, cela fera avancer de façon significative le débat. En effet, une telle preuve pourrait difficilement être apportée dans un procès individuel.[35]

27. Like the application judge before her, Justice Bélanger acknowledged that some aspects of the case, including issues related to the defence of consent, would need to be treated individually at a separate stage.[36] Yet the existence of individual questions is not and has never been a barrier to authorization. In her view, there was no reason to interfere with the Superior Court's decision: the criteria of Article 575 *C.C.P.* had not only been met, but the decision was in conformity with the rule of proportionality in civil procedure,[37] advanced the twin goals of deterrence and victim

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[31] *Ibid*, at para. 33.
[32] *Ibid*, at para. 32, footnote 22 citing *J.J. c. Oratoire Saint-Joseph du Mont-Royal*, 2017 QCCA 1460 ("***J.J.*, Court of Appeal**"), confirmed in *J.J.*, *supra* note 12; *Association des amis du Patro Lokal de St-Hyacinthe c. Trudel*, 2017 QCCS 3965 ("***Trudel***"); *A. c. Frères du Sacré-Cœur*, 2017 QCCS 5394 ("***Frères du Sacré-Cœur***"); *Association des jeunes victimes de l'Église c. Harvey*, 2016 QCCS 2252 ("***Harvey***"); *CCSMM*, *supra* note 4; *Tremblay c. Lavoie*, 2010 QCCS 5945 ("***Tremblay***"); *Sebastian c. English Montreal School Board (Protestant School Board of Greater Montreal)*, 2007 QCCS 2107 ("***Sebastian***").
[33] QCCA Decision, *supra* note 1, at para. 32. [Emphasis added]
[34] *Ibid*, at paras. 35-36.
[35] *Ibid*, at para. 37. [Emphasis added]
[36] *Ibid*, at paras. 5, 34.
[37] *Ibid*, at para. 39.

compensation, and accounted for the unique legal challenges faced by survivors of sexual violence.[38]

PART II – ISSUES

28. The Applicant adopts the question as framed by Justice Bélanger in dissent:

> "Est-il permis au Québec d'autoriser l'exercice d'une action collective visant un individu, en voulant soumettre sur une base collective qu'il a abusé de son statut, de son pouvoir et de son prestige pour agresser et harceler sexuellement les femmes et filles mineures membres du groupe, profitant de leur silence, de leur crainte, de leur honte et de l'impossibilité pour elles d'agir pour continuer sa prédation pendant des décennies?"[39]

PART III – STATEMENT OF ARGUMENT

29. The Applicant submits that the Majority committed serious errors, by:

a. Concluding that a class action against an individual perpetrator of sexual abuse alone cannot satisfy the common issues requirement of Article 575(1) *C.C.P.*;

b. Exceeding its authority by overturning the application judge's decision on appeal in the absence of a valid legal basis to intervene.

A. A class action against an individual abuser can satisfy Article 575(1) *C.C.P.*

The Majority's decision undermines access to justice for survivors of sexual violence and is contrary to legislative intent

30. At the outset of the book *Putting Trials on Trial*: *Sexual Assault and the Legal Profession*, Elaine Craig illustrates the historical inability for the overwhelming majority of victims of sexual violence to access justice through the courts:

> Imagine a society - one that purports to be a rule of law society - in which one segment of the population regularly engages in harmful acts of sexual violation against another segment of the community with almost complete legal immunity.
>
> Canada is such a society.[40]

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[38] *Ibid*, at paras. 46-52.
[39] *Ibid*, at para. 4.
[40] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, Montréal: McGill-Queen's University Press, 2018, p. 3, cited with approval in *Goldfinch*, *supra* note 11, and *R. v. R.V.*, 2019 SCC 41 ("***R.V.***"), BOA Tab 2.

31. Craig goes on to write that less than one percent of the sexual assaults that occur each year in this country will result in any form of legal sanction, and that over ninety percent go entirely unreported.[41] In the rare criminal cases that do go to trial, complainants can be forced to testify in proceedings over which they have no control.[42]

32. In the criminal law context, the state's heightened burden of proof, the rule restricting similar fact evidence, the accused's right to remain silent, and complainants' inability to direct proceedings can all present insurmountable obstacles for survivors. As this Court itself has acknowledged, the criminal justice system often fails victims of sexual violence - especially the most vulnerable and marginalized among them.[43]

33. Without access to the procedural vehicle of the class action, the civil justice system is little better for individuals in cases involving sexual violence. As Justice Bisson explained, in addition to the delay, stress, and financial burden faced by all litigants in civil trials, it is common for survivors of sexual assault to face unique challenges:

> Quant à l'aspect collectif du dossier, le Tribunal ajoute qu'il est reconnu que l'accès à la justice pour les victimes d'agressions sexuelles est parsemé d'embûches. Les victimes ont énormément de difficultés à dénoncer les agressions notamment en raison de la honte, des séquelles psychologiques qui en découlent, du tabou, de la peur de ne pas être crues, de la crainte de confronter l'agresseur qui est souvent une personne de prestige dans la société, comme c'est précisément le cas ici selon les allégations de la demande, et aussi, car la victime croit souvent, à tort, être seule et que l'agression était de sa faute.[44]

34. When abuse takes on a systematic or serial dimension, courts have recognized the effectiveness of class actions in enabling victims to seek redress. They have been authorized in the context of institutional abuse and harassment, such as where a religious organization fails to protect individuals under its authority, a community association enables the abuse of its young athletes, or an employer neglects to shield its workers from sexual harassment.[45] Whether or not an organization is named as a co-defendant, the class action always unites a number of individuals

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[41] *Ibid*, p. 3.
[42] *Ibid*, pp. 4-11; see also *R.V.*, *supra* note 40, at para. 33, BOA Tab 2.
[43] *R. v. Barton*, 2019 SCC 33, at para. 1 ("***Barton***"); *Goldfinch*, *supra* note 11, at paras. 2, 36-37.
[44] QCCS Decision, *supra* note 2, at para. 77; see also *J.J.*, *supra* note 12, at para. 8; *J.J. Court of Appeal*, *supra* note 32, at para. 49.
[45] See footnote 32, see also *Tiller v. Canada*, 2019 FC 895.

suffering serious injury at the hands of an individual who took advantage of his status, power and influence to commit abuse and to avoid accountability.

35. The adversity faced by survivors is often strongest in cases where the abuser occupies a position of status and influence, as in the case at bar. The procedural mechanism of a class action can operate to correct this asymmetry, and is the only realistic option in cases where the power imbalance is significant.

36. Even the rare plaintiff with both the courage and financial capacity to consider instituting an individual action will seldom be able to compel, let alone *identify*, other victims who can testify to similar abuse by the same perpetrator and corroborate her version of events in a "he said, she said" contest. In the context of a class action, testimony from multiple victims can demonstrate that the perpetrator exhibited a pattern of behaviour and strengthen the credibility of many individuals at once. To deprive class members of the ability to benefit from such evidence is manifestly unjust, and frustrates the truth-seeking function of a trial.

37. As the Court of Appeal noted in *J.J.*, sexual abuse class actions facilitate the emergence of truth: "Le double objectif poursuivi par cette procédure que sont la *dénonciation* et *l'indemnisation* commande une approche contextualisée basée sur des conditions propices à l'émergence de la vérité."[46]

38. Certain structural aspects of class actions, such as the right to remain relatively anonymous, are particularly beneficial to survivors of sexual abuse:

> [L]a protection de l'anonymat des victimes par l'exercice d'une action collective, contrairement aux mécanismes du mandat d'ester en justice pour le compte d'autrui ou de la jonction d'instance, milite ici en faveur de l'utilisation de l'action collective. Les victimes voulant protéger leur identité ne peuvent pas être décrites comme ayant une possibilité réelle d'ester en justice autrement que par la présente action collective.[47]

39. There are also practical barriers that prevent plaintiffs in sexual assault and harassment cases from accessing the justice system on an individual basis. Civil litigation not only requires each victim to retain legal counsel, but also to engage experts in support of their claim. For example, in the event that the present class action fails to proceed, each survivor would be required

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[46] *J.J.* Court of Appeal, *supra* note 32, at para. 48.
[47] QCCS Decision, *supra* note 2, at para. 91; see also *J.J.*, *supra* note 12, at para. 32.

to secure the resources to retain separate expertise to demonstrate the complex psychological harms caused by sexual violence and to establish the factors that often prevent such individuals from initiating proceedings within the prescriptive period. The cost of such expertise alone is prohibitive for most litigants.

40. Restricting access to justice for survivors runs contrary to legislative intent. In May 2013, the Quebec legislature took steps to facilitate access to the civil courts for those who have experienced sexual violence by adopting Article 2926.1 of the *Civil Code of Quebec*, which relaxed the obstacles imposed by the regime of prescription.[48] Quebec courts have also taken a flexible and generous approach to the authorization stage of class actions more generally, with a view to ensuring that cases of wrongdoing can be dealt with on the merits.[49] In *J.J.*, this Court reiterated that the class action is not an exceptional remedy to be interpreted narrowly, but rather an ordinary remedy whose purpose is to foster social justice.[50]

41. The Majority failed to acknowledge the stigma and shame associated with sexual violence that makes it difficult for any survivor to come forward alone. As the Court of Appeal recognized in *J.J.*, in such cases, "l'explicite est l'exception et la quête des faits concrets se heurte souvent à l'incapacité morale de la victime de dénoncer son agresseur."[51] It is telling that over a period of more than thirty years, not even one class member instituted an individual action for damages against the Respondent.

42. The Majority's decision is thus a significant step backwards, and risks jeopardizing public confidence in the collective efforts of the legislature and the courts to address this pressing social issue. This case presents an opportunity to apply this Court's teachings in *R. v. Barton*:

> Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian

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[48] *An 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, s. 13.
[49] *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299 ("***Sibiga***"), at para. 50; *J.J.*, *supra* note 12, at paras. 56-57.
[50] *J.J.*, *ibid*., at para. 8.
[51] *J.J. Court of Appeal*, *supra* note 32, at para. 88.

> society more broadly, this case attests to the fact that more needs to be done. Put simply, we can — and *must* — do better. [52]

Similar fact evidence is admissible to prove the systemic nature of sexual assaults in civil litigation

43. As noted above, prior to the authorization hearing, Justice Bisson rejected the Respondent's Motion to strike the allegation of the Application characterizing him as a "sexual predator",[53] correctly noting that such an issue - whether he "[a] commis de multiples agressions sexuelles selon un *modus operandi* pré-établi visant des victimes ciblées"[54] - is a question of fact to be determined on the merits.[55]

44. In coming to this conclusion, Justice Bisson recognized that the systemic and repetitive character of the Respondent's abuses were central to the Applicant's claim:

> De l'avis du Tribunal, les allégations et les pièces ne visent donc pas uniquement des agressions sexuelles commises au hasard des évènements sur n'importe quelle femme rencontrée par hasard. Au contraire, la Demande d'autorisation fait état d'agressions sexuelles répétées commises par M. Rozon sur des femmes de son entourage, dans son entourage, dans la sphère artistique, politique et sociale, avec une position de pouvoir et d'influence. Cela est un pattern, un modus operandi, une cible de victimes, qui correspond aux définitions de « prédateur sexuel » suggérées par M. Rozon lui-même.[56]

45. The Majority dismissed the significance of this common issue, notwithstanding its obvious potential to advance the claims of all members of the Class in fundamental respects. In doing so, it drew a false parallel regarding the admissibility of similar fact evidence in criminal trials.

46. By superimposing a criminal law standard at the authorization stage of a civil trial, the Majority concluded that "le dossier ne permet pas de conclure à l'admissibilité d'une telle preuve selon les critères exigeants mentionnés".[57] Not only was reference to the criminal law standard for a civil case wrong in law, but the Majority also erred by determining the weight and admissibility of such evidence at the authorization stage.

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[52] *Barton*, supra note 43, at para. 1. [Emphasis added]
[53] Judgment on Motion to Strike Allegations, *supra* note 16, at paras. 31 et. seq.
[54] *Ibid*, at para. 38.
[55] *Ibid*, at paras. 41-42.
[56] *Ibid*, at para. 41.
[57] QCCA Decision, *supra* note 1, at para. 93.

47. Furthermore, while it is true that similar fact evidence is presumptively inadmissible in the criminal law context, judges regularly exercise their discretion to admit such evidence where its probative value outweighs its prejudicial effect.[58] Such a determination requires the court to engage in a rigorous analysis that cannot take place at the authorization stage of a class action.

48. Even on the exacting criminal law standard, it is entirely possible that evidence regarding Mr. Rozon's *modus operandi* would be admissible in a criminal trial.[59] However this is not a criminal law trial. As Justice Hamilton ultimately conceded, similar fact evidence *is* admissible to prove a litigious fact in a civil matter.[60]

49. The search for truth "remains the cardinal principle in civil proceedings" and the ultimate aim of the trial.[61] In this case, as in any case involving similar allegations, that truth simply cannot be established without the collective administration of proof regarding the Respondent's position of power and the systematic abuse of that power over the course of many years. This pattern is a uniting feature of the class members' claims and is central to the faults alleged. Evidence regarding this *modus operandi* advances the litigation by strengthening the credibility and probative value of each Class member's individual claim, as well as establishing a clear foundation for the impossibility to act and an award of punitive damages.

The presence of an institutional defendant is not required for authorization of a class action against an individual perpetrator

50. The Majority lost sight of the collective dimension of the claims by mistakenly "emphasizing the possibility that numerous individual questions would ultimately have to be analyzed", as this Court warned against in *Vivendi*.[62] Its decision thus calls into question the stability of binding appellate jurisprudence on the authorization stage of class actions in the province, and distorts the test for determining whether class members' claims raise common issues.

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[58] *R. v. Handy*, 2002 SCC 56, at para. 55.
[59] See e.g., *R. v. Shearing*, 2002 SCC 58 at para. 50; *Brousseau c. R.*, 2018 QCCA 1140, at paras, 64-101; *Demers c. R.*, 2018 QCCA 617, at paras. 17-25; *R. v. J.H.*, 2018 ONCA 245, at paras. 21-25; *R v. T.L.M.*, 2012 SCC 6, unanimously affirming dissent in *R. v. T.L.M.*, 2011 NLCA 24.
[60] QCCA Decision, *supra* note 1, at para. 94.
[61] *Imperial Oil v. Jacques*, 2014 SCC 66, at para. 24.
[62] *Vivendi*, *supra* note 12, at para. 60.

51. The correct approach to Article 575(1) *C.C.P.* is settled law in Quebec. A *single* identical, similar or related issue of law or fact is sufficient, provided the authorization judge is "of the opinion that" the issue "soit susceptible d'influencer le sort de l'action collective".[63]

52. The jurisprudence confirms that "common questions do not have to lead to common answers" and that "at the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one."[64] As with all aspects of the test for authorization, the analysis conducted by the judge seized with the application is a fundamentally discretionary one.[65]

53. As summarized above, Justice Bisson engaged in the very analysis required by this Court in his assessment of Article 575(1) *C.C.P.* He exercised his discretion properly in developing the opinion that the proposed class action raises numerous common issues of law and fact relating to fault, prescription, compensatory and punitive damages.[66]

54. Sexual abuse class actions that name an institution as a co-defendant raise *additional* common issues - for example, pertaining to the failure of that institution to prevent the harm or the scope of its vicarious liability as employer. Yet the absence of a co-defendant cannot negate the existence of all other common issues that unite the class members.

55. As noted above, numerous sexual abuse class actions have been authorized in Quebec against both an individual and a complicit organization simultaneously. In these cases, the law required the court to be satisfied that Article 575(1) *C.C.P.* was met in respect of each proposed defendant, which necessarily includes the individual abuser. The common issues identified by the courts have consistently included questions analogous to the four categories identified by Justice Bisson in the case at bar.

56. As recognized by Justice Bélanger,[67] these cases demonstrate that it is entirely possible to treat issues relating to fault, prescription and the availability of compensatory or punitive damages collectively. Even where common proof cannot fully establish the liability of the individual abuser,

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[63] *Ibid*, at para. 44.
[64] *Ibid*, at para. 59.
[65] *J.J.*, *supra* note 12, at para. 10; *Vivendi*, *supra* note 22, at para. 33.
[66] QCCS Decision, *supra* note 2, at para. 72.
[67] QCCA Decision, *supra* note 1, at para. 32. [Emphasis added]

it can certainly impact the outcome of the class action, which is the test this Court decided must be met under Article 575(1) *C.C.P.*[68]

57. Whether or not an institution is named a defendant, proof on the merits will be necessary in order to establish a pattern of behaviour on the part of the abuser, the fact of the assaults, the extent of the damages and elements demonstrating an impossibility to act within the prescribed delay. The fact that such evidence would be required in the case at bar cannot mean that Article 575(1) *C.C.P.* is not met.

The Majority misconstrued the test for authorization more generally

58. The Majority's reasons entail a significant departure from settled legal principles of general application which have been recently confirmed by this Court and the Quebec Court of Appeal. Notably, they draw an unwarranted legal distinction between the "identical, similar or related issues of law or fact" required for authorization[69] on the one hand, and the "issues to be dealt with collectively"[70] to be identified in the authorization judgement on the other.[71]

59. The Majority states that "[l]e fait que le tribunal identifie des questions à être traitées collectivement ne signifie pas que ces mêmes questions justifient l'autorisation de l'action collective".[72] However, and with respect, that is precisely what it means.[73] As this Court noted in *Breslaw*, the power conferred upon the authorization judge to identify the issues to be dealt with collectively[74] "cannot be used to modify the action,"[75] such that the court's identification of collective issues for the merits of a class action necessarily means that those issues were significant enough in importance to meet the criterion of Article 575(1) C.C.P.

60. It follows that any "issues to be dealt with collectively" described by the judge in conformity with Article 576 *C.C.P.* must necessarily reflect the "identical, similar or related issues of law or fact" pursuant to Article 575(1) *C.C.P.* This is precisely why the *Code* entitles class

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[68] *J.J.*, *supra* note12, at para. 44.
[69] Art. 575(1) *C.C.P.*
[70] Arts. 576, 579(2) and 580 *C.C.P.*
[71] QCCA Decision, *supra* note 1, at para. 77.
[72] *Ibid,* at para. 77.
[73] *Vivendi*, *supra* note 22, at paras. 58-59.
[74] Art.1005 *a.C.C.P.*
[75] *Breslaw v. Montreal (City)*, 2009 SCC 44, at para 25.

members to receive notice of such questions: so that they can decide whether or not they wish to be bound by the Court's conclusions on those matters in the context of the class action.

61. Moreover, while the Majority acknowledged that the case before it was novel,[76] there is a risk that aspects of its decision will be understood to mean that issues of prescription, compensatory damages and punitive damages can *never* be dealt with collectively in a sexual abuse class action. Such an interpretation would contradict numerous judgments of the Superior Court and the Court of Appeal authorizing sexual abuse and other class action matters, as well as this Court's decision in *J.J.*, which confirmed authorization of a common question pertaining to the availability of punitive damages.[77]

B. The Majority exceeded its authority by overturning the application judge's decision on appeal in the absence of a valid legal basis to intervene

The claims raise common issues capable of significantly advancing the litigation

62. The issues of fact and law arising from the claims of multiple survivors of the same powerful perpetrator are, if not identical, manifestly similar or related.

63. In order to succeed on appeal, the Applicant needs only to establish that the Majority erred with respect to the existence of a *single* common issue that Justice Bisson decided "permettra l'avancement d'une part non négligeable des réclamations, sans une répétition de l'analyse juridique et factuelle à cet égard."[78] Nonetheless, the Applicant submits that the Majority erred with respect to *all* of the common issues identified by the court below.

64. First, the Majority erred by overturning Justice Bisson's determination that the allegation that the Respondent, as a sexual predator, employed a specific *modus operandi* to assault and harass class members would require common proof on the merits. This evidence would allow the Applicant to establish elements of the Respondent's fault by bolstering the credibility of individual class members' testimony, and would inform the court's assessment of punitive damages, all of which clearly advance each member's claim substantially.

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[76] QCCA Decision, *supra* note 1, at para. 81.
[77] *J.J.*, *supra* note 12, at para. 80 and footnote 32.
[78] QCCS Decision, *supra* note 2, at para. 72.

65. By deciding that "le *modus operandi* n'avance pas le dossier de façon non négligeable,"[79] the Majority made an unwarranted and pre-emptive determination on the merits concerning a ground of defence, which the Court of Appeal's own jurisprudence proscribes: "le Tribunal ne doit pas anticiper des moyens de défense afin de décider du caractère identique, similaire ou connexe des questions proposées."[80]

66. By contrast, Justice Bélanger noted the commonality of the issue and correctly left any determination of its impact on the litigation to the judge seized of the merits:

> C'est toute la notion d'abus de pouvoir qui est en cause et qui pourra être évaluée de façon collective, de même que l'impact que cet abus de pouvoir aurait pu causer chez des femmes œuvrant dans l'entourage professionnel de l'appelant. En fait, la question de l'abus de pouvoir est centrale et fondamentale en l'espèce et elle est commune à chacune des membres du groupe selon les allégations. Cette question joue un rôle plus que négligeable dans la solution du litige.[81]

67. Second, the Majority erred by overturning Justice Bisson's determination that the collective treatment of issues related to prescription would substantially advance the claims of every class member. Common proof in this respect would have allowed the Court to address legal questions related to the interpretation of Article 2926.1 *C.C.Q.* collectively, and facilitated the use of common psychological expertise regarding the impossibility for the class members, as survivors of assault and harassment, to act within the prescriptive period.

68. In *Tremblay,*[82] the only sexual abuse class action to proceed to a trial on the merits in Quebec, common expert evidence and the presumption established by this Court in *M. (K.),*[83] led the trial judge to draw conclusions and to establish presumptions of fact regarding prescription that significantly advanced the claims of every member at the recovery stage.[84] By substituting its own opinion for Justice Bisson's view and deciding that these common issues "ne fait pas beaucoup

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[79] QCCA Decision, *supra* note 1, at para. 98.
[80] QCCS Decision, *supra* note 2, at para. 60, quoting *Société québécoise de gestion collective des droits de reproduction (Copibec) c. Université Laval*, 2017 QCCA 199, at paras. 67 to 74.
[81] QCCA Decision, *supra* note 1, at para. 35 (per Bélanger JA).
[82] *Tremblay, supra* note 32.
[83] *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6, at pp. 27-28, 35-37, 47, 49.
[84] *Tremblay, supra* note 32, at paras. 284 to 306.

avancer le débat",[85] the Majority trivialized the significance of matters that are at the very heart of this case - including the common reasons why sexual abuse victims so seldom come forward.

69. Third, the Majority erred by substituting its own opinion for Justice Bisson's conclusion that common issues related to compensatory damages would advance the litigation. It characterized Justice Bisson's view as an error in law because each class member would eventually need to establish specific damages in individualized "mini-trials".[86] Ironically, the Majority's analysis on this point refers to *St-Ferdinand*, in which this Court decided that the trial judge had been justified in determining an amount of compensatory damages common to all members based on class-wide expert evidence adduced at trial.[87]

70. While the Majority was correct to observe that quantum may vary from one member to another, this Court affirmed in *J.J.* that "sexual assault has *always* been a fault that automatically causes serious injury".[88] In light of the serious injury automatically suffered by *all* victims of sexual assault, as well as this Court's decision in *St-Ferdinand*, it is certainly open to a trier of fact to set a minimum threshold for damages common to all victims. This is precisely what the Court did in *Tremblay*, when it decided that all victims merited a minimum of $75,000 in non-pecuniary damages.[89]

71. Finally, the Majority erred by overturning the finding that the case raised common issues with regard to punitive damages. This assessment requires the judge to appreciate "all the circumstances"[90] - including the gravity of the debtor's fault over the course of decades - for the purpose of determining the availability and quantum of punitive damages. It is manifest that a single judge is better positioned to evaluate the testimony of the Respondent and multiple victims than would be multiple judges, each seized with separate trials concerning different individuals alleging a single instance of abuse.

72. Treating class members' experiences individually obfuscates the systematic infringement of their rights and impairs the Court's ability to account for the totality of the circumstances

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[85] QCCA Decision, *supra* note 1, at para. 106.
[86] *Ibid*, at paras. 109 to 111.
[87] *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, at pp. 223-224, 232-233.
[88] *J.J.*, *supra* note 12, at para. 64. [Emphasis added]
[89] *Tremblay*, *supra* note 32, at paras. 401 to 404.
[90] Article 1621 C.C.Q.

surrounding their abuse for the purposes of Article 1621 *C.C.Q.* Justice Bélanger was therefore correct to note that, as in *Rumley*, where the defendant's fault has a systematic character, the availability of punitive damages can be treated as a common issue,[91] and that such a common issue on its own suffices to justify the use of a class action.

The Majority usurped the discretionary role of the application judge

73. Finally, this case necessarily raises a subsidiary question regarding whether the Majority inappropriately intervened in the lower court's decision to authorize the class action.

74. The authorization stage of class actions operates as "a screening mechanism [that] does not allow for an advance review of the merits of the case".[92] The test for authorization, which has been canvassed at length in the jurisprudence, requires a generous and liberal interpretation in order to achieve the class action's twin goals of deterrence and compensation.[93] With respect to Article 575(1) *C.C.P.* in particular, this Court has recently reiterated that courts must take a broad and flexible approach to the identification of common issues, and that the threshold requirement to meet this condition is low.[94]

75. The standard for appellate intervention at the authorization stage is undisputed. The application judge's decision is discretionary - a fact evidenced, as recently noted by Justice Gascon, from the words "if it is of the opinion that" in Article 575 *C.C.P.* itself.[95] The Superior Court's decision is therefore entitled to deference, and the Court of Appeal cannot intervene unless it can show that the application judge erred in law or that his assessment with respect to one of the criteria of Article 575 *C.C.P.* was clearly wrong.[96]

76. Despite its dutiful recitation of the standard of review,[97] the Majority failed to demonstrate any error of law or any aspect of Justice Bisson's assessment so flawed as to merit appellate

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[91] QCCA Decision, *supra* note 1, at para. 31 (per Bélanger JA), citing *Rumley v. British Columbia*, 2001 SCC 69, at para. 34.
[92] *J.J.*, *supra* note 12, at para. 7; *Vivendi*, *supra* note 12, at para. 37; *Infineon Technologies AG c. Option consommateurs*, 2013 SCC 59 ("***Infineon***"), at paras. 59 and 65.
[93] *J.J. Court of Appeal*, *supra* note 32, at para. 89, upheld by this Court in *J.J.*, *supra* note 12; see also *Vivendi*, *supra* note 12, at paras. 52-54; *Infineon*, *supra* note 92, at para. 60.
[94] *J.J.*, supra note 12, at para. 44.
[95] *Ibid*, at para. 111 (per Gascon J., dissenting in part, but not on this point).
[96] *Ibid*, at paras. 10 (per. Brown J.), at para 111 (per Gascon J.) at para. 202 (per Côté J.); *Vivendi*, *supra* note 12, at para. 34.
[97] QCCA Decision, *supra* note 1, at para. 64 (per Hamilton JA).

intervention. At best, the Majority had a subjective disagreement regarding the significance of the common issues present in the case before it - which it thought would not advance the litigation substantially,[98] and which Justice Bisson had concluded were important, numerous, and permitted the collective advancement of the Applicant's cause. By substituting its own opinion, the Majority engaged in precisely the kind of second-guessing that this Court has repeatedly denounced on appellate review. Its failure of restraint constitutes a legal error.[99]

77. Even if Justice Bisson's decision to authorize the class action invites the Superior Court into uncharted waters, that is not a reason to deny authorization. As Justice Kasirer (as he then was) affirmed:

> Courts have recognized access to justice as a "social dimension" to class action law that is relevant to the kind of interpretative task before the judge … courts should err on the side of caution and authorise the action where there is doubt as to whether the standard has been met.[100]

PART IV – COSTS

78. The Applicant seeks the costs of this application and the appeal, should it be successful.

PART V – ORDER SOUGHT

79. The Applicant submits that this case raises questions of public importance that justify the Court's intervention and requests that this application for leave be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th day of March, 2020.

Robert Kugler, Pierre Boivin
Olivera Pajani, Bruce W. Johnston
Gabrielle Gagné and Lex Gill

Counsel for the Applicant
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[98] *Ibid*, at para. 118.
[99] *J.J.*, *supra* note 12, at para. 11; *Sibiga*, *supra* note 49, at paras. 34-35.
[100] *Sibiga, ibid.*, at para. 51.

PART VI – TABLE OF AUTHORITIES

Secondary Sources	**Paragraph(s)**
Statistics Canada, *Police-reported sexual assaults in Canada before and after #MeToo*, 2016 and 2017 (2018)	8
Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, Montréal: McGill-Queen's University Press, 2018 [Chapter 1]	30, 31

PART VII – Applicable Statutes

Code of Civil Procedure, CQLR, c. C‑ 25.01

575. Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que: 1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes; 2° les faits allégués paraissent justifier les conclusions recherchées; 3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance; 4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.	**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.