



SUPREME COURT OF CANADA

CITATION: Desjardins Financial Services Firm Inc. v. Asselin, 2020 SCC 30
APPEAL HEARD: December 5, 2019
JUDGMENT RENDERED: October 30, 2020
DOCKET: 37898

BETWEEN:

Desjardins Financial Services Firm Inc. and Desjardins Global Asset Management Inc., a lawfully constituted legal person, formerly Desjardins Asset Management Inc.
Appellants

and

Ronald Asselin
Respondent

OFFICIAL ENGLISH TRANSLATION

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

REASONS FOR JUDGMENT: Kasirer J. (Wagner C.J. and Abella, Karakatsanis, Brown and Martin JJ. concurring)
(paras. 1 to 159)

REASONS DISSENTING IN PART: Côté J. (Moldaver and Rowe JJ. concurring)
(paras. 160 to 304)

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DESJARDINS v. ASSELIN

**Desjardins Financial Services Firm Inc. and
Desjardins Global Asset Management Inc.,
a lawfully constituted legal person,
formerly Desjardins Asset Management Inc.**

Appellants

v.

Ronald Asselin

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File No.: 37898.

2019: December 5; 2020: October 30.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Civil procedure — Class action — Authorization to institute class action
— Conditions for authorizing action — Motion for authorization to institute class
action in contractual liability for breach of duty to inform and in extracontractual*

liability for breach of duties of competence and management against financial institutions with respect to term savings investments — Superior Court dismissing motion — Court of Appeal setting aside judgment and authorizing class action — Whether Court of Appeal was justified in intervening in Superior Court’s decision — Code of Civil Procedure, CQLR, c. C-25, art. 1003.

A is a member of a caisse populaire in the Desjardins Group. Between March 2005 and June 2007, he purchased two types of investments from his caisse populaire, Perspectives Plus Term Savings (“PP”) and Alternative Term Savings (“ALT”), by entering into deposit agreements. The investments essentially involved capital that was guaranteed at maturity and corresponded to the original value of the deposit, and a potential return that was variable. It is alleged that the investments were purchased as a result of representations made by a financial planner and mutual fund representative who was a subordinate or mandatary of Desjardins Financial Services Firm Inc. (“Firm”), which is part of the Desjardins Group and which specializes in financial services. Both the financial planner and various documents promoting the investments allegedly represented them as being safe and as providing an attractive return, despite the fact that they involved a specific risk that affected their return potential. It is alleged that the investments were designed and managed by Desjardins Global Asset Management Inc. (“Management”), which is also part of the Desjardins Group and which specializes in asset management.

In March 2009, A received a letter informing him that he would obtain no return on his PP and ALT investments up to the time they matured. In February 2010, A received an investment statement indicating that his investments had in fact yielded a return of 0 percent for 2009. In September 2011, A filed a motion in the Quebec Superior Court seeking authorization to institute a class action against Firm and Management. He argued that Firm was contractually liable to the members of the class action group for breaching its duty to inform. He claimed that Firm had not adequately informed him and the other members of the group of the risks associated with the investments, alleging both direct and indirect fault. He argued that Management was extracontractually liable to the group’s members for breaching its duties of competence with regard to design and management. He alleged that Management had used risky investment strategies, including strategies involving investments in asset-backed commercial paper (“ABCP”), that had resulted in a loss of all the assets allocated to the return.

The Superior Court dismissed the motion for authorization to institute a class action against Firm and Management. The authorization judge found that A had not shown that his proposed action in contractual liability against Firm and in extracontractual liability against Management had a good colour of right as required by art. 1003(b) of the former *Code of Civil Procedure* of Quebec (“former *C.C.P.*”). The judge also found that there were no common questions as required by the condition set out in art. 1003(a) of the former *C.C.P.*, though she neglected to deal with that

condition in relation to the action against Management. The Court of Appeal allowed A's appeal and authorized the class action against Firm and Management.

Held (Moldaver, Côté and Rowe JJ. dissenting in part): The appeal should be allowed in part.

Per Wagner C.J. and Abella, Karakatsanis, Brown, Martin and **Kasirer JJ.**: The Court of Appeal was correct to authorize the class action proposed by A both against Firm and against Management. The authorization judge erred in analyzing certain aspects of the conditions set out in subparas. (a) and (b) of art. 1003 of the former *C.C.P.* (which correspond to subparas. (1) and (2) of art. 575 of the new *Code of Civil Procedure*). However, the appeal should be allowed in part for the sole purpose of varying paras. 8 and 9 of the Court of Appeal's judgment in order to clarify the scope of the claim for punitive damages.

The Court of Appeal adhered perfectly to the analytical framework established in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, and *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, even though the last of these cases was decided after the judgment under appeal. The threshold for authorizing a class action in Quebec is a low one. Once the four conditions set out in art. 1003 of the former *C.C.P.* are met, the judge must authorize the action; the judge has no residual discretion to deny authorization on the pretext that a class action is not the most appropriate vehicle. Questions of law may be resolved by an authorization

judge if the outcome of the proposed action depends on the judge's doing so, but this choice is generally a discretionary one. This reflects the purpose of the authorization stage of the class action: the judge's role is to filter out frivolous claims, and nothing more. In analyzing a motion, an authorization judge must avoid adopting a rigid approach and must read the wording of the motion to discover the full message it conveys, including the necessarily implied message. Finally, there is no requirement in Quebec that the common questions predominate over the individual ones. On the contrary, a single common question is enough if it advances the litigation in a not insignificant manner. It is not necessary that the common question be determinative of the outcome of the case.

Here, the allegations are sufficient to establish an arguable case against Firm in accordance with the condition set out in art. 1003(b) of the former *C.C.P.* 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. The proposed syllogism is neither frivolous nor clearly unfounded in law. The allegations are precise enough to be assumed to be true, and there is a sufficient basis for them in the evidence adduced.

A's syllogism is based on a breach by Firm of its duty to inform. In his motion, A explains right in the summary that he is alleging that Firm and Management breached and violated the obligations and duties of information, competence and management. Firm allegedly failed to inform adequately the group's members of the

risky transactions conducted using the amounts the members had entrusted to it. With regard to injury, A explains the loss of a return resulting from risky investment strategies; with regard to causation, he states that he would never have agreed to invest in the PP and ALT investments if Firm had adequately informed him of the risks associated with them. The faults are described with sufficient precision, and the information missing for the entire group relates, among other things, to the level of risk involved in the investments, their volatility and the way they worked, including the leverage used.

It can be understood from these allegations that the proposed action is based not on a breach of the deposit agreements, but rather on a generalized and systematic breach of the duty to inform. A alleges that Firm systematically breached this duty by not adequately informing all of its representatives of the risks and characteristics of the investments (the direct fault). According to the facts alleged in the motion, the representatives, having received false, misleading or incomplete information, then failed to provide adequate information to the group's members (the indirect fault). Firm's alleged dual fault, and the basis for the action, is a generalized and systematic breach of its general duty to inform. This dual fault refers, in other words, to two sides of the same coin: Firm's breach of its duty to inform the group's members directly itself, and to inform them indirectly through its representatives.

A person who provides financial services is indeed subject to a duty to inform, and failure to comply with that duty may give rise to civil liability, for which

the principal or mandator of the financial adviser at fault must answer. The group's members were linked to Firm by a contract for services within the meaning of art. 2098 of the *Civil Code of Québec* or, if the services were not paid for directly, a similar *sui generis* contract. Grounded in the general obligation of good faith (arts. 6, 7 and 1375 of the *Civil Code of Québec*), the duty to inform relates to all contracts and, in principle, applies to all contracting parties. There is a distinction between the duty to provide advice and the duty to inform. The obligation to inform is an obligation to reveal to another facts that the latter, in order to adjust his or her conduct, may legitimately expect to receive. The obligation to provide advice is an obligation to provide counsel to another in the furtherance of the latter's interest. The duty to inform is less onerous and less individualized than the obligation to provide advice.

In *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, the Court observed that the scope of the obligation to inform is assessed on the basis of the following criteria: (1) knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform; (2) the fact that the information in question is of decisive importance; (3) the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation. In the case at bar, Firm knows or is presumed to know the characteristics of the investments it recommends. A alleges that he would never have agreed to invest in the PP and ALT investments if he had been adequately informed of the risks associated with them and that it was impossible for him to inform himself of Management's investment strategies.

The motion does not allege a positive misrepresentation; it alleges an omission corresponding to a breach of the duty to inform, which, unlike the duty to provide advice, is an obligation of result. Mere proof by the creditor that the result was not achieved is sufficient to give rise to a presumption that the debtor is liable. At the authorization stage, the applicant bears the burden of demonstrating that the proposed legal syllogism is arguable, not the burden of proving each element of the syllogism on the usual civil balance of probabilities standard. In this context, the evidence adduced by A in support of allegations that must be assumed to be true is more than sufficient. The action can be authorized without proof on a balance of probabilities that A was not given the information. A filed many documents to support allegations concerning Firm's failure to disclose, to all clients, the risks associated with the methods used to manage the investments. It is argued that the choice made by Firm and its representatives to rely on the documents is evidence of the breach of the contractual duty to inform alleged in support of Firm's indirect contractual liability. A's pre-hearing examination is also relevant evidence with respect to the non-performance of an obligation to do something, such as an absence of advice or information. The breach amounts to a negative, which is inherently difficult to establish persuasively, but which can be proved simply by testimony.

The common questions condition set out in art. 1003(a) of the former *C.C.P.* is also met with respect to the proposed action against Firm. At the authorization stage, the decisions of the Quebec courts and of the Court require a flexible approach to the common interest that must exist among the group's members. As a result, even

where circumstances vary from one group member to another, a class action can be authorized if some of the questions are common. The fact that the situations of all members of the group are not perfectly identical does not mean that the group does not exist or is not uniform. In Quebec, a single common question is sufficient as long as it advances the litigation in a not insignificant manner. The class action in this case concerns a contractual breach of the duty to inform that grounds both Firm's direct liability and its indirect liability. In both cases, the alleged omissions are systematic in nature and do not depend on each client's individual characteristics. The systematic nature of these omissions in both cases makes it possible to identify common questions in the proposed action against Firm under art. 1003(a).

The motion filed by A indicates that the group's members were systematically misinformed. By giving its representatives documents that were misleading or incomplete, Firm misinformed them and did not give them the means to adequately inform the group's members. The information provided to the members was therefore necessarily wrong or insufficient, if not false, deceptive or misleading. The systematic nature of Firm's breach is thus clearly alleged and must be assumed to be true. Moreover, the information in question was objective information that Firm never gave the representatives or the members concerning the risky nature of the investments.

The position taken in the motion is not based on the individual liability of a financial adviser to a particular client, which would depend on evidence of each client's profile to establish whether the investment was in fact appropriate. The alleged

fault is a breach of a general obligation to inform that affected each member, not a breach of an individualized obligation to properly advise a client. Although the duty to inform varies with the context, there are circumstances in which all creditors were deprived of information as a result of a systematic omission. In this case, A specifically alleges the existence of such circumstances, in which an informational imbalance and Firm's control of the information are common to all the members. Indeed, A alleges that the group's members could not have known the information that Firm had about how the investments worked even with all due diligence. A class action based on a brokerage firm's liability for the conduct of its representatives is therefore possible if the issue is whether the information provided by the firm to its representatives and to the group's members was insufficient, with the result that a general duty to inform was breached. To conclude otherwise would deprive the class action of part of its role of helping people who, for economic and other reasons, face barriers in asserting their rights. The Court of Appeal was accordingly justified in intervening. It appears that the authorization judge considered the common questions condition from the perspective of an action based on the duty to provide individualized advice tailored to each client's risk tolerance even though that was not the basis for A's action.

It is conceded that it can be argued that Management is liable as the designer of the investments. On the issue of whether the case against Management is an arguable one, the syllogism proposed by A is neither circular nor untenable. A does not merely say in his allegations that Management's practices were risky because the investments did not generate a return; he makes concrete allegations against

Management. These allegations are sufficiently precise. As for the impact of the 2008 financial crisis on the causal link between Management’s alleged extracontractual faults and the loss for which A is seeking compensation, this is an issue that goes to the merits of the case.

A is claiming punitive damages from Management pursuant to ss. 6 and 49 of the *Charter of human rights and freedoms* for unlawful and intentional interference with his right to the peaceful possession of his property. For the purposes of that claim, he alleges that a significant portion of the money market investments in the PP and ALT investments consisted of ABCP. Management submits that any claim relating to ABCP has been extinguished as a result of the Sanction Order made by the Ontario Superior Court of Justice as part of the restructuring of the ABCP market carried out under the *Companies’ Creditors Arrangement Act* (“CCAA”). The motion judge found that the claim based on ABCP was, on its face, barred, but she did not refer to the distinction between “Affected ABCP” and “Unaffected Claims” as dealt with in the Third Amended Plan of Compromise and Arrangement that was the subject of the Sanction Order.

The Court of Appeal correctly found that the motion judge could not decide whether the claim was barred at the authorization stage. It is true that a court may decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so, but the question of whether the ABCP concerned is part of the Affected ABCP covered by the release and listed in its Schedule “A” is not a

pure question of law. It is not the application of the Order that is being contested but rather its scope, which can be argued later. The scope of the Affected ABCP and the unaffected ABCP under the Order is an issue that could, if necessary, be referred to the Ontario Superior Court of Justice. Caution must be exercised at the authorization stage, and any doubt should weigh in favour of the continuation of the proceedings. Deferring this matter will not result in Management losing any rights given that the action must proceed on the merits on the claim for compensatory damages. Though difficult, a claim for punitive damages based on unlawful and intentional interference under s. 6 of the *Charter of human rights and freedoms* in relation to the ABCP not covered by the release remains arguable in this context. However, it must be specified that any payment to each member of the group of an amount in punitive damages may be sought solely in relation to Unaffected Claims within the meaning of art. 1 of the Third Amended Plan of Compromise and Arrangement dated January 12, 2009.

Per Moldaver, Côté and Rowe JJ. (dissenting in part): The appeal should be allowed in part. Authorization of the proposed class action against Firm should be denied, and authorization of the proposed class action against Management should be granted, but only in relation to the claim for compensatory damages.

The objectives of facilitating access to justice, modifying harmful behaviour and conserving judicial resources that underlie the class action can be attained only if a rigorous procedure is followed for the authorization of such an action. The class action is a cumbersome procedural vehicle that represents a huge undertaking

for all of the participants, including the courts. Authorization is meant to be more than a mere formality. Its purpose is to protect the interests of all those involved in the class action — not only the interests of the representative and the absent members, but also those of the defendants and even of the administration of justice. The authorization stage is what confers full legitimacy on the class action.

Even though the court plays a more active role in the context of a class action, it may not take on the role of party or counsel and reorient the action as presented by the applicant however it likes. The court's role is not to read between the lines in order to guess the basis for the action whose authorization is being sought, or for the legal syllogism, where no specific allegations are made in relation to a key element of the cause of action. The court hearing the motion for authorization can supplement the allegations using the evidence in the record and can draw inferences and presumptions from them. However, the court is not required to assume the applicant's legal allegations to be true; it may decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so. When a judge decides a question of law on which the outcome of a class action depends at the authorization stage, this furthers the objectives of predictability of the law and judicial economy that underlie the system of administration of justice. The judge's role at the authorization stage is to screen out frivolous or untenable actions, but also to verify that all the conditions of art. 1003 of the former *C.C.P.* are met. A motion that does not meet all the conditions is not for that reason alone frivolous. Because the court must assume that the alleged facts are true, the allegations must be clear and complete,

not vague, general or imprecise. Defects of form can be excused, but substantive defects cannot be. The allegations must be read carefully in order to determine whether the legal syllogism they propose is an arguable one.

At the authorization stage, judges have considerable leeway in assessing whether the conditions set out in art. 1003 of the former *C.C.P.* are met. If a judge is of the opinion that each condition is met, he or she must authorize the action and has no discretion to decline to do so. An appellate court's power of intervention is limited, and it must defer to the judge's assessment of the conditions. The applicable standard for appellate intervention is that of palpable and overriding error.

In this case, the motion judge did not err in stating that Firm could not be contractually liable on the basis of the deposit agreements for the PP and ALT investments because the parties to those agreements were the clients and their respective caisses populaires. The contract that could give rise to Firm's contractual liability is instead the one that it entered into with clients through its representatives, which was a contract for services whose sole object was the giving of advice. While the giving of advice was the core prestation under the contract, this did not preclude a duty to inform from existing as well. The judge also analyzed the action against Firm as it had been presented, that is, from the standpoint of Firm's contractual liability for a breach of the duty to inform. This was analyzed in relation to a contractual basis for the action arising from the mandator-mandatar relationship between Firm's

representatives and the clients. The judge's assessment of the authorization conditions was entitled to deference on appeal absent a palpable and overriding error.

The common questions requirement set out in art. 1003(a) of the former *C.C.P.* is not met with respect to the proposed action against Firm. The liability of financial advisers for a breach of the duty to inform and the duty to provide advice is not well suited to a class action because of the highly individual nature of the relationship between a client and an adviser in the context of a contract for investment services. In such a case, the liability analysis would have to be repeated for each individual claim. The case law is consistent in this regard: there can be no common questions in such circumstances. However, if an applicant can show that the breach was systematic in nature, the common questions condition will not be an impediment to authorizing the action. A, on the other hand, has neither alleged nor shown any kind of systematic breach of the advisers' duty to inform that might be imputed to Firm. By his own admission, he has no idea whether other clients were in the same situation as him. It is therefore the absence of a systematic breach that is fatal to A's action, not the fact that the action concerns financial advisers.

The duty to inform is more general than the duty to provide advice owed by Firm's representatives; the duty to inform is, however, a variable obligation shaped by the circumstances of each case, as was affirmed in *Bail*. This is especially true in cases where the duty to inform is an accessory to a main prestation whose object is the giving of advice. In this case, the obligation to inform arose in the broader context of

the provision of a financial adviser's services, which varies in accordance with several factors, including the length of the relationship and the client's goals and level of expertise. The obligation of advisers or dealers to know their clients shapes their relationship with them; it is clear that the clients' specific circumstances are of significant importance. It is therefore not surprising that A does not know whether there are other members in the same situation as him. His situation cannot be extrapolated to the other members of the proposed group. Accordingly, even though a court should not focus on each member's specific characteristics at the authorization stage of the class action, the fact remains that in this case the elements of fault, causation and injury raised by A on behalf of the group are highly variable. Given the need for such a contextual analysis, there can therefore be no commonality to the question of whether the duty to inform was breached unless it is shown that the breach occurred systematically. The individualized analysis required by the action precludes the possibility of proceeding on a collective basis. A systematic duplication of fact-finding and legal analysis will be required for each relationship between a financial adviser and a client, which means that the proposed question cannot advance the litigation in a not insignificant manner.

In the case of the proposed action against Management, the Court of Appeal's intervention was warranted only in part. The Court of Appeal properly authorized the action against Management except in relation to the claim for punitive damages. On this point, the authorization judge was correct to consider the release with respect to ABCP found in the Sanction Order, and the scope of that release, in

concluding that the claim against Management for punitive damages in relation to ABCP did not establish an arguable case.

The defences available to a defendant are generally considered at the trial on the merits. However, a court may decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so. This principle also extends to the interpretation of a release included in a sanction order made by the Ontario Superior Court of Justice, which has full force and effect in Quebec under s. 16 of the *CCAA*.

The outcome of the part of the proposed action that concerns punitive damages in relation to ABCP depends on how the terms of the release are interpreted. Where evidence is necessary to determine the applicability of a release found in a sanction order, this question should be decided at the trial on the merits. Conversely, where such evidence is not necessary, as in this case, it would be neither logical nor desirable, from the standpoint of judicial economy and of proportionality of proceedings, to defer making a decision on this question of law when the court has an opportunity to decide it at the authorization stage. This is especially true for releases resulting from a compromise or arrangement sanctioned by a court under the *CCAA*. These releases advance one of the *CCAA*'s important objectives, which is to favour restructuring by preventing the risk of litigation. Under ss. 16 and 17 of the *CCAA*, it is imperative that Quebec courts give effect to *CCAA* orders regardless of the jurisdiction where the proceedings took place.

In this case, the release presents two impediments that are fatal to A's claim for punitive damages based on ABCP. The first impediment arises from the limited cause of action authorized for an Excepted Claim: the claim must be based on express fraudulent misrepresentations made to the potential plaintiff by an authorized representative of the potential defendant. However, A's claim for punitive damages is based not on a misrepresentation, but rather on Management's fault, which lies in flawed design and management contrary to its obligations and duties to act prudently and diligently and to adhere to sound and prudent management practices. The motion does not allege a cause of action covered by the definition of an Excepted Claim.

The second impediment to the claim for punitive damages relates to the strict time limit for asserting a claim. The nine-week time limit began to run on the date of delivery of notice by the Monitor, which was essentially the date on which the Sanction Order was made, namely June 5, 2008. A's motion for authorization to institute a class action was served on September 16, 2011. His claim for punitive damages based on Management's use of an investment strategy that included ABCP was therefore filed out of time. The release stands in the way of A's legal syllogism with regard to Management's fault, and the claim based on ABCP must be dismissed because it does not have the colour of right required by art. 1003(b) of the former *C.C.P.*

Insofar as it is argued that Management is liable as the designer and manager of the products, the action can be authorized in relation to compensatory

damages. By referring to the effects of the 2008 financial crisis in declining to authorize this part of the action, the authorization judge decided the merits of the action. However, this aspect of the action is not devoid of foundation. This was an error that warranted the Court of Appeal's intervention.

Cases Cited

By Kasirer J.

Applied: *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Vivendi Canada inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554; **referred to:** *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725; *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106; *Transport TFI 6 v. Espar inc.*, 2017 QCCS 6311; *Beauchamp v. Procureure générale du Québec*, 2017 QCCS 5184; *Bramante v. Restaurants McDonald's du Canada limitée*, 2018 QCCS 4852; *Imperial Tobacco Canada Ltée v. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, 55 C.C.L.T. (4th) 1; *Laflamme c. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638; *Souscripteurs du Lloyd's v. Alimentations Denis & Mario Guillemette inc.*, 2012 QCCA 1376; *Guilbert v. Vacances sans Frontières Ltée*, [1991] R.D.J. 513; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Western Canadian Shopping Centers Inc. v.*

Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534; *Fisher v. Richardson GMP Ltd.*, 2019 ABQB 450, 95 Alta. L.R. (6th) 172; *Louisméus v. Compagnie d'assurance-vie Manufacturers (Financière Manuvie)*, 2017 QCCS 3614; *Brunelle v. Banque Toronto Dominion*, 2009 QCCS 4605; *Paré v. Desjardins Sécurité financière*, 2007 QCCS 4566; *Farber c. N.N. Life Insurance Co. of Canada*, [2002] AZ-50123096; *Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446; *Chandler c. Volkswagen Aktiengesellschaft*, 2018 QCCS 2270; *Dupuis c. Desjardins Sécurité financière, compagnie d'assurance-vie*, 2015 QCCS 5828; *London Life Insurance Company v. Long*, 2016 QCCA 1434; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269, aff'd 2008 ONCA 587, 92 O.R. (3d) 513; *Desjardins Sécurité financière, compagnie d'assurance-vie v. Dupuis*, 2018 QCCA 1136; *Hy Bloom inc. v. Banque Nationale du Canada*, 2010 QCCS 737, [2010] R.J.Q. 912.

By Côté J. (dissenting in part)

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 43 C.B.R. (5th) 269, aff'd *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3

S.C.R. 158; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299; *Charles v. Boiron Canada inc.*, 2016 QCCA 1716; *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199; *Whirlpool Canada v. Gaudette*, 2018 QCCA 1206; *Martin v. Société Telus Communications*, 2010 QCCA 2376; *Pharmascience Inc. v. Option Consommateurs*, 2005 QCCA 437, [2005] R.J.Q. 1367; *Union des consommateurs v. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243; *Labelle v. Agence de développement des réseaux locaux de services de santé et de services sociaux — région de Montréal*, 2011 QCCA 334; *Toure v. Brault & Martineau inc.*, 2014 QCCA 1577; *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380; *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859; *Fortier v. Meubles Léon Ltée*, 2014 QCCA 195; *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201; *Trudel v. Banque Toronto-Dominion*, 2007 QCCA 413; *Groupe d'action d'investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923; *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433; *Benabu v. Vidéotron*, 2018 QCCS 2207, aff'd 2019 QCCA 2174; *Seigneur v. Netflix International*, 2018 QCCS 4629, aff'd 2019 QCCA 1671; *Raleigh v. Maibec inc.*, 2016 QCCS 2533; *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, 111 O.R. (3d) 745; *Federal Express Canada Corporation v. Farias*, 2019 QCCA 1954; *Sofio v. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820; *Belmamoun v. Brossard (Ville)*, 2017 QCCA 102, 68 M.P.L.R. (5th) 46; *Durand v. Attorney General of Quebec*, 2018 QCCS

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APPEAL from a judgment of the Quebec Court of Appeal (Bich, St-Pierre and Gagnon JJ.A.), 2017 QCCA 1673, [2017] AZ-51437750, [2017] J.Q. n° 14964 (QL), 2017 CarswellQue 9582 (WL Can.), setting aside a decision of Dallaire J., 2016 QCCS 839, [2016] AZ-51437750, [2016] J.Q. n° 1632 (QL), 2016 CarswellQue 1552 (WL Can.). Appeal allowed in part, Moldaver, Côté and Rowe JJ. dissenting in part.

Mason Poplaw, Isabelle Vendette, Samuel Lepage and Gabriel Faure, for the appellants.

Bruce W. Johnston, Mathieu Charest-Beaudry, Serge Létourneau, Audrey Létourneau, Julien Delisle, Guy Paquette and Christophe Perron-Natel, for the respondent.

English version of the judgment of Wagner C.J. and Abella, Karakatsanis, Brown, Martin and Kasirer JJ. delivered by

KASIRER J. —

[1] With the greatest respect for the contrary view, I agree with the Court of Appeal’s decision to authorize the class action proposed by the respondent, both against Desjardins Financial Services Firm Inc. (“Firm”) and against Desjardins Global Asset Management Inc. (“Management”). In my respectful opinion, the Superior Court judge erred in dismissing the Re-amended and particularized motion (2) for authorization to institute a class action and to obtain the status of representative, reproduced in A.R., vol. II, at pp. 104-62 (“motion”), against the appellants. Except for one matter, I agree with the better part of the Court of Appeal’s analysis.

[2] It is true, as the jurisprudence of this Court has made plain, that a judgment dismissing a class action is entitled to deference on appeal, particularly because of the discretionary nature of the decisions of authorization judges. In this case, however — and this is conceded by the appellants in several respects — the Superior Court judge erred in analyzing certain aspects of the conditions set out in subparas. (a) and (b) of

art. 1003 of the former *Code of Civil Procedure*, CQLR, c. C-25 (“former *C.C.P.*”) (which correspond to subparas. (1) and (2) of art. 575 of the new *Code of Civil Procedure*, CQLR, c. C-25.01 (“new *C.C.P.*”). Like the Court of Appeal, I am respectfully of the view that these errors in many respects undermine the deference that must ordinarily be shown by an appellate court.

[3] I am also of the opinion that some of these errors, including that of disregarding the contractual relationship between Firm and the group’s members, are overriding because they strike at the very heart of the judge’s decision not to authorize the class action. As the Court of Appeal stated, the respondent’s position was not well circumscribed before the Superior Court. In fact, the action against Firm is based on allegations that a common omission, made by all of its representatives, gave rise to liability for this appellant because of the duty to inform that was inherent in its contractual relationship with the respondent and the other members of the group. The alleged fault is therefore a systematic breach of the duty owed by Firm, acting through its employees or mandataries, to inform the group’s members of the risks associated with the investments at issue — an omission that was identical and generalized across the group. Having declined to find that there was a contract, the judge did not identify this omission by Firm, which, according to the motion, is a source of contractual liability for Firm under art. 1458 of the *Civil Code of Québec* (“*C.C.Q.*”).

[4] First of all, the “direct” contractual liability alleged against Firm is based on its own fault. It is argued that Firm is at fault for giving insufficient instructions to

all of its representatives. It is also alleged that Firm’s representatives, having received false, misleading or incomplete information, failed in turn to provide adequate information to the respondent and the other members of the group, thereby causing them loss. According to the position the respondent wishes to argue on the merits, this generalized omission gave rise to “indirect” contractual liability for Firm as a mandator or employer.

[5] Despite various concessions made at the hearing in this Court, the appellants argue — incorrectly, in my view — that the action against Firm must be characterized as a [TRANSLATION] “class action based on the representations made individually by hundreds of financial advisers” (A.F., at para. 17). I disagree: the motion alleges that all of the representatives failed in the same way to discharge their contractual duty to inform each member of the group of the risks associated with the proposed investment, thereby making the appellant Firm indirectly liable for an identical fault committed systematically by all its representatives.

[6] Contrary to what the motion judge held, I am therefore of the view that the respondent has met the conditions relating to each of the legal bases for the proposed class action against Firm.

[7] Moreover, because of errors made by the Superior Court in assessing the allegations against the appellant Management — again largely conceded — this aspect of the class action must also be authorized, as the Court of Appeal held. However, I would acknowledge the respondent’s concession that he is not seeking, on his own

behalf or on behalf of the group, punitive damages in relation to the “Affected ABCP” (asset-backed commercial paper) — a definition not disputed by the parties — that is subject to a restructuring process and a related sanction order made by an Ontario court under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”).

[8] Finally, I am of the opinion that, in performing her screening function, the motion judge trenched upon the work of the trial judge, both with regard to Firm and with regard to Management. As the Court of Appeal correctly pointed out, this too is an error that, under the established standards, provides a basis for appellate review of the judge’s decision.

[9] In fairness to the motion judge, I note that the parties did not make life easy for her. The respondent’s motion — amended thoroughly along the way, including with respect to the initial position put forward — is not the most elegant of its kind. The judge’s task was also complicated by the procedural initiatives of all kinds undertaken by the appellants — examinations, production of documents, motions for particulars. The Court of Appeal rightly noted that the steps taken by the appellants seemed [TRANSLATION] “at first glance to be inconsistent with the idea of a summary proceeding” (2017 QCCA 1673, at para. 36 (CanLII)). The increasing complexity of the proceedings and the excessive volume of evidence may have prompted the authorization judge to take on, perhaps reluctantly, but no less inappropriately, the role of ultimate arbiter of the facts rather than limiting herself to analyzing the proposed legal syllogism.

I. Preliminary Remarks

[10] Once it found that there were grounds to intervene, the Court of Appeal thought it appropriate to review — and it was right to do so — the procedural and factual background of the case. I adopt its account as my own, subject to a few additional points raised by the parties’ arguments. Before going any further, I also wish to make a few remarks concerning the debate between the parties.

[11] *First preliminary remark:* The standard for authorizing a class action is not in dispute in this appeal. This is so despite the fact that, in the factum they filed with this Court, the appellants criticize the Court of Appeal’s judgment harshly as being [TRANSLATION] “a new milestone in calling into question the work of the Superior Court’s authorization judges” (A.F., at para. 11), and despite the fact that, in their application for leave to appeal, they asked in part that this Court [TRANSLATION] “clarify the application of the test developed in [*Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3] in the context of market intermediaries’ liability for the actions of financial advis[e]rs” (para. 16). Focusing more specifically on the expression [TRANSLATION] “read between the lines” used by the Court of Appeal (at para. 33), the appellants state the following in their factum:

[TRANSLATION] By establishing that authorization judges must now “read between the lines” to identify arguable cases in allegations that are “not perfect”, the Court of Appeal is giving perilous guidance that is contrary to the principles laid down by this Court with respect to the burden on applicants to articulate their syllogism in a clear and sufficient manner. That guidance alone warrants the intervention of this Court [Footnote omitted; para. 34.]

In support of this assertion, the appellants cite the reasons of the judges who dissented or dissented in part in *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, thus inviting the Court to reconsider a decision it rendered in 2019.

[12] This position is surprising and contrasts with the grounds raised by the appellants at the hearing, during which they did not even mention the expression “read between the lines”. In answer to questions from the members of the panel, counsel for the appellants conceded that the purpose of their appeal was not to challenge the principles established by this Court in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, and *Vivendi* or — despite what is stated in the appellants’ factum — to move away from the majority opinion in *Oratoire*.

[13] Because my colleague deals at length with the expression “read between the lines”, which she believes reflects a methodological error made by the Court of Appeal, I think it will be helpful to explain why, in my view, this expression should not be understood as a departure from the applicable law.

[14] To dispel any confusion on this point, I will quote the Court of Appeal’s words in their context:

[TRANSLATION] Stated otherwise, on the basis of the facts alleged in the application for authorization — facts that, in addition, must in principle be assumed to be true — “[t]he applicant’s burden at this stage is to establish an arguable case”, according to the Supreme Court in *Infineon*, and nothing more. Of course, the Supreme Court added immediately, referring to *Harmegnies v. Toyota Canada inc.*, these factual allegations must,

however, not be vague, general or imprecise and must “be accompanied by some evidence to form an arguable case”. What does this mean?

On the one hand, while it is true that one must not be satisfied with vagueness, generalities and imprecision, it would be wrong to close one’s eyes to allegations that are perhaps not perfect, but whose true meaning is nonetheless clear. One must therefore be able to read between the lines. To do otherwise would be to adopt an unduly literal or rigid approach and to give what the Supreme Court stated in this regard a meaning that it does not have.

On the other hand, it must be understood that generic allegations will not suffice, as the facts raised must, in light of the applicable law, be specific enough to make it possible to comprehend the gist of the proposed narrative and to verify on that basis that the conditions of art. 575 *C.C.P.* are met, that is, that the legal syllogism is arguable and that the issues of fact and law underlying it are sufficiently common that their resolution will advance the case for the benefit of each of the members of an otherwise appropriate class, whose interests will be assured by a person capable of properly representing them; these conditions must be interpreted and applied in a manner that “favours easier access to the class action”. There is therefore no requirement that the person seeking authorization to institute a class action specify in minute detail all the allegations being made or the evidence that the person intends to adduce in support of those allegations at the trial on the merits, an approach rejected in *Infineon* by the Supreme Court, which noted that “the applicable standard is that of showing an arguable case, not the more onerous one of proof on a balance of probabilities”. [Footnotes omitted; paras. 32-34.]

[15] Contrary to what the appellants argue in their factum, I do not think that the expression “read between the lines” reflects any error by the Court of Appeal. A careful reading of the passage shows that this figurative expression was used simply to caution against being overly literal in analyzing a motion for authorization to institute a class action, and not to signal a change in the law. When the Court of Appeal’s reasons are read as a whole and the justifications it gave for intervening are considered in context, one plainly understands that “read between the lines” is not an invitation to

search in a vacuum — on the blank page — for allegations that are missing from the motion.

[16] A few paragraphs earlier, the Court of Appeal explained that an overly strict approach at the authorization stage, however laudable the intention behind it may be, is not consistent with the approach proposed by this Court in *Infineon, Vivendi, Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, and *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, i.e. a flexible, liberal and generous approach to the authorization conditions that “favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation” (*Infineon*, at para. 60, quoted in C.A. reasons, at para. 29). I would add that the Court of Appeal properly relied on *Infineon*, in which, as we know, this Court explained that inferences can be drawn, not from an absence of words, but from the allegations themselves (see *Infineon*, at para. 89). It is true, as my colleague states, that inferences may not be drawn in the complete absence of allegations. In my view, however, the Court of Appeal adhered perfectly to the principles laid down in *Infineon*: through its approach, those principles were implemented. The Court of Appeal relied precisely on the allegations at paras. 107 et seq. of the motion to identify the breach committed by Ms. Blanchette, the financial adviser, that is, failing to inform the respondent of the risks associated with the investment (see, e.g., para. 77). The Court of Appeal’s approach also allowed it to overlook the fact that the motion was poorly worded in some respects, for example, by not dwelling on an ill-chosen word in the motion but instead reading the entire

paragraph, even the entire motion, in order to understand the [TRANSLATION] “true meaning” of the allegations (see, e.g., para. 95).

[17] The same approach has been adopted in this Court’s decisions — including *Oratoire*, rendered after the Court of Appeal’s judgment. My colleague Brown J., writing for the majority in that case, accepted J.J.’s argument, which was not explained in detail in the allegations, that the combination of several pieces of evidence “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” (para. 24 (emphasis in original); see also para. 69). Brown J. added that authorization judges 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’” (para. 24; see also para. 60). It can be seen from the majority’s reasons in *Oratoire* that the applicant must present facts that are specific enough to allow the legal syllogism to be considered but that it is not necessary to provide step-by-step details of the legal argument to be made in the submissions on the merits of the case. In this regard, the Court of Appeal was not changing or reshaping the law by not requiring that the entire legal argument be laid out in minute detail.

[18] In using the expression “read between the lines”, the Court of Appeal also intended to denounce the rigidity and literalism that, in its view, were reflected in the motion judge’s decision. It found that this ill-advised rigidity was the source of the

judge’s reviewable error in [TRANSLATION] “stepping into the realm of the evidence and the merits and imposing on the applicant a burden going well beyond the requirements set by art. 575 *C.C.P.* (art. 1003 of the former *C.C.P.*)” (para. 35). I agree with my colleague that the judge made this error, including by concluding that the 2008 financial crisis, not Management’s fault, was the cause of the loss suffered.

[19] There is therefore no question of inventing wording that is not in the motion or of relieving the applicant of its burden of demonstration. As the Court of Appeal explained, [TRANSLATION] “[f]orm is, of course, important, but it must not prevail over substance, even in a class action” (para. 95). Rigour is called for in reading the motion as a whole, but, as the Court of Appeal stated, a rigid or literal approach is risky. In 2006, in a book published prior to the decisions in *Infineon*, *Vivendi* and *Oratoire*, Professor Pierre-Claude Lafond pointed out the flaws in an overly rigid approach, noting that [TRANSLATION] “[t]he liberal judicial interpretation, which is now the prevailing one, ensures that the class action does not become inaccessible for essentially technical reasons, depriving litigants of a powerful instrument of access to justice” (*Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at p. 272; see also pp. 7, 81-88 and 280). This Court took note, relying on the writings of Professor Lafond and other sources to endorse this liberal approach in *Oratoire* (see paras. 42, 56 and 79).

[20] In short, contrary to what the appellants suggest, the Court of Appeal did not invent wording or a cause of action by using this expression. To “read between the

lines” is to take the wording as a starting point from which to discover the full message it conveys, including the necessarily implied message. Paradoxically, the appellants take the expression literally by insisting that “read between the lines” means to read into the blank spaces something not written there. They seem to forget the meaning of the metaphor chosen by the Court of Appeal, lapsing into precisely the same literalism that the expression is intended to denounce.

[21] Indeed, the appellants have not cited any decision in which the expression “read between the lines” has caused confusion or has been interpreted as an invitation to rewrite a cause of action. On the contrary, it seems to me that the judges of the Superior Court have no particular difficulty understanding these words, as they have found, for example, that [TRANSLATION] “the allegations in an application for authorization need not specify in minute detail the evidence that an applicant intends to adduce on the merits, and that the allegations may be imperfect but their true meaning may nonetheless be clear” (*Transport TFI 6 v. Espar inc.*, 2017 QCCS 6311, at para. 23 (CanLII), citing *Asselin (C.A.)* and *Infineon*; see also: *Beauchamp v. Procureure générale du Québec*, 2017 QCCS 5184, at paras. 18 and 73 (CanLII); *Bramante v. Restaurants McDonald’s du Canada limitée*, 2018 QCCS 4852, at para. 10 (CanLII)). The concerns about a slippery slope that will transform the state of the law in Quebec if the Court of Appeal’s decision is upheld are therefore, in my view, unfounded.

[22] *Second preliminary remark:* The appellants’ categorical assertion that it is impossible to bring a class action against a brokerage firm based on wrongdoing by

investment advisers must be rejected. In urging the dismissal of the action against Firm, counsel for the appellants argued at the hearing that any action based on faults committed by representatives, like the one proposed in this case, is *necessarily* an individual action because the relationship between an adviser and a client is inevitably personalized around the client's risk tolerance and the advice relating to it. This statement is lacking in nuance, as my colleague acknowledges. As we will see, not only do the appellants paint an inaccurate picture of the case law, but the categorical position they put forward to defeat the class action against Firm is also inconsistent with the Quebec authorization judge's task of verifying whether there is an identical, similar or related question that will advance the case, a condition more flexible than the one that exists in the rest of the country. Although my colleague states that she would not close the door to the possibility of a class action in similar circumstances, her reasons, if accepted by this Court, would in my respectful view reflect, in their practical effects, the appellants' assertion.

[23] *Third preliminary remark:* The case is shaped to a large extent by the appellants' concessions that the motion judge made several errors. As I have already noted, they concede that the judge erred in denying the existence of a contractual relationship between Firm and the group's members, a relationship on which Mr. Asselin relies to argue that this appellant is contractually liable. The appellants also concede that the motion judge erred in excluding the possibility of a cause of action against Management as the designer of the investments at issue. Moreover, they admit that she rejected a class action against Management pursuant to art. 1003(a) of the

former *C.C.P.* without having analyzed this appellant’s situation, as she confined herself to examining Firm’s situation alone. In this Court, the appellants do not dispute the fact that there are what are called “common” questions relating to Management. They also concede that their argument concerning the release related to ABCP would prevent only the claim for punitive damages from being authorized, not the aspect of the proposed action that deals with compensatory damages.

[24] Not only do all of these concessions clarify the debate that remains to be resolved by this Court, but they also confirm that the Court of Appeal was correct to intervene despite the deference generally owed to authorization judges. With respect, in light of these conceded errors — most of which were relevant to the motion judge’s decision to deny authorization — I think that it is particularly difficult to argue that the Court of Appeal intervened in this case without any grounds or by “rewriting” Mr. Asselin’s cause of action.

[25] *Fourth preliminary remark:* Although my colleague Côté J. writes that “[t]he flexible and liberal approach to authorization established by this Court’s decisions in *Infineon*, *Vivendi* and subsequent cases is not being called into question here” (para. 199), I am, with respect, of the view that this would in fact be the unavoidable consequence of what she proposes in her reasons. Her analysis might be thought to deviate from what this Court has said about the approach to be taken at the authorization stage on at least two points. First, she suggests that a court’s role is not simply to screen out frivolous applications, thereby contradicting the principles laid

down by this Court in *Infineon* and *Oratoire*. Second, by disregarding the common question raised by this case and emphasizing that “[t]he individualized analysis required by the action precludes the possibility of proceeding on a collective basis” (reasons of Côté J., at para. 247), she seems to add a requirement, in the analysis of the condition set out in art. 1003(a) of the former *C.C.P.*, that the common questions predominate over the individual ones. However, Quebec law requires only that there be a common question that can advance the action in a not insignificant manner. In my respectful view, these assertions seem to have the effect of undermining the generous and flexible approach adopted by this Court in *Infineon*, *Vivendi* and *Oratoire*.

[26] I note that the parties have not asked the Court to reconsider its decisions. Indeed, the appellants conceded at the hearing that the appeal to this Court is not meant to change the law; it is an appeal in which this Court’s role is simply to “correct errors” allegedly made by the Court of Appeal. I agree with the appellants on this point, and I would even go further: not only does this case provide no basis for changing the law, but the Court of Appeal adhered perfectly to the analytical framework established in *Infineon* and *Vivendi*, and even though *Oratoire* was decided after the Court of Appeal rendered its judgment, its reasoning was also consistent with the main principles enunciated by this Court in that case, which, until further notice, states the law.

[27] I therefore propose to confine myself to the law as it stands following *Infineon*, *Vivendi* and *Oratoire*. As we know, the threshold for authorizing a class action in Quebec is a low one. Once the four conditions set out in art. 1003 of the former

C.C.P. (now art. 575 of the new *C.C.P.*) are met, the authorization judge *must* authorize the class action; the judge has no residual discretion to deny authorization on the pretext that, despite the fact that the four conditions are met, a class action is not “the most appropriate” vehicle (see *Vivendi*, at para. 67). Questions of law may be resolved by an authorization judge if the outcome of the proposed action depends on the judge’s doing so, but this choice is generally a discretionary one (see *Oratoire*, at para. 55). This reflects the purpose of the authorization stage of the class action: the judge’s role is to filter out frivolous claims, and nothing more (see *Oratoire*, at para. 56, citing, among other things, *Infineon*, at paras. 61, 125 and 150). Finally, there is no requirement in Quebec that the common questions predominate over the individual ones (see *Vivendi*, at paras. 56-57). On the contrary, a single common question is enough if it advances the litigation in a not insignificant manner. It is not necessary that the common question be determinative of the outcome of the case (see *Vivendi*, at para. 58; *Oratoire*, at para. 15).

[28] With respect, I am therefore of the view that my colleague and I do not disagree on mere questions “of application” of well-established principles (reasons of Côté J., at para. 200).

II. Background and Parties’ Arguments

[29] The respondent submits that the appellant Firm incurred contractual liability to him and the other members of the group by reason of its own conduct as well as through its representatives. This liability is based on what the Court of Appeal

referred to as a [TRANSLATION] “dual fault”: (i) Firm’s own systematic failure to give all of its representatives sufficient instructions concerning the fact that there were risks associated with the investments issued by the Desjardins caisses populaires (Firm’s “direct” fault), and (ii) a systematic failure by all of Firm’s representatives to disclose those risks to the group’s members (Firm’s “indirect” fault). The parties agree that Firm can be liable for the faults of its financial advisers (including Mr. Asselin’s adviser, Ms. Blanchette) because they were acting as its employees or mandataries.

[30] The respondent also argues in his motion that the appellant Management is extracontractually liable to him and the other members of the group. This liability is twofold as well: (i) Management allegedly committed an extracontractual fault in the design of the capital-guaranteed deposits and is therefore liable as the [TRANSLATION] “designer” of the investments; and (ii) Management allegedly managed the invested funds incompetently, thereby incurring extracontractual liability as the “manager” of the investments.

[31] According to the main allegations in the motion, the basis for the appellants’ liability is that Firm [TRANSLATION] “breached its informational obligations and duties and is liable for the damage sustained by the Group’s members” (A.R., vol. II, at p. 44, para. 105), while Management “breached its obligations and duties of competence with regard to design and management and is liable for the damage sustained by the Group’s members” (p. 44, para. 106 (emphasis deleted)).

[32] The appellants dispute the existence of common questions in the proposed action against Firm pursuant to art. 1003(a) of the former *C.C.P.* They also challenge the sufficiency of the allegations in the proposed action against Firm and Management in light of the conditions established under art. 1003(b) of the former *C.C.P.* Furthermore, they take issue with the Court of Appeal for not applying the judicial release with respect to ABCP, which would have led that court to deny the claim for punitive damages against Management at this preliminary stage.

[33] I propose to discuss the grounds of appeal in detail, in relation to each appellant, in the same order as the motion judge: first from the perspective of art. 1003(b) of the former *C.C.P.* and then by reference to the “common” questions under art. 1003(a) of the former *C.C.P.*

III. Firm

A. *Article 1003(b) of the Former C.C.P.: “Arguable Case” Against Firm*

[34] The appellants allege that there is no arguable case against Firm. On this point, the motion judge found that there was no good colour of right for a potential contractual claim against Firm because of the lack of a contractual relationship between Firm and Mr. Asselin. The judge noted the absence of any wrongful breach of the deposit agreements, which were contracts that were not binding on Firm, and also found that Firm could not be alleged to have committed a particularized contractual fault (2016 QCCS 839, at paras. 70 and 82 (CanLII)). Absent a signed contract or a mandate,

Firm was not contractually liable to the respondent or the other members of the group, which, in the judge's view, defeated the position advanced by the respondent in his motion (para. 136).

[35] We know that the Court of Appeal viewed this as an error. In its opinion, the contractual claim against Firm was not based on the deposit agreements. The motion and the evidence adduced in support of the allegations confirmed that Ms. Blanchette, Firm's planner who had advised the respondent, Mr. Asselin, was an employee or mandatary of Firm, just like the individuals who had advised the other members of the group (para. 51, note 63, and para. 52, note 66). Those representatives linked Firm to the group's members through a contract for investment advice, a contract that existed independently of the deposit agreements entered into with the caisses populaires (paras. 49-82).

[36] At the hearing in this Court, the appellants rightly conceded that the motion judge had erred on this point and that there was a contract between Firm and the group's members. Counsel thus admitted that Ms. Blanchette and the other financial advisers were representatives of Firm — its employees or mandataries — and that, as such, their faults could give rise to contractual liability for Firm (transcript, at pp. 10 and 19). The contractual basis for Firm's liability is therefore no longer in issue.

[37] The existence of this contractual relationship between Firm and the group's members is a fundamental element of the proposed legal syllogism, which makes it possible to argue that Firm is *contractually* liable. This being the case, I cannot agree

with the view that the Court of Appeal intervened with respect to this conclusion in the absence of a palpable and overriding error or an error of law by the motion judge. With respect, it seems equally difficult to argue that the Court of Appeal rewrote or “reorient[ed]” the respondent’s cause of action (A.F., at para. 28; reasons of Côté J., at para. 236). To my mind, the appellants’ concession that the judge erred in refusing to recognize the contractual relationship between Firm and the group’s members is fundamental. This error shows that the motion judge simply did not understand the proposed legal syllogism, and the error is more than sufficient to justify the Court of Appeal’s intervention with respect to this condition in the proposed action against Firm.

[38] Despite their concession, the appellants submit that the allegations of the motion are, for the purposes of the assessment required by art. 1003(b) of the former *C.C.P.*, insufficient for the class action to be authorized. They argue that the respondent makes only [TRANSLATION] “vague, general and imprecise allegations” with respect to Firm’s faults. In the circumstances, they say, such allegations should be supported by some evidence, but that evidence is absent in this case.

[39] Specifically, the appellants argue that all of the documents filed by the respondent that allegedly contain misrepresentations came not from Firm, but from the caisses populaires that were the issuers of the capital-guaranteed deposits. Those documents cannot make up for the insufficiency of the allegations of fault against Firm, nor can they ground Firm’s liability. The appellants argue that the motion judge was right about this: the few exhibits that came from Firm, such as the respondent’s

planning forms, contain no specific representations concerning the capital-guaranteed deposits.

[40] These arguments must be rejected. In my view, there is no absence of allegations in the case at bar. On the contrary, the allegations are sufficiently precise, in accordance with the applicable standard, and are also supported by “some evidence” within the meaning of *Infineon* and *Oratoire*.

(1) Allegations of the Motion

[41] Once it is established — contrary to what the motion judge concluded from the record — that there was a contract, the factual allegations relating to the dual fault can be identified easily, and they must therefore be assumed to be true at the authorization stage.

[42] The proposed legal syllogism, which is based on a breach by Firm of its duty to inform, bears closer examination. In his motion, Mr. Asselin explains right in the summary that he is alleging that the appellants [TRANSLATION] “breached and violated the obligations and duties of information, competence and management . . .” (A.R., vol. II, at p. 105, para. 2 (emphasis added)). According to the motion, the appellants failed to “adequately infor[m] the Group’s members” (p. 105, para. 5 (emphasis added)) of the risky transactions conducted using the amounts the members had entrusted to them. With regard to injury, Mr. Asselin explains the loss of a return resulting from risky investment strategies (para. 8); with regard to causation, he states

that he “would never have agreed to invest in the PP and ALT Investments if the respondents [here, the appellants] had adequately informed him of the risks associated with these investments” (p. 106, para. 10 (emphasis added)). This is the legal syllogism advanced by Mr. Asselin for the proposed action against Firm.

[43] The faults are described with sufficient precision, and the information missing for the entire group relates, among other things, to the level of risk involved in the investments, their volatility and the way they worked, including the leverage used. First, there are paras. 107 and 107.1 of the motion: Firm described the investments as being [TRANSLATION] “safe and intended for a risk-averse investor”, and Firm failed to give its representatives sufficient instructions “regarding the characteristics and risks of the . . . Investments” (A.R., vol. II, at p. 147). In both cases, Mr. Asselin makes direct allegations against Firm. Because it had a monopoly on information about the structure and characteristics of the investments, Firm had a duty to inform its representatives so that they in turn could inform their clients. In the absence of adequate instruction concerning the investments, the representatives “were not therefore in a position to evaluate their advantages and disadvantages” (p. 147, para. 107.1).

[44] A specific allegation of fault made against the representatives can be found at para. 107.2 of the motion: [TRANSLATION] “The information provided by the representatives of Desjardins Financial Services to the Group’s members was therefore necessarily wrong or insufficient, if not false, deceptive or misleading” (A.R., vol. II, at p. 147). Firm’s liability for those faults is also alleged, since the respondent explains

that Firm was “responsible for the mutual fund representatives and financial planners working in the network of caisses populaires” (p. 110, para. 30) and, more specifically, that Firm was, “[i]n the context of this case . . . responsible for the representatives who offered PP and ALT Investments and solicited deposits from the Group’s members in the network of caisses populaires of the Desjardins Group” (p. 110, para. 32).

[45] It can therefore be understood that the proposed action is based not on a breach of the deposit agreements, but rather on a generalized and systematic breach of the duty to inform. Mr. Asselin alleges that Firm systematically breached its duty to inform by not adequately informing all of its representatives of the risks and characteristics of the investments (the “direct” fault). According to the facts alleged in the motion, the representatives, having received false, misleading or incomplete information, then failed to provide adequate information to the group’s members (the “indirect” fault). Firm’s alleged “dual fault”, and the basis for the action, is a generalized and systematic breach of its general duty to inform. Given that Firm dealt with the group’s members only through its representatives, this “dual fault” identified by the Court of Appeal refers, in other words, to two sides of the same coin: Firm’s breach of its duty to inform the group’s members directly itself, and to inform them indirectly through its representatives.

[46] The motion states, at paras. 73.7 and 73.8, that the promotional documents used by the representatives with their clients emphasized that the investments at issue had potential returns that were higher, regular and not very volatile. [TRANSLATION]

“However”, the motion reads, “these documents said nothing at all about the risks associated with these investments, apart from sometimes stating in a footnote that the returns might be nil” (A.R., vol. II, at p. 124 (emphasis deleted)).

[47] This is an allegation that there was a failure to disclose the risks, a failure that, according to the respondent, was generalized across the group and constituted an identical breach by Firm of its contractual duty to inform that was repeated systematically for each member of the group. The allegation against Firm must be analyzed in light of the very nature of the fault committed — an omission is, by definition, characterized by an *absence* of information. Firm’s liability allegedly [TRANSLATION] “arises from [its] denial or failure to disclose”, to borrow a useful expression from another context (see *Imperial Tobacco Canada Ltée v. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, 55 C.C.L.T. (4th) 1, at para. 813). In my view, it is therefore not a matter of seeking some particularized fault committed by the representative, Ms. Blanchette: the motion alleges faults of omission that were committed systematically by both Firm and its representatives.

[48] At paras. 73.9 and 73.10, as well as paras. 73.26 to 73.30, the motion provides additional information concerning breaches of a similar nature. And elsewhere, the emphasis is on the faults of omission committed as they relate to Firm’s direct and indirect liability. After explaining the leveraging of the financial products, the respondent alleges [TRANSLATION] “that at no time did the [appellants] explain to the Group’s members how the Investments worked” (A.R., vol. II, at p. 114, para. 52);

at para. 107.1.1, the respondent refers to the documents entered in evidence, alleging that they “gave no explanation, or a very incomplete explanation, of the leverage used to obtain the return on the PP and ALT Investments”; at para. 107.1.2, the respondent adds that “[t]hose documents merely provided an incomplete description of the PP and ALT Investments and presented the advantages of these investments without describing the risks associated with the PP and ALT Investments” (p. 147 (emphasis deleted)).

[49] In one form or another, Mr. Asselin alleges that at no time did Firm [TRANSLATION] “disclose to the Group’s members the risks associated with the liquidity issues and the financial leverage” for the investments (A.R., vol. II, at p. 148, para. 110). Mr. Asselin explains that the group’s members “could not have known, even with all due diligence” (p. 148, para. 115), that Management was using risky investment strategies that had not been disclosed. Furthermore, Firm “made false and misleading representations to the Group’s members . . . regarding the correlation with the stock markets” (p. 148, para. 116).

[50] On the basis of these facts, the motion alleges that Firm [TRANSLATION] “breached the informational obligations and duties it owes by law” (A.R., vol. II, at p. 149, para. 118) and that it is therefore contractually liable (p. 154, para. 145).

(2) Sufficiency of the Allegations

[51] Are these allegations sufficient to meet the condition set out in art. 1003(b) of the former *C.C.P.*?

[52] In *Oratoire*, Brown J., writing for the majority, explained that “[t]he applicant’s burden at the authorization stage is simply to establish an ‘arguable case’ in light of the facts and the applicable law”, a threshold he described as “low” (para. 58; see also *Infineon*, at paras. 65 and 67).

[53] With respect, the proposition that the role of authorization judges at this stage is not limited to screening applications for authorization is a change to the applicable law (reasons of Côté J., at paras. 218 and 220-21). None of the decisions cited to this effect (*Infineon*, at para. 59, *Vivendi*, at para. 37, and *Oratoire*, at para. 7, cited in the reasons of Côté J., at para. 220) describes the role of screening out frivolous actions as being separate from that of verifying compliance with the conditions set out in art. 1003 of the former *C.C.P.* (in this regard, see also Lafond, at p. 116, quoted with approval in *Oratoire*, at para. 56: [TRANSLATION] “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”).

[54] With respect, I do not think it is appropriate to revive a debate that was in fact settled by this Court as recently as last year. In *Oratoire*, the dissenting judge also suggested that “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” (para. 207). However, eight judges expressed a contrary view.

[55] Brown J., for the majority, explained that “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” (para. 58). He specifically noted that, “[a]s 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. 56 (emphasis in original)). He then referred to two other paragraphs of *Infineon* in which LeBel J. and Wagner J. (as he then was) stated unequivocally that “the purpose of the authorization stage is merely to screen out frivolous claims” (para. 56, citing *Infineon*, at para. 150; see also para. 125). The majority in *Oratoire*, relying in part on *Infineon* and *Theratechnologies*, also noted that its approach was already well established in the case law and academic literature (see paras. 56 and 58).

[56] Moreover, as Brown J. noted in response to the comments made by Côté J. in *Oratoire*, Gascon J. agreed with his position, and it would be wrong to say “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’” (para. 61 (emphasis in original)). Conscious of the fact that some would like this Court to strengthen the authorization process, Brown J. observed, however, that the “decisions in *Infineon* and *Vivendi* . . . can be said to have been endorsed by the Quebec legislature when the new *C.C.P.* came into force” (para. 62).

[57] In the case at bar, the burden of establishing “an ‘arguable case’ in light of the facts and the applicable law” is met (*Oratoire*, at para. 58). Mr. Asselin’s proposed cause of action is neither frivolous nor clearly unfounded.

[58] On the contrary, the proposed legal syllogism is perfectly arguable: a person who provides financial services is indeed subject to a duty to inform, and failure to comply with that duty may give rise to civil liability, for which the principal or mandator of the financial adviser at fault must answer (see *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638, at paras. 30-31; R. Crête and C. Duclos, “Les sanctions civiles en cas de manquements professionnels dans les services de placement”, in Crête, ed., et al., *Courtiers et conseillers financiers. Encadrement des services de placement* (2011), 361, at p. 394; *Souscripteurs du Lloyd’s v. Alimentations Denis & Mario Guillemette inc.*, 2012 QCCA 1376, at paras. 16-17 (CanLII)).

[59] As the Court of Appeal explained, the group’s members were in fact linked to Firm by [TRANSLATION] “a contract for services within the meaning of art. 2098 C.C.Q. or, if the services are not paid for directly, a similar *sui generis* contract” (para. 54). Under a contract whose object is the giving of advice, the obligation to give advice is the core prestation, while the obligation to inform is an accessory one (see D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 2004).

[60] It is important to understand the distinction between the duty to provide advice and the duty to inform, which are [TRANSLATION] “in theory distinct from one

another” (Lluelles and Moore, at No. 2002 (footnote omitted)). This distinction will also be relevant in analyzing the common questions.

[61] Grounded in the general obligation of good faith (arts. 6, 7 and 1375 C.C.Q.), the duty to inform relates to *all* contracts and, in principle, applies to *all* contracting parties (Lluelles and Moore, at Nos. 2001 and 2003). The *Private Law Dictionary and Bilingual Lexicons: Obligations* (2003) defines “obligation to inform” as an “[o]bligation to reveal to another facts that the latter, in order to adjust his or her conduct, may legitimately expect to receive” (p. 215). In contrast, “obligation to advise” is defined as an “[o]bligation to provide counsel to another in the furtherance of the latter’s interest” (p. 214). The duty to inform is less onerous and less individualized than the obligation to provide advice (M. Fabre-Magnan, *De l’obligation d’information dans les contrats: Essai d’une théorie* (1992), at paras. 471-72; F. Terré, P. Simler and Y. Lequette, *Droit Civil: Les obligations* (11th ed. 2013), at No. 455; J.-L. Baudouin and P. G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 306). As this Court explained in *Laflamme*:

The duty to provide advice requires that the manager make his knowledge and expertise available to the client, and that he use them better to serve the client’s interests in light of the client’s objectives. However, the duty to provide advice is not the same as the obligation to inform, the substance of the latter being more objectively quantifiable. [Emphasis added; para. 33.]

[62] The main obligation of a financial adviser, and of the adviser’s firm, is therefore to provide advice tailored to the client. Mr. Asselin, however, is relying on

the accessory obligation that Firm and all of the representatives had to present the characteristics and risks associated with the investments, that is, to provide each client with objective information, such as information about the leverage being used. This is the basis for the proposed legal syllogism, which the motion judge misunderstood when she conflated the duty to provide advice and the duty to inform.

[63] In *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, this Court observed that the scope of the obligation to inform is assessed on the basis of the following criteria: “[1] knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform; [2] the fact that the information in question is of decisive importance; [3] the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation” (pp. 586-87).

[64] The first point is not in any doubt, since Firm knows or is presumed to know the characteristics of the investments it recommends. The motion also alleges that the appellants [TRANSLATION] “knew as early as 2007 that a liquidity crisis affecting hedge funds would occur” (A.R., vol. II, at p. 148, para. 114), making the investments even more unstable. On the second point, Mr. Asselin alleges that he made the investments in question “on the strength of all [the] information” provided and passed on by Ms. Blanchette (p. 144, paras. 89-91) and that he “would never have agreed to invest in the PP and ALT Investments if the [appellants] had adequately informed him of the risks associated with these investments” (p. 106, para. 11). This

means that, according to the motion, the information was of decisive importance. On the third point, the motion alleges that “[t]he Group’s members were not in a position and could not have known, even with all due diligence, that [Management] was using significant leverage that might eliminate any possibility of obtaining a return at maturity” (p. 148, para. 115). The motion thus alleges that it was impossible for the members to inform themselves.

[65] In short, on my reading, and with respect for those who disagree, the wording of the motion makes it possible to understand the proposed syllogism without any need to reorient the cause of action or to guess what it is. Not only did the Court of Appeal fully understand that there was a contractual relationship between Firm and the respondent, but it also correctly observed that the class action against Firm was based in part on a breach of the duty to inform imposed by the contract. The relevant allegations refer to faults of omission that are said to be attributable to Firm.

[66] I therefore conclude that, contrary to what the appellants argue, the allegations are sufficient to establish an arguable case against Firm. The proposed syllogism is neither frivolous nor clearly unfounded in law. The allegations are precise enough to be assumed to be true. But even if it were to be found that the allegations lack precision, there is, in my view, a sufficient basis for them in the evidence adduced.

(3) The Evidence

[67] The appellants submit that the respondent’s assertions are not supported by “concrete”, “specific” or “tangible” facts (*Oratoire*, at para. 25, per Brown J., for the majority). In *Oratoire*, they say, the majority justified its conclusion by referring to a “table of victims” that had been entered in evidence. That table, which listed approximately 40 victims and close to 30 assailants, set out “‘specific, tangible’ facts that in themselves support[ed] J.J.’s claim that the Congregation knew about the alleged assaults on children by its members” (para. 23), a fact that could be proved by presumption. According to the appellants, there is nothing comparable in the evidence adduced by the respondent that could compensate for his insufficient allegations.

[68] I disagree, for three reasons.

[69] First, the motion does not allege a positive misrepresentation; it alleges an omission. In *Oratoire*, on the other hand, what was sought was evidence of positive wrongful acts — assaults on minors — and the applicant bore the ultimate burden of proving those acts.

[70] In contractual matters, the burden of proof depends on the intensity of the obligation. Here, the alleged omission corresponds to a breach of the duty to inform, which, unlike the duty to provide advice, is an obligation of result (*Lluelles and Moore*, at No. 2002). In the case of an obligation of result, [TRANSLATION] “mere proof by the creditor that the result was not achieved is sufficient to give rise to a presumption that the debtor is liable” (*Jobin and Vézina*, at No. 40; see also *Lluelles and Moore*, at No. 108). Thus, according to scholarly opinion, the burden of proving that the

information was provided lies on the debtor, in this case the appellants. In other words, evidence that Mr. Asselin did not receive the information owed to him would shift the burden of showing that the information was provided — that is, that there was no omission — to the appellants. Otherwise, as Professor Fabre-Magnan explains, if a creditor of the obligation to inform, in order to succeed, had to adduce evidence that the other contracting party had failed to provide information, the creditor [TRANSLATION] “would be required to demonstrate an indefinite negative proposition, which is by no means easy, and perhaps even impossible” (No. 545 (footnote)).

[71] Why does this matter here? At the authorization stage, the applicant bears the burden of demonstrating that the proposed legal syllogism is arguable, not the burden of proving each element of the syllogism on the usual civil balance of probabilities standard (*Oratoire*, at para. 58). The Superior Court judge applied the wrong standard to test the conditions set out in art. 1003(a) and (b) when she wrote that the applicant [TRANSLATION] “has not demonstrated that a representative actually provided the alleged documents or information” (para. 212 (emphasis added)). To assess the sufficiency of the evidence and the allegations, the judge instead had to consider the particular features of the context and what would or would not have to be proved at trial. Here, we are dealing with allegations of omissions and with a burden of proof on the merits that is lower in some respects. In this context, the evidence adduced by Mr. Asselin in support of allegations that must, in any event, be assumed to be true is more than sufficient.

[72] It is therefore not surprising that the action could be authorized without proof on a balance of probabilities that the information had not been provided. If the appellants had evidence that the information had in fact been given to the members and the representatives, they could have sought the Superior Court’s permission to adduce that evidence. We know that the sufficiency of the evidence of a possible breach is an issue for the trial on the merits. A finding that the allegations are supported by some evidence at this stage is not binding on the court that will decide the merits of the case and does not entail any loss of rights for the appellants, who will have ample opportunity at trial to present evidence and to make the argument that the promotional documents cannot ground a breach of Firm’s duty to inform. I reiterate that the purpose of this stage of the proceedings is only to authorize the filing of the motion to institute proceedings; the judgment on the motion for authorization of the action is [TRANSLATION] “merely a preliminary decision that could be varied at the trial, or even before, and does not prejudge the final outcome of the litigation” (Lafond, at pp. 116-17 (footnotes omitted)).

[73] Second, Mr. Asselin has filed many documents to support allegations concerning Firm’s failure to disclose, to all clients, the risks associated with the methods used to manage the investments. The filing of these exhibits serves to illustrate the absence of any adequate warning regarding those risks, thereby bolstering the plausibility of the allegations. The omissions show that the documents in question were deficient, and they therefore confirm the possibility that an omission was made systematically by all of Firm’s representatives.

[74] The appellants maintain that these documents contain no evidence of any misrepresentation, such that they cannot be viewed as “some evidence” needed to clarify and explain the vague and imprecise allegations made in the motion. However, the documents were filed not as evidence of what was said, but rather — in the context of allegations concerning the faults attributable to Firm — as evidence of what was not said. Here again, the Court of Appeal was correct, as it explained at para. 149 of its reasons that the respondent [TRANSLATION] “is basing his application . . . and his potential action against [Firm] not on these documents, but on the (alleged) fact that [Firm] and its representatives did not warn him or the other members of the group of the true risks associated with the PP and ALT investments”. The documents are a means to this end, not an end in themselves. Requiring a fuller demonstration of breaches at the authorization stage — for example, by emphasizing the need for evidence that the documents were in fact provided to all the members — would risk transforming this preliminary stage into an actual trial. It is true that the authorization stage is more than a mere formality, but it is also much less than an actual trial. As Professor Lafond explains, [TRANSLATION] “a motion for authorization must be treated as what it is: a simple screening mechanism, a preliminary proceeding that must in no way encroach on the merits of the case” (p. 134). This is the main risk we run in the case at bar, and, with respect, it is a risk about which the motion judge was less than vigilant.

[75] What significance should be given to the fact that some of these documents “did not come” from Firm but were, as the appellants note, prepared by the caisses populaires?

[76] None at all. Firm, through its representatives, chose to use these documents in the performance of its contract with the respondent and some other members of the group. The motion is clear in this respect (paras. 73.20, 73.23, 73.34, 73.42, 73.48, 73.69, 89.3 and 89.4). Regardless of their origin, when Ms. Blanchette gave documents to Mr. Asselin in order to provide him with information, she spoke to him and was thereby able to bind Firm.

[77] Thus, it is not so much the origin of the documents that is relevant to whether the case the respondent is trying to make against Firm is an arguable one, but rather the fact that Firm used the documents and provided them to others. It is alleged that this fact, and the choice made by Firm and its representatives to rely on the documents, are evidence of the breach of the contractual duty to inform alleged in support of Firm's indirect contractual liability. As a result of the failure to disclose the risks associated with the investments at issue, the same documents are also alleged to be evidence that the instruction given by Firm to the representatives was inadequate, which supports the allegation of direct contractual liability. This evidence will, of course, have to be tested at the trial on the merits, but it is sufficient for the action to be authorized.

[78] I would add that the prospectus exemption granted by securities legislation is equally irrelevant to the alleged breaches of the contractual duty to inform and to the failure to train the representatives properly. A document provided by a financial adviser that looks official, whether that document is required or not, may mislead an investor

if it contains false or incomplete information. The appellants are therefore wrong to argue, as they did at the hearing, that the documents cannot form the basis for a direct fault by Firm where the issuer — the caisses populaires — was not required by the applicable legislation to provide investors with information. Whether the documents were or were not necessary to comply with legislative requirements is not a deciding factor; what matters is that they were used by the representatives and that they were, according to the motion, deficient. The respondent alleges that Firm breached its obligations. Firm’s use of the documents is “some evidence” that, if need be, clarifies even further the allegations relating to the breaches that constitute, as the Court of Appeal put it, Firm’s “dual fault”.

[79] Third, Mr. Asselin’s pre-hearing examination is also relevant evidence. Lluelles and Moore note that in the case of [TRANSLATION] “non-performance of an obligation to do something, such as an absence of advice or information, the question of the burden of proof is more difficult, as the breach amounts to a negative, which is inherently difficult to establish persuasively” (No. 2014, note 259). They add, however, that it can be proved simply by testimony: “the creditor of the obligation to inform or to provide advice would have to state under oath that he or she did *not receive* such information or advice, which would make it possible to establish that the debtor did *not give* the information or advice” (No. 2014, note 259 (emphasis in original)). Mr. Asselin’s credibility and the probative value of his assertions are matters to be assessed at the trial on the merits.

[80] Contrary to what the appellants argue, the fact that Mr. Asselin was “happy” with his dealings with his adviser, Ms. Blanchette, is of no importance here; what is important is that he trusted her and that, during their discussions, he was not properly informed of the risk affecting this kind of investment. This is confirmed by his examination. The respondent’s position is that all of the investors were in the same situation.

[81] In conclusion, the allegations not only exist and are sufficiently precise, but they are also supported by the evidence in the record. It should be noted that in Quebec, unlike in the rest of the country, an applicant is not required to “show that the claim has a ‘sufficient basis in fact’” (*Oratoire*, at para. 58, citing *Infineon*, at para. 128). In this case, requiring conclusive documentary evidence of a failure to provide information would not only ask too much at the authorization stage, but would also impose on Mr. Asselin a burden more onerous than the one he will have to face during the trial on the merits, since an omission can be proved by any means, including testimony and inference.

[82] Far from reading the motion in a cursory manner or treating the authorization stage as a mere formality, the Court of Appeal analyzed the motion closely and rigorously. The appellants have not shown that it made any error with regard to the arguable case against Firm.

B. *Article 1003(a) of the Former C.C.P.: Identical, Similar or Related Question of Law or Fact That Can Advance the Cause of Action Against Firm in a Not Insignificant Manner*

[83] Unlike the motion judge, the Court of Appeal correctly held that a generalized and systematic breach of the duty to inform raised common questions.

[84] It should be borne in mind that, at the authorization stage, the decisions of the Quebec courts and of this Court require “a flexible approach to the common interest that must exist among the group’s members” (*Vivendi*, at para. 54). As a result, “even where circumstances vary from one group member to another, a class action can be authorized if some of the questions are common” (*Vivendi*, at para. 58). It is clear from the decided cases that [TRANSLATION] “[t]he fact that the situations of all members of the group are not perfectly identical does not mean that the group does not exist or is not uniform” (*Infineon*, at para. 73, citing *Guilbert v. Vacances sans Frontière Ltée*, [1991] R.D.J. 513, at p. 517) and that, “[a]t the authorization stage, the threshold requirement for common questions is low” (para. 72).

[85] Although some jurisdictions require that the common questions *predominate*, in Quebec, a single common question is sufficient as long as it advances the litigation in a not insignificant manner. LeBel J. and Wagner J. (as he then was), writing for a unanimous Court, explained this clearly in *Vivendi* (see para. 58; see also *Oratoire*, at paras. 15, 18 and 20). I would also note that the *C.C.P.* requires not a common *answer*, but rather a common *question* (*Vivendi*, at para. 51).

[86] The question of whether Firm misinformed its representatives, with the result that there was a generalized and systematic failure to inform the investor clients, is, by definition, a question common to all members of the group. Answering this

question would advance the litigation in a not insignificant manner. Given the nature of the allegations, there is even a strong possibility that the answer to the question will be the same for all members, although it is not necessary to demonstrate this at this stage. Nor is it necessary at the authorization stage to demonstrate the systematic nature of Firm's breach. This question requires the same analysis and "is significant enough to affect the outcome of the class action" (*Infineon*, at para. 72).

[87] According to the decided cases, attempting to determine whether the common question predominates distracts us from the central issue at the authorization stage, which is whether the common question plays a not insignificant role in the outcome of the case (see *Vivendi*, at para. 60; *Oratoire*, at para. 20). A common question may advance the litigation even if many individual questions remain.

[88] I must therefore respectfully disagree with my colleague's statement that "[t]he individualized analysis required by the action precludes the possibility of proceeding on a collective basis" (para. 247). In my respectful view, this position could distort the law on class actions in Quebec. I reiterate that the conditions set out in the *C.C.P.* do not require that the common questions predominate. The fact that a number of individual questions remain does not mean that the common question plays an insignificant role in the action. Care must be taken not to make the same error that was made by the authorization judge in *Vivendi*, who was "mistaken in emphasizing the possibility that numerous individual questions would ultimately have to be analyzed"

(para. 60). The fact that there are common questions in the proposed action becomes even clearer from the allegations once the following is understood:

- a) the action is based on a breach of the duty to inform;
- b) the duty to inform may be general in scope; and
- c) a class action for such a breach based on the adviser-client relationship is not impossible.

I propose to consider each of these three points in turn.

(1) The Action Is Based on a Breach of the Duty to Inform

[89] The appellants' arguments in this Court are focused on the following proposition: unless a direct fault by Firm or the systematic nature of the misrepresentations conveyed by its advisers is [TRANSLATION] "supported or demonstrated", as their counsel put it at the hearing, a class action cannot be authorized on the basis of the investor-adviser relationship, because that relationship involves too many individual issues. The appellants submit that the Court of Appeal, in authorizing the class action, disregarded unanimous case law to the effect that the claims made by the respondent and the other members necessarily vary with each investor's specific context and individual risk tolerance (in accordance with the "know your client" concept). They argue that a class action against a brokerage firm for a breach of the duty to provide advice is impossible in such circumstances.

[90] Once it is understood that the basis for the proposed action against Firm is a breach of the general duty to inform (and not the duty to provide advice), it becomes clear that there are common questions that meet the condition of art. 1003(a) of the former *C.C.P.* What is common to all the members is the generalized and systematic failure to disclose information concerning the risk associated with the investments. The appellants' arguments regarding the individualized duty to provide advice are therefore not relevant. Like the motion judge, the appellants are basing their reasoning on an incorrect understanding of the position taken in the motion.

[91] I come to this view for the following reasons.

[92] As discussed above, Mr. Asselin's proposed action is based on an alleged breach by Firm of its duty to inform. The motion is clear in this regard:

[TRANSLATION]

Faults

Breaches of the duty to inform

107. The PP and ALT Investments were represented and described to the Group's members as being safe and intended for a risk-averse investor, as will be shown more fully at the hearing;

107.1. Moreover, the representatives of Desjardins Financial Services were not given sufficient instructions regarding the characteristics and risks of the PP and ALT Investments and were not therefore in a position to evaluate their advantages and disadvantages;

107.1.1. In this regard, the documents describing the PP and ALT Investments . . . gave no explanation, or a very incomplete explanation, of the leverage used to obtain the return on the PP and ALT Investments;

107.1.2 Those documents merely provided an incomplete description of the PP and ALT Investments and presented the advantages of these investments without describing the risks associated with the PP and ALT Investments;

107.2 The information provided by the representatives of Desjardins Financial Services to the Group's members was therefore necessarily wrong or insufficient, if not false, deceptive or misleading;

108. In reality, the amounts allocated to the return on the PP Investment and the ALT Investment were invested in hedge funds with a leverage ratio of five (5) to one (1), as can be seen from the article by Jean Gagnon entitled "Pourquoi certains produits à capital garanti de Desjardins ne rapporteront rien", Exhibit R-14;

108.1 What is more, the hedge funds in which those amounts were invested were themselves leveraged, which multiplied the risk of the PP and ALT Investments;

109. The use of these strategies resulted in a loss of one hundred percent (100%) of the assets of the PP and ALT Investments allocated to the return, whereas the hedge fund market had losses of only thirteen percent (13%) as of September 30, 2008;

110. At no time, however, did the respondent . . . Desjardins Financial Services disclose to the Group's members the risks associated with the liquidity issues and the financial leverage, despite the fact that it was aware or could not have been unaware of those risks;

. . .

115. The Group's members were not in a position and could not have known, even with all due diligence, that the respondent . . . Desjardins Asset Management was using significant leverage that might eliminate any possibility of obtaining a return at maturity and that in fact caused the loss, in the fall of 2008, of the portion of the original deposit allocated to the return;

116. Furthermore, the respondent . . . Desjardins Financial Services made false and misleading representations to the Group's members . . . regarding the correlation with the stock markets;

117. Contrary to what the respondent . . . Desjardins Financial Services claimed, the PP and ALT Investments were profoundly affected by stock market fluctuations;

118. The respondent . . . Desjardins Financial Services failed to provide adequate information to the Group’s members and breached the informational obligations and duties it owes by law;

119. The faults of the respondent . . . Desjardins Financial Services concerning the obligations related to the disclosure of information occurred in a context in which the PP and ALT Investments were intended for a varied clientele including individuals with little knowledge of financial concepts; [Emphasis added; emphasis in original deleted.]

(A.R., vol. II, at pp. 147-49)

[93] The motion indicates that the group’s members were systematically misinformed. By giving its representatives documents that were misleading and incomplete, Firm misinformed them and did not give them the means to adequately inform the group’s members. The motion alleges that the information provided to the members was therefore necessarily wrong or insufficient, if not false, deceptive or misleading.

[94] The systematic nature of Firm’s breach is therefore clearly alleged. There is no question of reading something into the motion that is not there or of “reorienting” the respondent’s cause of action; it is enough to note, and to assume the truth of, Mr. Asselin’s allegation that Firm’s representatives were not given sufficient instructions regarding the products’ characteristics and, as a result, were unable in turn to inform the group’s members.

[95] It is also important to note that the information in question here was objective information that Firm never gave the representatives or the members concerning, among other things, the leverage used to obtain the return and the risky

nature of the investments (paras. 107.1.1 and 107.2). Mr. Asselin is not alleging that certain representatives gave the members personalized and subjective advice that was not in keeping with their individual risk tolerance. He is alleging that information that was essential to all the members was never given to the representatives and therefore could not be passed on to the members.

[96] That being the case, Mr. Asselin identifies common questions relating, again, to Firm's duty to inform. The common questions are specifically formulated by reference to the duty to inform, not the duty to provide advice:

[TRANSLATION]

A. Identical, Similar or Related Questions of Fact and Law That Link Each Member of the Group to the Respondents and That the Applicant Intends to Have Decided Through the Class Action

138. **Conformity of the financial product.** Did the PP and ALT Investments conform with the financial products that Desjardins Trust, Desjardins Financial Services and Desjardins Asset Management designed and/or offered to the Group's members?
139. **Duty to inform.** Did Desjardins Trust and Desjardins Financial Services owe the members of the Registered Group, in the case of Desjardins Trust, and the members of the Principal Group, in the case of Desjardins Financial Services, a duty under the *Deposit Insurance Act*, the *Act respecting the distribution of financial products and services*, the *Civil Code of Québec* and/or the applicable rules and/or practices to provide them with information with respect to the offering, design and management of the PP and ALT Investments?
140. If so, did Desjardins Trust and Desjardins Financial Services breach this duty by failing to clearly inform the members of the Registered Group, in the case of Desjardins Trust, and the members of the Principal Group, in the case of Desjardins Financial Services, that the PP and ALT Investments would include investment strategies

that might eliminate, before maturity, any possibility of a return?
[Emphasis deleted.]

(A.R., vol. II, at pp. 152-53)

[97] Despite being poorly worded at times, as the Court of Appeal noted, the motion is clear in identifying the breach of a duty to inform as the basis for Firm’s contractual liability. Nowhere in the motion is there any mention of a breach of an individualized duty to provide advice.

[98] It is therefore surprising that the appellants’ primary argument is that the *duty to provide advice* is too individualized to form the basis for a class action. It is true that a case based on the duty to provide advice and the responsibility to “be well informed” as to one’s client may be ill suited to a class action — but that is not the question. The position taken in the motion is not based on the individual liability of a financial adviser to a particular client, which would depend, on a case-by-case basis, on evidence of the client’s profile to establish whether the investment was in fact appropriate. As counsel for the respondent clearly explained before the Court of Appeal, [TRANSLATION] “[t]hat is not the basis for the action at all”:

The judge, in closing, the motion judge also said that a class action should not be authorized because, basically, what the applicants were asserting was the liability of an adviser to a client. It would be necessary to establish — as in the case of a management mandate between a client and a manager — it would be necessary to establish each client’s profile in order to determine whether in fact the product was appropriate for the client. It is absolutely not the case, it was never argued, we even told the Court — it mentions this in its judgment — that we were not pursuing a relationship based on the professional liability of a dealer or financial adviser to a client. That is not the basis for the action at all; the basis for

the action, the principal and essential legal syllogism put forward for this action, is that a product was represented as having particular characteristics even though it did not have those characteristics and, as a result, a product was sold, misrepresentations were made, a product was sold as being safe, including the return portion, even though it was being managed in a highly speculative manner through leverage, the use of leverage, in this case a ratio of one to five (1:5), five (5) to one (1), and even in the case of the hedge funds, twenty (20) to one (1). [Emphasis added.]

(A.R., vol. XIII, at pp. 29-30)

[99] The basis for the action is the duty to inform: it is alleged that the information provided by Firm was systematically truncated, incomplete or misleading.

(2) The Duty to Inform May Be General in Scope

[100] I emphasize the appellants' misunderstanding of the basis for the proposed action because the scope of the duty to inform and the scope of the duty to provide advice do not vary in the same way with each client's specific context.

[101] The duty to provide advice owed by Firm's representatives was indeed an individualized one, as the appellants contend and as my colleague notes as well. They rely on cases dealing with the individualization of the duty to provide advice, which I see no need to discuss, as that is not the basis for the action. Suffice it to say that the duty of financial advisers to provide advice requires [TRANSLATION] "consideration of the client's particular situation, goals and expectations" and that it "therefore requires a subjective assessment in order to tailor the advice to the client's specific situation" (Crête and Duclos, at pp. 394-95 (footnotes omitted)).

[102] It was to this duty to provide advice that counsel for the appellants referred at the hearing in his recurring argument about the “know your client” concept, that is, the responsibility of a financial adviser to be well informed as to his or her client and to tailor advice to the client’s situation. The advice given to each client takes into account the client’s level of risk tolerance and particular financial situation. That is not the action before this Court, however. As my colleague notes, “one of the most important obligations of securities dealers and financial advisers is to know their clients” (para. 243). But this does not mean that such advisers are not also subject to other obligations, which could be more general, a proposition with which my colleague agrees (para. 242).

[103] In this case, as we have seen, Firm and its representatives also had a duty to inform that coexisted with the duty to provide advice (R. Crête and C. Duclos, “Le portrait des prestataires de services de placement”, in R. Crête, ed., et al., *Courtiers et conseillers financiers. Encadrement des services de placement* (2011), 45, at p. 65).

[104] This duty to inform is, in many respects, less individualized and therefore more likely to give rise to common questions than the duty to provide advice. The duty to provide advice [TRANSLATION] “is subjective in nature and requires a great deal of skill as well as knowledge of the other contracting party’s needs” (Lluelles and Moore, at No. 2002). The duty to inform, on the other hand, “is quite easy to fulfil, as it simply involves transferring, during the course of the contract, information that is important to the other contracting party” (No. 2002). Unlike the duty to provide advice, which

depends on each client's idiosyncrasies, the duty to inform is therefore "above all largely dependent on the status of the parties" (No. 2006 (footnote omitted)).

[105] Here, the alleged fault is a breach of a *general* obligation to inform that affected *each* member, not a breach of an individualized obligation to properly advise a client. What Mr. Asselin alleges is that Firm and its representatives systematically failed to provide essential and *objective* information regarding the characteristics of the investments. It is therefore clear that the alleged breach of Firm's duty to inform is necessarily a common question, regardless of each client's specific characteristics.

[106] But what about the fact that the scope of the duty to inform varies with the context? As we have seen, the scope of the duty depends on "[1] knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform; [2] the fact that the information in question is of decisive importance; [3] the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation". The scope of the duty to inform is therefore assessed in light of the needs and knowledge of the creditor of the duty. This does not mean that there cannot be circumstances in which all of the creditors were deprived of information as a result of a systematic omission. Mr. Asselin is specifically alleging the existence of such circumstances, in which an [TRANSLATION] "informational imbalance" (Jobin and Vézina, at No. 313) and Firm's control of the information are common to all the members.

[107] In scholarly commentary, it is noted that the scope of the creditor’s duty to inform itself depends on whether it is possible for the creditor [TRANSLATION] “to know or have access to the information” (Jobin and Vézina, at No. 314; see also, e.g., S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (2nd ed. 2016), at para. 327). As Professor Fabre-Magnan observes, the same limit is found in French law where [TRANSLATION] “the creditor legitimately has no knowledge of the information” (Fabre-Magnan (1992), at Nos. 254 et seq.; see also J. Carbonnier, *Droit civil* (2004), vol. II, at No. 998). It is true that this lack of knowledge or impossibility, even in the context of the obligation to inform, can be assessed concretely in light of the individual capabilities of the person who claims to be owed the information. However, the case for a class action here is based on the idea that all of the investors were in this situation of impossibility because of the breaches committed by Firm in disseminating information about the risks to its own mandataries and employees.

[108] Indeed, as alleged in the motion, the group’s members could not have known the information that Firm had about how the investments worked, “even with all due diligence”. Accordingly, the fact that the duty to inform does not extend to what the creditor already knows or is presumed to know has no impact on Mr. Asselin’s position. In any event, if Firm wishes to show that, despite its silence, some clients already knew or should have known the characteristics of the investments, this goes to the defence that this appellant can raise at the trial on the merits. At this stage of the proceedings, the alleged facts must be assumed to be true, and Mr. Asselin is clearly alleging that it was impossible for clients to find out the relevant information so that

they could know the characteristics of the investments. The questions raised with respect to Firm's alleged breach are therefore common to all the clients, regardless of their level of financial education.

[109] Moreover, the appellants' argument that expertise and risk tolerance are specific to each client is immaterial given that Mr. Asselin is alleging a general failure to disclose information that was owed *to all members* and was of decisive importance *to all members*. This was what counsel for Mr. Asselin explained before the Court of Appeal:

[TRANSLATION] So it is simply the equivalent of saying, here are a hundred (100) people or a thousand (1,000) people who ordered a car, I don't know, a Buick, and received a scooter. So there is no need to look at why the people wanted, the applicants or the members wanted a car, what they were going to do with the car, whether it was really a car that was suitable for them; there's no need to do that.

(A.R., vol. XIII, at pp. 30-31)

[110] I note that my colleague is critical of the motion for not alleging "that a systematic fault was committed by Firm's representatives, which, in [her] opinion, is essential for a common question to be found to exist" (para. 256). As we have seen, however, para. 107.2 of the motion states that "[t]he information provided by the representatives of Desjardins Financial Services to the Group's members was . . . necessarily wrong or insufficient, if not false, deceptive or misleading". This, in my respectful view, is an adequate allegation of fault on the part of the representatives.

[111] I will also say, since the appellants reproach Mr. Asselin for not offering any concrete criticisms of his financial adviser at the time, that it is not a question of pointing the finger at a financial adviser who is alleged to have been particularly incompetent. On the contrary, the argument is that by failing to properly train its representatives, Firm doomed all of them to commit the same fault.

[112] It is therefore not the Court of Appeal that rewrote the respondent's motion by divining a fault committed by the financial advisers, including Ms. Blanchette. In my view, it is rather the appellants that are reorienting the cause of action by regarding the action as being based on the poor individualized advice allegedly given by Ms. Blanchette. Indeed, this misreading of the motion is what grounds their argument that the respondent has not made any specific allegations or raised any common questions. In my opinion, the respondent's action is based, as I have already said, on a generalized and systematic failure by Firm to provide information. Firm is alleged to have breached its duty to all members of the group by failing to provide representatives and clients with essential and objective information about the products being recommended.

[113] With respect, I therefore cannot agree with my colleague that Firm's alleged breach here requires too individualized an analysis to be the subject of a class action. The alleged faults do not depend on the identity of either the client or the adviser.

(3) A Class Action for a Breach of the Duty to Inform Based on the Adviser-Client Relationship Is Not Impossible

[114] At the hearing, in answer to a question by one of my colleagues, the appellants tried to persuade this Court that a class action against a brokerage firm for breaches by its representatives is *impossible*.

[115] I disagree with the appellants' argument that this type of case is never well suited to a class action. In light of the social function of the class action, it would be highly imprudent for this Court to declare, as the appellants would like, that any class action of this kind against a brokerage firm is impossible or that an action based on a representative's alleged fault is necessarily an individual action.

[116] This Court has clearly explained, in decisions that are consistent on this point, that the twin goals of access to justice and victim compensation will be achieved by interpreting the authorization conditions broadly (see *Oratoire*, at para. 8; *Marcotte*, at para. 43; *Infineon*, at para. 60). The categorical interpretation proposed by the appellants would, in a context like the one here, deprive the class action of part of its role of helping people who, for economic and other reasons, face barriers in asserting their rights (*Oratoire*, at para. 8; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 24 and 27; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 16). This concern is particularly relevant in actions based on financial investments, since the fact that the amounts in issue are modest when considered individually often means that “traditional litigation provides no

economically feasible way to recover the investors' claimed losses" (*Fischer*, at para. 57; see *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 para. 28).

[117] Furthermore, the appellants' description of the case law — they contend that the need for such an action to proceed on an individual basis has been accepted unanimously by the courts, [TRANSLATION] “not just in Quebec, [but] throughout Canada” (transcript, at pp. 7 and 22) — does not support the conclusion they suggest to us.

[118] The appellants cite cases on class actions that, with a few exceptions, are common law cases or were decided before *Vivendi* and *Infineon*. The appellants refer, for example, to *Fisher v. Richardson GMP Ltd.*, 2019 ABQB 450, 95 Alta. L.R. (6th) 172, in which the application judge held in part that the proposed class proceeding was not the “preferable procedure” based on one of the criteria in the Alberta statute, a criterion that differs from the ones applicable in Quebec (para. 132). It should be borne in mind that, in *Vivendi*, this Court noted that common law decisions cannot “necessarily be imported without adaptation into Quebec civil procedure” (para. 48).

[119] The appellants cite only one Quebec judgment rendered after *Vivendi* in which the judge declined to authorize a class action, namely *Louisméus v. Compagnie d'assurance-vie Manufacturers (Financière Manuvie)*, 2017 QCCS 3614. It certainly was not held in that case that a class action is never possible in circumstances such as

these, since Hamilton J., as he then was, made a point of stating that the application before him was not based on [TRANSLATION] “failure to provide information” (para. 38 (CanLII)). His comments on this subject were therefore, at best, *obiter*. In fact, he remained cautious, writing that the sufficiency of the information provided by a brokerage firm pursuant to its obligation to inform its clientele as a whole might be a common issue in a potential class action, but that this was not the specific position taken by the applicant in the case before him. In other words, Hamilton J., far from closing the door to any class action, stated instead that common issues *may* exist in the case of a failure to provide information:

[TRANSLATION] The claim based on failure to provide information or a defect of consent is more problematic as a class action.

It is based on the understanding that Ms. Louisméus and Mr. Gauthier had when she purchased the policy in 1993 and additional capital in 2000.

It is difficult to see any common issues shared with the other members of the class. What understanding an insured person or an adviser has is an individual issue, not a common one. Whether Aetna provided sufficient information might be a common issue, but in this case Mr. Gauthier appears to concede that the information in Aetna’s bulletins was sufficient, and the question is rather whether the representatives received that information. It is necessary to consider the information that each adviser received, what each adviser understood and told his or her clients, what the client understood and what was important to the client in making a decision.

The Court does not think that a claim of this kind (if it had been pleaded, which is not the case) involves a common issue that is sufficiently important to justify a class action. [Emphasis added; footnote omitted; paras. 91-94.]

[120] The judgment cited by the appellants therefore supports the proposition that is the opposite of theirs: a class action based on a brokerage firm’s liability for the conduct of its representatives is possible, though such actions would be quite rare, as long as the issue is whether the information provided by the brokerage firm (here, Firm) to its representatives and to the group’s members was insufficient, with the result that a general duty to inform was breached.

[121] With respect, it seems to me that the other judgments cited by the appellants and by my colleague also miss the mark. My colleague relies in part on *Brunelle v. Banque Toronto Dominion*, 2009 QCCS 4605. In that case, the court noted that the legal syllogism was untenable as regards the duty to provide advice because the bank did not owe its customers such a duty, which arose [TRANSLATION] “only in exceptional circumstances” (para. 82 (CanLII)). In the case at bar, however, it is clear — and undisputed — that each financial adviser had a duty to provide advice and a duty to inform. In the judgment cited, the duty to provide advice, which existed *in exceptional circumstances*, could not be dealt with collectively. Here, the duty to provide advice and the duty to inform existed for all members. While I agree with my colleague that Mr. Asselin’s action concerns the duty to inform, I am, however, of the view that the analogy with a judgment concerning the exceptional nature of the duty to provide advice is of no assistance to the appellants.

[122] I also see three important reasons to distinguish *Paré v. Desjardins Sécurité financière*, 2007 QCCS 4566, from the instant case. First, in *Paré*, the information

provided to the members was sufficient [TRANSLATION] “for the borrower to clearly understand the process” involved (para. 56 (CanLII)), which is not the case here. Second, that decision was based on *Dutton*, which established that “with regard to the common issues, success for one class member must mean success for all” (*Dutton*, at para. 40, cited in *Paré*, at para. 35). But in *Vivendi*, this Court noted that “the common success requirement identified in *Dutton* must not be applied inflexibly” (para. 45) and that “[c]aution must be exercised when applying the principles from *Dutton* and *Rumley* to the rules of Quebec civil procedure relating to class actions” (para. 48). Third, the applicant in *Paré* had “not alleged or made out a *prima facie* case that a majority or at least a significant number of participants did not understand the explanations in the Participant’s Guide or did not receive the necessary information from their adviser” (*Paré*, at para. 64). As we know, Mr. Asselin is alleging here that all the members were deprived of relevant information and that Firm committed a systematic fault. *Paré* is therefore of no assistance to Firm in trying to persuade this Court that the proposed class action is impossible.

[123] *Farber v. N.N. Life Insurance Co. of Canada*, [2002] AZ-50123096 (Sup. Ct.), which is also cited by the appellants and by my colleague, raises similar concerns. It is a 10-paragraph decision in which the applicant made two contradictory arguments (para. 3) and the court did not believe his assertion that he had misunderstood the documents provided by the insurance company (para. 4). Moreover, the decision predates this Court’s decisions in *Vivendi* and *Infineon*, and states that the common

questions condition requires “that the recourses be identical, similar or related” (para. 3).

[124] In short, it is true that some authorization judges have occasionally expressed reservations about class actions based on representations made by a large number of employees. To conclude from this that a class action is impossible in the circumstances, or that the decided cases are consistent and unanimous, is a step that I am not prepared to take. This would disregard not only the flexibility mandated by the role of class actions in fostering social justice, but also any decisions to the contrary rendered by courts in Quebec and Canada, including decisions stating that causation can be proven by presumption despite differences among the members (*Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446, at para. 98 (CanLII); *Chandler v. Volkswagen Aktiengesellschaft*, 2018 QCCS 2270, at paras. 66 and 98 (CanLII)). For example, in *Manuvie*, in which one of the allegations was that there had been a failure to disclose the risks associated with variable annuity portfolios, the authorization judge stated the following:

[TRANSLATION] . . . It may be presumed as well that the impact of each of these misrepresentations on Manulife’s security prices may not have been identical and that, depending on the economic context and on their own skill and expertise, the investors may have assessed the available information in different ways. This does not mean the Court can say that there are no common or related questions of law or fact here that can advance the litigation. [Emphasis added; para. 103.]

[125] In addition, the case before this Court is very similar to *Dupuis v. Desjardins Sécurité financière, compagnie d’assurance-vie*, 2015 QCCS 5828 (in

which authorization to institute a class action was granted). As in the instant case, when the action was considered from the perspective of the failure by the company selling the investments to disclose relevant information, common questions were identified despite the specific characteristics of each member of the group (see paras. 47-53 (CanLII)). In fact, the authorization judge, in his decision (at para. 91), identified common questions that are virtually identical to the ones proposed by Mr. Asselin in this case.

[126] I therefore see no reason to accede to the appellants' request that any class action against a brokerage firm for the conduct of its representatives be declared impossible despite the fact that it was Firm's systematic failure to provide information to its representatives that gave rise to their faults. With respect, it also seems to me that, although my colleague states that she is not "concluding that a claim for a financial adviser's breach of the duty to inform can never be the subject of a class action" (para. 256), this would indeed be the consequence of her reasons. It is alleged here that *all* of the representatives *systematically* failed to provide information to the group's members because they did not have that information themselves. If this argument is not sufficient to find that the appeal raises a common question, I have difficulty imagining what allegation could be sufficient.

[127] To close the door to the proposed class action in such a categorical fashion would undermine the role of the class action as a procedural mechanism for fostering social justice in this setting.

(4) Conclusion Concerning the Condition of Article 1003(a) of the Former C.C.P.

[128] The proposed class action against Firm concerns, as we have seen, a contractual breach of its duty to inform that grounds both its direct liability, for its failure to provide information to its representatives, and its indirect liability, for the incomplete information provided by the representatives to the group's members. In both cases, the alleged omissions are systematic in nature. They do not depend on each client's individual characteristics.

[129] The systematic nature of these omissions in both cases makes it possible to identify common questions in the proposed action against Firm under art. 1003(a) of the former *C.C.P.* The following common questions were correctly identified by the Court of Appeal (para. 8):

[TRANSLATION]

1. **Conformity of the financial product.** Did the PP and ALT Investments conform with the financial products that [Firm] and [Management] designed and/or offered to the group's members?
2. **Duty to inform.** Did [Firm] owe the group's members a duty under the *Deposit Insurance Act*, the *Act respecting the distribution of financial products and services*, the *Civil Code of Québec*, any other statute and/or the applicable rules and/or practices to provide them with information with respect to the nature, characteristics, offering and management of the PP and ALT Investments?
3. If so, did [Firm] breach this duty by failing to clearly inform the group's members that the PP and ALT Investments would include investment strategies that might eliminate, before maturity, any possibility of a return?

[130] In my respectful view, the motion judge’s reasons show that she considered the common questions condition from the perspective of an action based on the duty to provide individualized advice tailored to each client’s risk tolerance, even though that was not the basis for Mr. Asselin’s action (paras. 208-9).

[131] In addition to this error of reading the motion from the perspective of an individualized duty to provide advice, the manner in which the motion judge noted the absence of a common question suggests that she also went beyond the standard that applies at this stage of the proceedings:

[TRANSLATION] This is because, unless there is valid evidence demonstrating the systematic distribution of a document containing representations that all of the clients necessarily read before purchasing various investments and that inevitably influenced their choice of investment, the essence of such a relationship is based more on a very personal assessment of each client’s investor profile and goals, which involves discussions that vary from one client to the next, even if the same representative serves multiple clients and may do so in a similar manner. [Emphasis added; para. 210.]

[132] With great respect, it seems to me that the respondent is correct to say that the authorization judge — by looking at whether the documents contained representations, and not omissions, that were necessarily known and that inevitably had an impact on everyone — imposed a burden of demonstration that went beyond showing an arguable case. The systematic conduct that the judge reproached Mr. Asselin for not having “demonstrated” is *alleged* throughout the motion, which is more than sufficient. In my respectful opinion, my colleague makes the same error

when she states that Firm’s alleged fault requires an analysis that is too individual “unless it is shown that the breach occurred systematically” (para. 247).

[133] The motion may be unwieldy at times, and its coherence no doubt suffered by reason of the multiples amendments made to it. In my view, however, the basis for this liability giving rise to common questions is adequately alleged. In these circumstances, the Court of Appeal was justified in intervening, and the common questions condition is met for the proposed action against Firm.

IV. Management

[134] In this Court, the appellants make several concessions with regard to Management’s situation. They reiterate that the authorization judge erred with respect to the condition set out in art. 1003(a) of the former *C.C.P.* As the Court of Appeal noted, [TRANSLATION] “the judgment completely overlooks the portion of the action that concerns [Management]” (para. 147). Yet this portion of the action undoubtedly raises common questions, as the appellants acknowledge. They also concede, as they did before the Court of Appeal, that it can be argued that Management is liable as the designer of the investments, contrary to what the motion judge found.

[135] The appellants raise two main grounds of appeal in order to prevent, in whole or in part, the authorization of the class action against Management.

A. *Circularity of the Reasoning*

[136] The first ground of appeal has to do with whether the case against Management is an arguable one. According to the appellants, the syllogism proposed by the respondent is circular in nature and untenable. They submit that there is nothing to suggest that the absence of a return was due to the risky strategies used by Management; this allegation, in the context of the 2008 financial crisis, is mere speculation and cannot suffice for the purposes of art. 1003 of the former *C.C.P.*

[137] This argument is without merit.

[138] Contrary to what the appellants contend, Mr. Asselin is not merely saying that Management's practices were risky because the investments did not generate a return; he is making concrete allegations against Management. The motion speaks for itself in this regard:

[TRANSLATION]

108. In reality, the amounts allocated to the return on the PP Investment and the ALT Investment were invested in hedge funds with a leverage ratio of five (5) to one (1), as can be seen from the article by Jean Gagnon entitled "Pourquoi certains produits à capital garanti de Desjardins ne rapporteront rien", Exhibit R-14;

108.1 What is more, the hedge funds in which those amounts were invested were themselves leveraged, which multiplied the risk of the PP and ALT Investments;

...

123. Furthermore, a significant portion of the money market investments in the PP Investment and the ALT Investment consisted of Asset-backed Commercial Paper ("ABCP");

124. As of August 2007, however, ABCP became a risky and illiquid asset that could no longer play the role ascribed to it in the PP and ALT Investments, as can be seen from, among other things, the Desjardins Group's annual reports for 2007 (pp. 25-27 and 113-15), 2008 (pp. 34-40 and 133-37), 2009 (pp. 170-74) and 2010 (pp. 142-46), Exhibit R-17, jointly, as well as the Desjardins Group's quarterly reports from September 2007 to September 2008, Exhibit R-13, jointly;
125. Despite the foregoing, the respondents not only retained ABCP in the PP Investment and the ALT Investment after August 2007, but also made new issues of those Investments until September 2008, as can be seen from, among other things, reports R-17 and R-13;
126. This management decision, which was injurious to the Group's members, stands in contrast to the fact that, during the same period, the respondents replaced the ABCP held by their institutional clients with secure, liquid deposit notes, as can be seen from, among other things, reports R-17 and R-13;
- ...
128. The respondents Desjardins Trust and Desjardins Asset Management ceased in the fall of 2008 to manage the amounts that had been entrusted to them for the purpose of obtaining a return at maturity for the Group's members; [Emphasis added; emphasis in original deleted.]

Like the Court of Appeal and my colleague, I am of the opinion that these allegations are sufficiently precise.

[139] It seems to me that, through their argument that the allegations are circular, the appellants are attempting to revive the defence, which was accepted by the motion judge but rejected on appeal, that the real cause of the respondent's loss was the 2008 financial crisis, not Management's incompetence.

[140] The issue of what impact the financial crisis had on the causal link between Management’s alleged extracontractual faults and the loss for which the respondent is seeking compensation is one that goes to the merits of the case. The Court of Appeal, properly relying on *London Life Insurance Company v. Long*, 2016 QCCA 1434, at paras. 104 and 108 (CanLII), emphasized that the difficult issue — disputed in this case — of how the crisis may have affected the return on an investment could not be decided at the authorization stage without encroaching on the role of the trial judge (see, e.g., *Oratoire*, at para. 41). There is no reviewable error in that conclusion.

B. *Release With Respect to ABCP*

[141] The second ground of appeal concerns Management’s alleged faults in relation to ABCP, for which Mr. Asselin is claiming punitive damages.

[142] The respondent argues that the appellant Management interfered unlawfully and intentionally with his right to the peaceful possession of his property, thereby justifying a claim for punitive damages pursuant to ss. 6 and 49 of the *Charter of human rights and freedoms*, CQLR, c. C-12. The motion for authorization alleges, at para. 123, that “a significant portion of the money market investments in the PP Investment and the ALT Investment consisted of Asset-backed Commercial Paper (‘ABCP’)”. The following is stated at para. 126.1:

[TRANSLATION] Since the respondents knew that the ABCP market was precarious and illiquid, their decision to continue issuing the PP Investment and the ALT Investment after August 2007 and to retain ABCP in the PP

and ALT Investments issued before August 2007 had the effect of imposing on the Group's members a loss that the respondents Desjardins Trust (with regard to the members of the Registered Group only) and Desjardin Asset Management would otherwise have had to assume personally, which amounts to unlawful and intentional interference with the right of the Group's members to the peaceful enjoyment and free disposition of their property, and which justifies an award of punitive damages;

(A.R., vol. II, at p. 150)

[143] The appellants submit that this aspect of the claim is not arguable and that the Court of Appeal made an overriding error in setting aside the motion judge's decision on this point. According to the appellants, any claim relating to ABCP has been extinguished as a result of the Sanction Order made as part of the restructuring of the ABCP market carried out under the CCAA (see *ATB Financial Inc. v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269 (Ont. S.C.), decision accompanying the Sanction Order, June 5, 2008, and the Third Amended Plan of Compromise and Arrangement, January 12, 2009, *aff'd* 2008 ONCA 587, 92 O.R. (3d) 513). In light of the release and injunction included in the Sanction Order, the aspect of the respondent's cause of action that is based on ABCP is not arguable under art. 1003(b) of the former *C.C.P.*

[144] The appellants allege that the Court of Appeal made a number of errors in allowing the respondent's claim for punitive damages to proceed on the merits. First, they argue that it erred in insisting that the Sanction Order be formally introduced in evidence, disregarding the rule that, under the CCAA, such an order is automatically enforceable. In addition, the Court of Appeal allegedly erred in declining to find that

the cause of action relating to ABCP had been extinguished because the release sanctioned by the Order in favour of all participants in the Canadian ABCP market was a full release. If there was any doubt as to the interpretation of the Order, the matter had to be referred to the Ontario Superior Court of Justice, which, according to the appellants, has exclusive jurisdiction over any question concerning the interpretation of the release and injunction reproduced in the Order. Finally, the appellants argue, the Court of Appeal erred in refusing to segment the claim in order to separate the elements relating to ABCP from those relating to the other aspects of the cause of action.

[145] The respondent defends the Court of Appeal’s decision to leave the issues relating to the application of the release for the trial on the merits. First, he notes that the claim for compensatory damages is not based on the members’ holding of ABCP and that the only claim possibly based on ABCP is the one for punitive damages. Moreover, at this stage of the proceedings and given the state of the record, it would be premature to conclude, without evidence concerning the exact nature of the investments at issue, that the claim for punitive damages should be denied on the basis of the release and injunction included in the Sanction Order. The respondent points out that the appellants adduced no evidence from which the authorization judge could determine whether the ABCP to which the investments at issue may have been exposed was Affected ABCP covered by the Order or was subject to “Unaffected Claims” excluded from the Order. Clearly, he says, evidence is necessary in order to understand this, which means that there is no pure question of law that can be decided at the authorization stage. He relies on *Desjardins Sécurité financière, compagnie*

d'assurance-vie v. Dupuis, 2018 QCCA 1136, particularly paras. 16 and 18 (CanLII), where the Court of Appeal, faced with a similar problem, held that it would be premature to deny a claim for punitive damages. In *Dupuis* (C.A.), as here, no connection could be established between the proposed class action and the ABCP market because, without evidence, it was unclear whether the ABCP was of the type covered by the Sanction Order.

[146] How is this matter to be decided?

[147] To begin with, it should be noted that both parties have qualified the arguments they made in the courts below, which, in my view, helps to clarify the debate.

[148] First, the parties agree that this aspect of the litigation relates only to the claim for punitive damages; the motion for authorization brought against Management with respect to compensatory damages can therefore proceed, subject, of course, to the other conditions set out in art. 1003 of the former *C.C.P.*

[149] In addition, the respondent acknowledges that the release on which the appellants rely is in effect and enforceable in Quebec (transcript, at p. 76). His counsel stated at the hearing that [TRANSLATION] “. . . there is no dispute that the release is fully applicable, but it is impossible at this time to know what its scope might be” (p. 81). Counsel conceded that his client’s claim pertains only to Unaffected Claims as defined in the release (pp. 78-82).

[150] It can be understood from his position that the respondent is waiving any claim for punitive damages for Affected ABCP and limiting himself to the ABCP not covered by the release. In light of this clarification of what is being claimed for the purposes of the class action, the Affected ABCP can, it seems to me, be excluded at once, even though a defence that involves the weighing of evidence should ordinarily be dealt with at trial: *Oratoire*, at paras. 41-42. It is therefore unnecessary to discuss the conditions for pursuing an “Excepted Claim”, which, according to the plan of arrangement, is a claim for the prejudice suffered “as a direct result of purchasing specific Affected ABCP” (Third Amended Plan of Compromise and Arrangement, art. 10.4(c); Sanction Order, art. 20(c) (emphasis added)).

[151] Technically speaking, the exclusion of Affected ABCP is not a segmentation of the cause of action but rather a clarification of its contours based on the statements made by the respondent himself. This appears to me to be an appropriate solution to which the appellants do not formally object, given the position taken by their counsel at the hearing:

[TRANSLATION] If my friends are arguing that their action is not based on ABCP or that the claim . . . has to do with management as such and not with ABCP, let this be confirmed in a judgment, let it be stated that the claim cannot include damages sought in relation to ABCP, because, in every respect, when you read the release, there is nothing that could have been done with regard to ABCP that would allow an action to continue.

(transcript, at p. 52)

[152] The motion judge found that [TRANSLATION] “the claim based on ABCP is, on its face, barred” (para. 187). To make that finding, she relied in particular on the Sanction Order made by Campbell J. and cited certain provisions of the Third Amended Plan of Compromise and Arrangement. However, she did not refer to the distinction between Affected ABCP and Unaffected Claims as dealt with in the Third Amended Plan of Compromise and Arrangement.

[153] The Court of Appeal intervened after taking note of the respondent’s argument that this issue went to the merits of the case, and also because of its own view that the argument made by the appellants required evidence (para. 138). I agree on these two points and, with respect, I am of the opinion that the motion judge could not decide whether the claim was barred at the authorization stage.

[154] It is true, as I have noted, that a court “*may . . .* decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so” (*Oratoire*, at para. 55 (emphasis in original)). But the question of whether the ABCP concerned is part of the Affected ABCP covered by the release and listed in its Schedule “A” is not a pure question of law. Deciding it would require, at a minimum, a list of the ABCP included in the investments at issue. I therefore disagree with my colleague’s interpretation, which is that the admission made by counsel for Mr. Asselin at the motion hearing that “the release with respect to ABCP covers the investments made prior to August 2007” implies that there is no remaining factual question to be dealt with on the merits (para. 268).

[155] In this case, it is not the application of the Order that is being contested but rather its scope, which can be argued later, just like the scope of the judicial admission made at the motion hearing. The scope of the Affected ABCP and the unaffected ABCP is an issue that could, if necessary, be referred to the Ontario Superior Court of Justice (see art. 11.12 of the Third Amended Plan of Compromise and Arrangement). As in *Hy Bloom inc. v. Banque Nationale du Canada*, 2010 QCCS 737, [2010] R.J.Q. 912, at para. 102, and *Dupuis (C.A.)*, at paras. 18-20, potential claims relating to ABCP that are not extinguished by the release can be heard. That being the case, the parties' dispute formally concerns, at this point in time, not the interpretation of the Order, but simply its implementation. The scope of the Affected ABCP or the unaffected ABCP is not being decided.

[156] Caution must therefore be exercised at this stage, and any doubt should weigh in favour of the continuation of the proceedings, especially since deferring this matter will not result in the appellants losing any rights given that the action against Management must proceed on the merits on the claim for compensatory damages. That being said, counsel for the respondent acknowledges that the claim for punitive damages is by no means certain to be successful, although it must be recognized that, though difficult, a claim based on unlawful and intentional interference under s. 6 of the *Charter* in relation to the ABCP not covered by the release remains arguable in this context.

[157] This is the explanation for the qualifying words that, in my respectful view, should be added to paras. 8 and 9 of the Court of Appeal’s judgment in this appeal: for common question 8(c) and for the conclusion dealing with punitive damages, I would specify that the payment to each member of the group of an amount [TRANSLATION] “in punitive damages” may be sought “solely in relation to Unaffected Claims within the meaning of article 1 of the Third Amended Plan of Compromise and Arrangement sanctioned by order of the Ontario Superior Court of Justice dated January 12, 2009”.

V. Conclusion

[158] I would allow the appeal in part, but solely for the purpose of varying paras. 8 and 9 of the Court of Appeal’s judgment so that they read as follows:

[TRANSLATION]

[8] **IDENTIFIES** as follows the principal questions of fact and of law to be dealt with collectively:

...

8. **Damages.** Based on the answers to the previous questions, are Desjardins Financial Services Firm Inc. and Desjardins Global Asset Management Inc. liable:

...

(c) to pay each member of the group one thousand dollars (\$1,000) in punitive damages solely in relation to Unaffected Claims within the meaning of article 1 of the Third Amended Plan of Compromise and Arrangement sanctioned by order of the Ontario Superior Court of Justice dated January 12, 2009, subject to adjustment, with interest at the legal rate and the additional indemnity from the date of the judgment to be rendered?

[9] **IDENTIFIES** as follows the principal conclusions sought on the merits in the class action, it being understood that whether the awards set out below are *in solidum* depends on the answer, if any, given by the Superior Court to the final portion of question 6, as defined at paragraph [8] above:

...

ORDER each of the respondents to pay each member of the group one thousand dollars (\$1,000) in punitive damages solely in relation to Unaffected Claims within the meaning of article 1 of the Third Amended Plan of Compromise and Arrangement sanctioned by order of the Ontario Superior Court of Justice dated January 12, 2009, subject to adjustment, with interest at the legal rate and the additional indemnity from the date of the judgment to be rendered, and ORDER the collective recovery of these amounts.

[159] I would award costs to Mr. Asselin throughout.

English version of the reasons of Moldaver, Côté and Rowe JJ. delivered by

CÔTÉ J. —

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I.	<u>Overview</u>	

[160] This appeal raises issues related to the authorization of class actions in Quebec. Much continues to be written on this subject by both judges and authors. Although the principles that are to guide a court at the authorization stage are well known, applying them remains difficult and at times unpredictable.

[161] The case concerns capital-guaranteed investments that, it is alleged, though represented to be safe, were in reality risky investments that were also managed in a risky manner. The investments in question ultimately yielded no return at maturity, although the investors did recover their capital. The respondent, disappointed at having obtained no return on his investment, filed a Re-amended and particularized motion (2) for authorization to institute a class action and to obtain the status of representative, reproduced in A.R., vol. II, at pp. 104-62 (“motion”).¹ The Superior Court declined to authorize the action (2016 QCCS 839). The Court of Appeal set aside that decision and authorized the action (2017 QCCA 1673).

II. The Parties

[162] The respondent, Ronald Asselin, is a long-time member of a caisse populaire that is part of the Desjardins Group and that offers various financial services. The appellants in this case — Desjardins Financial Services Firm Inc. (“Firm”) and Desjardins Global Asset Management Inc. (“Management”) — are part of the Desjardins Group. At first, Desjardins Trust Inc. was also a party in the proceeding, but the respondent discontinued his suit against it in the Superior Court.

[163] The appellant Firm is a financial services firm that works in the areas of mutual fund brokerage and financial planning. In his motion, the respondent alleges

¹ Since the enactment of the new *Code of Civil Procedure*, CQLR, c. C-25.01 (“new *C.C.P.*”), the expression used is now instead an “application for authorization to institute a class action”. Because the proceedings in this case were filed under the former *Code of Civil Procedure*, CQLR, c. C-25 (“*C.C.P.*”), I will refer throughout these reasons to the “motion for authorization to institute a class action”.

that Firm is responsible for the mutual fund representatives and financial planners working in the caisses populaires of the Desjardins Group, including the representatives who offered the investments at issue to the members of the group covered by the proposed class action.

[164] The appellant Management is a portfolio company that works in asset management. It offers various services relating to investments, portfolio management, and financial and asset allocation strategies. The respondent alleges that Management designed the investments at issue in this proceeding and was responsible for managing them.

III. The Investments

[165] This case concerns two types of investments: Perspectives Plus Term Savings (“PP”) and Alternative Term Savings (“ALT”). Mutual fund representatives and financial planners offered these savings vehicles in the network of caisses populaires of the Desjardins Group. What was appealing about the PP and ALT investments can be described briefly: their capital was guaranteed at maturity, and they offered a potential return that was variable, although it could be nil. Clients purchased these investments by entering into deposit agreements with the caisse populaire where they did business. Each deposit agreement therefore created a contractual relationship between the client and his or her caisse populaire, which was the issuer of the investment, but did not create a contractual relationship between the client and either Firm or Management.

[166] In his motion, the respondent describes as follows how the investments worked. A portion of the invested capital was guaranteed by a zero-coupon bond whose value at maturity was equal to the value of the original deposit, such that the capital was guaranteed. The amounts allocated to the return were equal to the residual value of the original deposit following the purchase of the zero-coupon bond, and that value was invested in money market funds and used to guarantee trades in financial derivatives selected on a monthly basis. At maturity, the value of the investment was thus equal to the original deposit (which was guaranteed) plus any return obtained.

IV. Facts of the Case

[167] The respondent alleges that on March 4, 2005, Denise Blanchette, a financial planner and mutual fund representative, recommended that he purchase PP and ALT investments. On June 14, 2005, allegedly on the basis of those recommendations, the respondent entered into a deposit agreement with the Caisse populaire de Sherbrooke-Est and deposited amounts in a first PP investment with a term of seven years. In January 2006, the respondent received his annual investment statement issued by the Caisse populaire de Sherbrooke-Est, which indicated that his investment had yielded a return of 2.3 percent for 2005. In January 2007, he received a second annual investment statement, again issued by the Caisse populaire de Sherbrooke-Est, which showed a return of 6.9 percent for 2006.

[168] The 2006 statement was accompanied by a letter from the Caisse populaire de Sherbrooke-Est signed by Ms. Blanchette. The letter stated that the guaranteed

investments were [TRANSLATION] “an excellent investment vehicle, both for the protection of your capital and for the attractive returns you can obtain from them” (A.R., vol. XI, at p. 14 (emphasis deleted)). The respondent alleges that, later in 2007, he received a document from the Desjardins Group that promoted the PP and ALT investments. It should be noted that the document expressly stated that [TRANSLATION] “[t]he returns presented are not a guarantee of future performance” (A.R., vol. X, at p. 101).

[169] On June 19 and 26, 2007, allegedly [TRANSLATION] “on the strength of all this information” (Sup. Ct. reasons, at para. 101 (CanLII)), the respondent signed two new deposit agreements for a second PP investment with a term of three and a half years and a first ALT investment with a term of five years. These agreements were again entered into with the Caisse populaire de Sherbrooke-Est.

[170] In February 2008, the respondent received his investment statements for 2007, once again issued by the Caisse populaire de Sherbrooke-Est, which indicated returns ranging from 1.7 to 9.0 percent for his PP and ALT investments. Never, while his investments were yielding a positive return, did the respondent complain about how they were being managed or about the makeup of the financial products in which the amounts allocated to the return were being invested.

[171] On March 26, 2009, the respondent received a letter dated March 2, 2009 from the Fédération des caisses Desjardins informing him that his three investments would yield no return, even though the terms had not yet expired. This was confirmed

in February 2010 when the respondent received his investment statement for 2009, issued by the Caisse de l'Est de Sherbrooke, which indicated a return of 0 percent.

V. The Respondent's Motion for Authorization To Institute a Class Action

[172] On September 16, 2011, the respondent filed his motion for authorization to institute a class action. The route taken by the motion prior to the decision on authorization was a long one. It was the subject of several interlocutory and preliminary motions and of numerous amendments over a period of four years before the authorization hearing.

[173] Of course, it is the final version of the motion that must be considered for the purposes of authorization. As I will explain below, the motion alleges that the appellants are liable both contractually and extracontractually. The group the respondent intends to represent comprises all persons who held PP and ALT investments as of October 1, 2008.

[174] The respondent essentially alleges that Firm breached its duty to inform by not adequately informing him and the group's members of the specific nature of the investment strategies being used, which he describes as risky. The motion describes Firm's alleged faults as follows:

[TRANSLATION]

107. The PP and ALT Investments were represented and described to the Group's members as being safe and intended for a risk-averse investor . . . ;
- 107.1 Moreover, the representatives of [Firm] were not given sufficient instructions regarding the characteristics and risks of the PP and ALT Investments and were not therefore in a position to evaluate their advantages and disadvantages;
- 107.1.1 In this regard, the documents describing the PP and ALT Investments . . . gave no explanation, or a very incomplete explanation, of the leverage used to obtain the return on the PP and ALT Investments;
- 107.1.2 Those documents merely provided an incomplete description of the PP and ALT Investments and presented the advantages of these investments without describing the risks associated with the PP and ALT Investments;
- 107.2 The information provided by the representatives of [Firm] was therefore necessarily wrong or insufficient, if not false, deceptive or misleading;
108. In reality, the amounts allocated to the return on the PP Investment and the ALT Investment were invested in hedge funds with a leverage ratio of five (5) to one (1) . . . ;
- . . .
110. At no time, however, did [Firm] disclose to the Group's members the risks associated with the liquidity issues and the financial leverage, despite the fact that it was aware or could not have been unaware of those risks;
- . . .
116. Furthermore, [Firm] made false and misleading representations to the Group's members . . . regarding the correlation with the stock markets;
117. Contrary to what [Firm] claimed, the PP and ALT Investments were profoundly affected by stock market fluctuations;
118. [Firm] failed to provide adequate information to the Group's members and breached the informational obligations and duties it owes by law;

119. The faults of [Firm] concerning the obligations related to the disclosure of information occurred in a context in which the PP and ALT Investments were intended for a varied clientele including individuals with little knowledge of financial concepts. [Emphasis deleted.]

(A.R., vol. II, at pp. 147-49)

[175] As for Management, the respondent essentially alleges that it breached its duty of competence and management by using the amounts deposited by the group's members, or allowing those amounts to be used, to conduct risky transactions that exposed the investments to market fluctuations. The motion describes Management's alleged faults as follows:

[TRANSLATION]

120. [Management] took risks that were contrary to its legal and contractual obligations and duties in designing and implementing their investment strategies;

...

122. [T]he amounts allocated to the return had to be liquidated to honour the capital guarantee for the PP Investment and the ALT Investment, which shows the scale of the risk associated with the chosen investment strategies;

- 122.1 The investment strategies, particularly the use of a leverage ratio of five (5) to one (1), had the effect of putting the capital guarantee at risk and of forcing a liquidation, which, moreover, was premature, of the amounts allocated to the return on the PP Investment and the ALT Investment;

123. Furthermore, a significant portion of the money market investments in the PP Investment and the ALT Investment consisted of Asset-backed Commercial Paper ("ABCP");

124. As of August 2007, however, ABCP became a risky and illiquid asset that could no longer play the role ascribed to it in the PP and ALT Investments . . . ;
125. Despite the foregoing, [the appellants] not only retained ABCP in the PP Investment and the ALT Investment after August 2007, but also made new issues of those Investments until September 2008 . . . ;
- . . .
127. This flawed design and management by [Management], contrary to its obligations and duties to act prudently and diligently and to adhere to sound and prudent management practices, resulted in a loss of one hundred percent (100%) of the assets allocated to the return, whereas none of the underlying assets sustained a loss on such a scale. [Emphasis added.]

(A.R., vol. II, at pp. 149-51)

[176] Regarding causation, the respondent alleges that the appellants' actions, and in particular the investment strategies they used, caused the collapse of the investments in 2008 and resulted in the loss of all the assets allocated to the return. In addition to being deprived of a return, the group's members were allegedly deprived of access to the invested capital until the investments matured. The respondent claims, among other things, the difference between the return that was obtained or to be obtained and the return that should normally have been obtained from investments designed and managed in accordance with the duties of management and competence, damages for being deprived of the deposited capital for the term until maturity, damages for the troubles, worries and inconveniences suffered by the members and, lastly, punitive damages in relation to Management's decision to continue to issue the PP and ALT investments after August 2007.

VI. Judicial History

A. *Quebec Superior Court, 2016 QCCS 839 (the Honourable Justice Claude Dallaire)*

[177] The Superior Court refused to authorize the class action. It held that the colour of right requirement set out in art. 1003(b) *C.C.P.* (art. 575(2) of the new *C.C.P.*) was not met with respect to either the action against Firm or the action against Management. It also held that the common questions requirement set out in art. 1003(a) *C.C.P.* (art. 575(1) of the new *C.C.P.*) was not met with respect to the action against Firm.

[178] The judge rigorously reviewed the general principles applicable to the authorization of a class action before discussing the motion for authorization. First, she considered Firm's alleged contractual liability in order to determine whether the alleged facts seemed to justify the conclusions being sought (art. 1003(b) *C.C.P.*). She found that the only possible contractual basis for the action against Firm lay in the term deposit agreements, but that the parties to those agreements were the caisses populaires and their clients. The principle of relativity of contracts therefore meant that there was no contractual relationship between the group's members and Firm.

[179] The judge was also of the opinion that the allegations of the motion contained no specific fact that would support a finding that one of Firm's representatives had committed a particularized fault related to inadequate

representations; the contract of mandate raised by counsel for the respondent at the hearing as a last gasp was of no assistance to them in the absence of specific allegations concerning the representatives' fault.

[180] Finally, the judge reviewed the documents filed by the respondent to ensure that [TRANSLATION] “nothing in the motion [could] link the members to Firm on a contractual basis” (para. 86). She found that almost all of the documents came not from Firm, but from the caisses populaires or from unknown sources, which made it impossible to infer that Firm might have played any role in drafting their content.

[181] The judge considered the respondent's individual claim against Firm. She noted that the respondent had never signed a contract with Firm and that he was neither alleging the existence of a mandate nor making any specific allegation against the representatives of Firm with whom he had dealt. In her view, the allegations were instead general in nature. Moreover, she found that the respondent's allegation that he had purchased the investments “on the strength of all this information” provided by Ms. Blanchette was too vague and that the evidence suggested that the documents the respondent alleged he had consulted before making his investments could not have influenced his decision. She noted that all that remained was Ms. Blanchette's recommendation, the substance of which was unknown because the respondent said that he had no recollection of it. She also noted that the respondent did not criticize the recommendation made by Ms. Blanchette in any way. The judge therefore concluded

that the allegations with respect to Firm were speculative and did not satisfy the condition of art. 1003(b) *C.C.P.*

[182] Regarding the common questions requirement of art. 1003(a) *C.C.P.*, the judge expressed the view that the mandator-mandatory relationship between a mutual fund representative and his or her client is ill suited to a class action (paras. 208-9). Unless there was evidence of the systematic nature of the representations, of which all the members would have had knowledge, it would be more difficult to establish that there were common questions. This condition was therefore also an impediment to authorizing the action against Firm.

[183] Second, the judge dealt with the action against Management. She began by considering the allegations against Management as the designer of the investments. In light of the evidence in the record, she was not convinced by the allegation that Management was responsible for designing the investments. She found that the faulty design of the investments had not been established and was merely speculation.

[184] The judge then discussed the alleged fault related to the duty of competence and management. In her view, the allegations to the effect that Management's investment strategies, including the use of significant leverage, were so risky that they amounted to a breach of its duty of competence and management were general and vague. She added that the legislative provisions being relied on with respect to the obligations resting on managers to act prudently, diligently, competently, loyally and in good faith were not applicable to the appellants because the investments in question

were neither mutual funds nor investment funds within the meaning of the *Securities Act*, CQLR, c. V-1.1.

[185] The judge also considered the allegation that Management had committed a fault by investing the amounts allocated to the return in asset-backed commercial paper (“ABCP”). She found that if the action were able to proceed, the claim for punitive damages would be barred because of the release with respect to ABCP arising from the Sanction Order made by the Ontario Superior Court of Justice as part of the restructuring of the ABCP market under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”) (para. 187; see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269 (Ont. S.C.), decision accompanying the Sanction Order, June 5, 2008, and the Third Amended Plan of Compromise and Arrangement, January 12, 2009, aff’d 2008 ONCA 587, 92 O.R. (3d) 513).

[186] The judge noted that, even though she did not have to decide the merits of the action, she was required to determine whether it was plausible; in this regard, she observed that the evidence suggested that the economic crisis of 2008 was the reason why there had been no return on the investments. She therefore found that the allegations against Management did not satisfy the condition set out in art. 1003(b) *C.C.P.* (para. 201).

[187] As for the other conditions, the judge noted that art. 1003(c) *C.C.P.* was not in issue and that the respondent satisfied the requirement of art. 1003(d) even though he might not be the ideal representative.

B. *Quebec Court of Appeal, 2017 QCCA 1673 (the Honourable Justice Marie-France Bich, Justices Marie St-Pierre and Claude C. Gagnon concurring)*

[188] The Court of Appeal allowed the appeal, set aside the Superior Court’s judgment and authorized the class action in its entirety. It concluded that the legal syllogism proposed by the respondent was tenable in relation to both Firm and Management.

[189] The Court of Appeal discussed the authorization process itself, expressing the opinion that introducing greater stringency into this process would not reflect the state of the law as established by this Court in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, and *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106. In its view, the applicant, Mr. Asselin, was only required to establish an [TRANSLATION] “arguable case, that is, one with a chance of success” (para. 29 (CanLII)). It noted the importance of not considering the merits of the action at the authorization stage.

[190] Although the Court of Appeal conceded that the motion for authorization in this case was not [TRANSLATION] “perfectly clear”, it found that it was “quite possible

to discern in this labyrinth the essential elements” of the respondent’s legal syllogism (para. 47). More specifically, the court opined that “while it is true that one must not be satisfied with vagueness, generalities and imprecision, it would be wrong to close one’s eyes to allegations that are perhaps not perfect, but whose true meaning is nonetheless clear. One must therefore be able to read between the lines” (para. 33) (emphasis added).

[191] The Court of Appeal dealt first with the contractual aspect of the case — the action against Firm. In its view, Ms. Blanchette, as an employee or mandatary acting in the performance of her duties, had contractually bound Firm. Relying on an academic article, the Court of Appeal determined that a contractual relationship exists between a client who consults a firm for financial advice and the said firm (para. 57). This relationship existed for all other members of the group who were in a situation similar to that of Mr. Asselin. There was thus, *prima facie*, a contract between the respondent and Firm whose object was the giving of financial advice.

[192] Regarding the contractual fault alleged against Firm, the Court of Appeal explained that it involved a breach of the duty to honour its contractual undertakings. The Court of Appeal held that the respondent’s argument was that Firm should not have recommended the products in question to its clients without advising them of a known uncertainty and warning them of the consequent risk (para. 68).

[193] Next, the Court of Appeal considered the extracontractual aspect of the case — the action against Management. The Court of Appeal noted that the appellants

were now conceding that it could be argued that Management might be liable as the designer of the investments at issue. The Court of Appeal also rejected the motion judge's findings to the effect that the fault ascribed to Management was based on hypothetical, vague and speculative allegations containing opinions. In its view, alleging that Management's investment strategies had undermined the products was not at all hypothetical or speculative, but was a question of fact. Although some of the allegations were poorly worded, the Court of Appeal expressed the opinion that form must not prevail over substance and concluded that the alleged fault was sufficiently well defined.

[194] On the issue of injury, the Court of Appeal found that the loss of a return could be a real injury, as could the fact that the respondent and the members had been deprived of their capital until maturity and had therefore been unable to reinvest it elsewhere in the meantime. As for causation, the Court of Appeal expressed the opinion that the respondent had adequately established a failure by Firm to disclose crucial information as well as his reliance on that incomplete and erroneous information when making his decision to purchase the investments. In its view, therefore, the legal syllogism for Firm's breach of its duty to provide advice and its duty to inform, and for Management's breach of its duty of competence, was tenable.

[195] Regarding the release from which Management was alleged to have benefited, the Court of Appeal was of the view that the motion judge should have rejected this argument. The Court of Appeal concluded that this ground required the

production of evidence, namely evidence of the Third Amended Plan of Compromise and Arrangement and the release it contained, because in this case they constituted facts to be proved in accordance with art. 2803 of the *Civil Code of Québec*. In spite of that, the Court of Appeal considered the release and held that it did not make it possible to determine with certainty whether Management was one of the “Released Parties” as defined in the release or to determine whether the claim in this case was covered by the release (para. 138).

[196] Finally, the Court of Appeal held that the motion judge’s conclusion concerning the common questions requirement of art. 1003(a) *C.C.P.* was wrong because, in its view, it was not enough to assert that the type of relationship between Firm and the group’s members was ill suited to a class action (para. 150).

VII. Issues

[197] This appeal requires that we answer the following questions:

- (1) Did the Court of Appeal err in authorizing the respondent’s action against Firm?
 - (a) Does the respondent’s action raise identical, similar or related questions of law or fact in accordance with art. 1003(a) *C.C.P.* (*common questions*)?

- (b) Do the facts alleged in the respondent's motion seem to justify the conclusions being sought in accordance with art. 1003(b) *C.C.P.* (*colour of right*)?
- (2) Did the Court of Appeal err in authorizing the respondent's action against Management?
 - (a) Does the release relied on by Management bar the respondent's claim for punitive damages in relation to ABCP (*colour of right*)?
 - (b) Do the facts alleged in the respondent's motion seem to justify the conclusions being sought with respect to compensatory damages (*colour of right*)?

[198] Before turning to the analysis, I note that although this appeal was decided under the *C.C.P.*, the legislature did not alter the substance of the authorization conditions in enacting the new *C.C.P.*, which came into force in 2016 (see Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 575). While certain aspects of the authorization procedure were changed with the enactment of the new *C.C.P.* — one example is the possibility of a decision authorizing a class action being appealed with leave under art. 578 of the new *C.C.P.* (see also art. 577 of the new *C.C.P.*) — these changes did not affect how a court is to deal with a motion (or application) for authorization to institute a class action. Thus, my comments apply both to the former and to the new *C.C.P.*

VIII. Analysis

[199] In my opinion, this appeal raises questions of application rather than of principle. The flexible and liberal approach to authorization established by this Court's decisions in *Infineon*, *Vivendi* and subsequent cases is not being called into question here. However, it must be determined whether, and to what extent, this flexible and liberal approach allows a court of first instance or an appellate court considering a motion for authorization to institute a class action to read "between the lines" of the motion in order to find that the conditions set out in art. 1003 *C.C.P.* (now art. 575) are met.

[200] My colleague Kasirer J. disagrees. I agree with him that an unduly strict reading of the authorization conditions is incompatible with Quebec law as it now stands. Our differences of opinion seem instead to relate to what amounts to a "strict" treatment of a motion for authorization. The courts have accepted that a motion for authorization to institute a class action must be dealt with in a flexible manner, but the current case law does not allow an authorization judge to "guess" what the basis is for the cause of action. This position does not amount to an unduly strict reading of the motion, but, rather, is consistent with the intention clearly expressed by the legislature that each of the conditions set out in art. 1003 *C.C.P.* be met.

A. *Objectives of the Class Action*

[201] This Court has already discussed the objectives of the class action in detail. They include facilitating access to justice, modifying harmful behaviour and conserving judicial resources (*L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*,

2019 SCC 35, at para. 6; *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*, at para. 1). These objectives have led to case law that facilitates bringing such an action (*Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 43, quoting *Infineon*, at para. 60). This case law is well established, and my intention is not to raise any doubts about it.

[202] As commendable as the objectives of the class action may be, they can be attained, however, only if a rigorous procedure is followed for the authorization of such an action. The fact that the class action is a cumbersome procedural vehicle that represents a huge undertaking for all of the participants, including the courts, cannot be disregarded. The class action will not be able to attain its objectives unless the courts give meaning and substance to the legislature's provisions in a manner consistent with their institutional role.

B. *Authorization Stage of the Class Action*

[203] Four conditions must be met in order for a class action to be authorized:

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(a) the recourses of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[204] The authorization stage — known as the certification stage in the common law provinces — regulates the unique procedural vehicle that is the class action. Indeed, the class action enables a single representative to advance the interests of dozens or even hundreds of people (art. 999(d) *C.C.P.*). The mechanisms of authorization and notice to the members make up for the absence of a power of attorney that is inherent in the class action because of the exception made to the rules for mandates to take part in judicial proceedings (C. Piché, *L'action collective: ses succès et ses défis* (2019), at p. 71). Seen in this light, the authorization stage is what confers full legitimacy on the class action.

[205] The authorization stage thus helps to protect the interests of all those involved in the class action — not only the interests of the representative and the absent members, but also those of the defendants and even of the administration of justice:

[TRANSLATION] [T]he authorization procedure is also intrinsically intended to protect the rights and interests of defendants. Because the court is required to rule on the preconditions for authorizing the action, it ensures, in so doing, that defendants do not face groundless suits. This exercise is fundamental in a context in which abuse of process and actions with little basis can be common. Aside from that risk, the bringing of a class action generally has significant consequences for defendants. In that sense, it is now recognized that there is a considerable media and business impact on them [when a motion for authorization is filed]. The multiplier effect from the aggregation of a large number of claims produces a significant risk of nuisance. [Citations omitted.]

(C. Piché (2019), at pp. 71-72)

[206] Authorization is therefore meant to be more than a mere formality. It would be regrettable if this stage were reduced to simply rubber stamping the proposed action. Indeed, a lack of rigour at the authorization stage represents a threat to the objectives of the class action itself, and in particular to its role as a vehicle for access to justice (see P.-C. Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at p. 349). I therefore agree completely with this eloquent statement by my colleague Kasirer J.A., as he then was:

A lack of rigour at authorization can indeed weigh down the courts with ill-conceived claims, creating the perverse outcome that the rules on class actions serve to defeat the very values of access to justice they were designed to champion.

(*Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, at para. 14 (CanLII))

[207] Despite its fundamental role, the authorization stage is nevertheless not uncontroversial. It is not accepted unanimously in the legal community, and differing views have in fact frequently been expressed by judges in this regard (see, e.g., *Charles v. Boiron Canada inc.*, 2016 QCCA 1716, at paras. 69-74, per Bich J.A. (CanLII); *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199, at para. 136 (CanLII); see, *a contrario*, *Whirlpool Canada v. Gaudette*, 2018 QCCA 1206, at para. 29, per Savard J.A., as she then was (CanLII)). These disagreements are not merely theoretical; they have very practical

stakes that relate to the core of the legitimacy of the class action, that is, access to justice.

[208] The usefulness of the authorization stage is questioned because of the delays it can cause. However, even though some might consider that the time required for an authorization proceeding is excessive, this can in no way be compared to the length of the hearing on the merits (C. Piché, “Tout ce qu’on ne vous a jamais dit sur l’étape d’autorisation dans l’action collective” (2018), 77 *R. du B.* 525, at p. 540).

[209] What can be said in the face of this controversy? The fact is that, although the legislature has had several opportunities to eliminate the authorization stage, it has not seen fit to do so. Refashioning this stage — or, if necessary, abolishing it — is a matter for politicians. The authorization stage remains, and it must be given meaning.

C. *Role of the Judge at the Authorization Stage*

[210] The judge has a very specific role at the authorization stage that must be considered in order to properly fix the guideposts for this stage and ensure that motions for authorization to institute class actions are dealt with more uniformly. Before turning to this, I wish to briefly discuss certain well-established principles that apply at the authorization stage of a class action in Quebec.

[211] To begin, it should be borne in mind that the burden of showing that all the conditions of art. 1003 *C.C.P.* are met is *always*, and *only*, on the applicant. This is not

a heavy burden: it is a burden of demonstration that the proposed legal syllogism is tenable rather than a burden of proof on a balance of probabilities (*Infineon*, at paras. 61, 65, 84, 89 and 127; *Oratoire*, at para. 58; *Martin v. Société Telus Communications*, 2010 QCCA 2376, at para. 32 (CanLII); *Pharmascience Inc. v. Option Consommateurs*, 2005 QCCA 437, [2005] R.J.Q. 1367, at para. 25). It has, in particular, been described as a burden of logic (Court of Appeal reasons, at paras. 38 and 45; *Union des consommateurs v. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243, at para. 88).

[212] Next, the allegations of fact in the motion must be assumed to be true, provided that they are sufficiently precise to ensure that they effectively support the existence of the right being claimed (*Infineon*, at paras. 67 and 134; *Oratoire*, at para. 59, per Brown J., and para. 171, per Gascon J.; *Labelle v. Agence de développement des réseaux locaux de services de santé et de services sociaux — région de Montréal*, 2011 QCCA 334, at paras. 59-60 (CanLII); *Toure v. Brault & Martineau inc.*, 2014 QCCA 1577, at para. 38 (CanLII); *Sibiga*, at para. 52; *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380, at para. 44 (CanLII); *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859, at para. 32; *Boiron Canada inc.*, at para. 4). Vague, general or imprecise allegations cannot be assumed to be true, as they are more akin to personal opinion, speculation or conjecture (*Oratoire*, at para. 59, per Brown J.; *Fortier v. Meubles Léon Ltée*, 2014 QCCA 195, at para. 69 (CanLII); *Toure*, at para. 39). Allegations that are vague, general or imprecise cannot be taken into consideration unless they are supported by “some

evidence” (*Infineon*, at paras. 67 and 134; *Oratoire*, at para. 59). Furthermore, the court hearing the motion for authorization is not required to assume allegations amounting to legal argument to be true (*Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, at paras. 37-38 (CanLII); Lafond, at p. 132).

[213] I would also reiterate that the court’s role is not to guess the basis for the action whose authorization is being sought, or for the legal syllogism, where no specific allegations are made in relation to a key element of the cause of action. The court hearing the motion for authorization can supplement the allegations using the evidence in the record and can draw inferences and presumptions from them (*Oratoire*, at para. 24, per Brown J.).

[214] Because the court is not required to assume the applicant’s legal allegations to be true, it “*may . . .* 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” (*Oratoire*, at para. 55, per Brown J. (emphasis in original); see also *Trudel v. Banque Toronto-Dominion*, 2007 QCCA 413, at paras. 2-3 (CanLII); *Groupe d’action d’investisseurs dans Biosyntech v. Tsang*, 2016 QCCA 1923, at para. 33 (CanLII); *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433, at para. 12 (CanLII); *Fortier*, at paras. 89-91; *Toure*, at para. 42; *Benabu v. Vidéotron*, 2018 QCCS 2207, at paras. 19-22 (CanLII), *aff’d* 2019 QCCA 2174; *Seigneur v. Netflix International*, 2018 QCCS 4629, at paras. 39

and 51-52 (CanLII), aff'd 2019 QCCA 1671). I wish to emphasize that when a judge decides a question of law on which the outcome of a class action depends at the authorization stage, this furthers the objectives of predictability of the law and judicial economy that underlie the system of administration of justice. It is also consistent with the objective at the authorization stage of “ensur[ing] that defendants do not have to defend against untenable claims on the merits” (*Vivendi*, at para. 37; see also *Infineon*, at para. 61; *Oratoire*, at para. 56). Questions of fact, which require the filing of evidence, must be left to the trial judge.

[215] A judge has a more active role in deciding a motion for authorization than in an ordinary proceeding. The authorization judge must play the role of protector of the absent members’ interests while remaining impartial and striving not to usurp the functions of counsel by managing the proceeding in an overly inquisitorial manner (*Lafond*, at pp. 14-16 and 48).

[216] The fundamental principle of our adversarial system is that it is the parties who conduct the case. Courts must decide cases on the basis of the record before them and may not reframe the litigation on their own initiative. Thus, although a judge does have the power to propose certain amendments — such as limiting the definition of the group — in order to promote the efficiency of the proceeding, he or she cannot reorient the debate (*Lafond*, at p. 20; see also *Raleigh v. Maibec inc.*, 2016 QCCS 2533, at para. 65 (CanLII); see also, in the common law context, *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 132 and

134). Even though the court is required to play a more active role in the context of a class action, this does not mean it can take on the role of party or counsel and change the purpose of the action as presented by the applicant.

[217] In *Infineon*, and in the subsequent cases, this Court stated that the court plays a “filtering” or screening role at the authorization stage (paras. 59 and 65). However, this Court has explained as well that the court hearing the motion for authorization must also verify that the action meets each of the conditions of art. 1003 *C.C.P.* (*Vivendi*, at para. 37; *Infineon*, at para. 59). Nonetheless, there sometimes seem to be differences of opinion between seeing authorization as simply a screening stage whose purpose is only to prevent frivolous or vexatious cases and seeing it as a verification stage that ensures that the action meets all the conditions of art. 1003 *C.C.P.* Yet this Court clearly stated in *Infineon* that “the court’s role is merely to filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of art. 1003”, that is, those that disclose an “arguable case” or a “good colour of right” (paras. 61 and 65 (emphasis added); see also *Vivendi*, at para. 37). Similarly, this Court has on several occasions reiterated that it is not only frivolous applications that must be screened out, but also those that are “untenable” (*Oratoire*, at paras. 56 and 61; see also *Infineon*, at paras. 61-62; *Vivendi*, at para. 37).

[218] Courts that decide whether to authorize class actions must take a consistent approach. Verifying that the relevant conditions are met at the authorization stage must not be mistaken for making an incursion into the merits or adding to the applicant’s

burden at this stage. Even though the analysis required at the authorization stage may be laborious because, for example, the case is complex, this does not mean that it is illegitimate. Quite the contrary, the analysis is necessary to ensure that all the elements of the applicant's cause of action are present and that each of the conditions set out in art. 1003 *C.C.P.* is met. The fact that the analysis may be difficult does not mean that the action must be authorized. Determining whether there is a "good colour of right" necessarily requires that the motion be read carefully to ascertain whether the proposed syllogism is tenable.

[219] The authorization judge is thus in the delicate position of having to adopt an approach to the authorization conditions that, on the one hand, helps preserve the integrity of the authorization stage and, on the other, does not place undue restrictions on the action being proposed. Defects of form can be excused, but substantive defects cannot be. Because the court must assume that the alleged facts are true, the allegations must be clear and complete, not vague, general or imprecise. In short, the judge's role at the authorization stage is to screen out frivolous or untenable actions, *but also* to verify that the applicant meets all the conditions of art. 1003 *C.C.P.* Professor Lafond clearly summarizes the task of the court hearing the motion for authorization:

[TRANSLATION] The class action does not have to be put through the ultimate test at the authorization stage. As the Supreme Court has stated, the court need not be convinced of the merits of the claim. Its role comes down to verifying, without making any assumption about the merits of the case, whether the legal syllogism underlying the action is correct, which involves a brief review of the legal arguments made by the applicant. [Emphasis added; citations omitted; pp. 110-11.]

[220] That being said, my articulation of the screening role is not an attempt to “revive a debate that was in fact settled by this Court as recently as last year”, as my colleague suggests (para. 54). In Kasirer J.’s view, *Oratoire* confirmed that authorization can be denied only if a motion is frivolous or clearly unfounded in law or in fact (paras. 55-58). However, saying that authorization is a verification stage and not simply a stage for screening out abusive and frivolous actions is consistent with the decisions of this Court (see *Infineon*, at para. 61; *Vivendi*, at para. 37). The case law is perfectly clear and unanimous in this regard: at the authorization stage, the court must ensure that all the conditions of art. 1003 *C.C.P.* are met and must decline to authorize the action if even one of them is not met. The court certainly plays a screening role at the authorization stage, *but also* a verification role (*Infineon*, at para. 59; *Vivendi*, at para. 37; *Oratoire*, at para. 7, per Brown J.).

[221] I wish to clarify my understanding of the expression “frivolous on its face”, as this seems to be at the root of the difference of opinion with my colleague. In this regard, I am of the opinion that my colleague departs from this Court’s precedents in *Infineon*, *Vivendi* and *Oratoire* in stating that the purpose of screening is merely “to filter out frivolous claims, and nothing more” (paras. 25 and 27). I agree that the screening threshold is not a very high one. Nevertheless, there is a distinction between an “untenable” motion and one that is “frivolous”. In my view, a motion for authorization that does not meet all the authorization conditions is not for that reason alone “frivolous”, a label that applies instead to a motion that is futile, vexatious or meaningless on its face. It is therefore not a question of screening out only the most

extreme motions. The motion must be read carefully and the evidence in the record analyzed. When I speak of a verification stage, I am reiterating the well-established principle that the authorization judge must carefully read the allegations of the motion that are assumed to be true in order to determine whether the legal syllogism proposed in the motion is an arguable one.

[222] Having clarified this, I will now discuss the standard for appellate intervention in a decision made at the authorization stage.

D. *Standard for Appellate Intervention*

[223] Judges have broad powers at the authorization stage; they have considerable leeway in assessing whether the four authorization conditions set out in art. 1003 *C.C.P.* are met (*Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380, at paras. 20-24 (CanLII); see also *Lafond*, at pp. 153-54). If a judge is of the opinion that each condition is met, he or she must authorize the action, as provided for in art. 1003 *C.C.P.*, and has no discretion to decline to do so (see also *Vivendi*, at para. 67).

[224] This broad power to assess is reflected in the applicable standard for appellate intervention: palpable and overriding error. As this Court recently observed, an appellate court's power to intervene is limited when it hears an appeal from a decision on a motion for authorization to institute a class action (*Oratoire*, at para. 10, per Brown J.). Intervention by the Court of Appeal will be justified only if the authorization judge's assessment of the conditions of art. 1003 *C.C.P.* is clearly wrong

(see also *Vivendi*, at para. 34; *Federal Express Canada Corporation v. Farias*, 2019 QCCA 1954, at para. 2 (CanLII); *Benabu* (C.A.), at para. 3 (CanLII)). If the Court of Appeal chooses to intervene on the basis that, in its view, the assessment of one of the authorization conditions is clearly wrong, it can substitute its own opinion only with respect to that condition (*Vivendi*, at para. 35; *Sofio v. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, at para. 17 (CanLII); *Sibiga*, at paras. 32-35; *Boiron Canada inc.*, at para. 37; *Belmamoun v. Brossard (Ville)*, 2017 QCCA 102, 68 M.P.L.R. (5th) 46, at para. 70). Of course, the Court of Appeal can intervene if there is an error of law, because the standard applicable to questions of law is correctness. The fact remains, however, that an appellate court's power of intervention is limited and that it must defer to the authorization judge's assessment of the conditions of art. 1003 C.C.P.

IX. Application

[225] How do these principles apply in this case? I begin by noting that this is not an action in which the inadequacies of the legal syllogism are obvious on the face of the motion for authorization (see, e.g., *Durand v. Attorney General of Quebec*, 2018 QCCS 2817). However, *Infineon* and *Vivendi* did not make the authorization conditions so generous that only motions that are frivolous on their face can be screened out.

[226] This appeal requires a careful analysis of the motion, including the allegations and the documents that were before the authorization judge so that she could

determine whether the action should be authorized. This is precisely the exercise that an authorization judge must undertake, and prior to this analysis, it cannot be said on what basis the cause of action is arguable and can be authorized. Authorization remains an intellectual exercise that cannot be sidestepped on the ground that a cursory reading of the motion does not show the legal syllogism to be fundamentally flawed.

A. *The Proposed Action Against Firm*

[227] The main issue that must be considered in relation to the action against Firm concerns the Court of Appeal's intervention in the Superior Court's decision. This issue raises two sub-issues relating to the authorization conditions set out in art. 1003 *C.C.P.*: whether there are any common questions with regard to Firm (art. 1003(a) *C.C.P.*) and whether there is an arguable case against Firm (art. 1003(b) *C.C.P.*).

[228] Before dealing with these issues, I believe it is essential to discuss the basis for the respondent's action against Firm, as there is some disagreement about it.

[229] I agree with my colleague that the existence of a contractual relationship between Firm and the respondent is no longer in any doubt (paras. 23 and 37). Firm's representatives, including Ms. Blanchette, could therefore engage its contractual liability, which the appellants in fact conceded at the hearing in this Court. However, I note that the motion judge considered several possible contractual bases for the action against Firm. The fact that she ruled out the possibility of a contractual basis arising from the deposit agreements does not invalidate her decision given the fact that she

considered other contractual bases, including the one arising from the mandator-mandatory relationship between Firm's representatives and their clients.

[230] The respondent's action is based on a breach of Firm's duty to inform. The respondent asserts that if he had been informed that the investments involved certain risks relating to the return, he would not have purchased them.

[231] My colleague outlines the nature of the duty to inform (para. 61). I therefore propose to make only a few additional points. First, the duty to inform arises both at the pre-contractual stage, where it requires the disclosure of the information needed to obtain informed consent, and during the performance of the contract (J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *Responsabilité professionnelle* (8th ed. 2014), at Nos. 2-452 and 307). The duty to inform to which my colleague refers would appear to be an ongoing duty that arose during the performance of the contract for services, as it cannot, in this case, be a duty to inform that arose at the pre-contractual stage in relation to the deposit agreements.

[232] Finally, before embarking on the subject of the respondent's action against Firm, I would like to clarify which contracts are at issue in this case given that the respondent is alleging that Firm is contractually liable. The motion judge did not err in stating that Firm could not be contractually liable on the basis of the deposit agreements for the PP and ALT investments because the parties to those agreements were the clients and their respective caisses populaires. This does not seem to have been questioned either by the Court of Appeal or by my colleague. The contract that could

give rise to Firm’s contractual liability is instead the one that it entered into with clients through its representatives, in this case Ms. Blanchette. I agree with the Court of Appeal that the contract in question was a contract for services whose sole object was the giving of advice (paras. 54 and 63). My position on this point is therefore the same as that of my colleague (para. 59). While the giving of advice was the core prestation under the contract, I also agree that this did not preclude a duty to inform from existing as well (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 306).

(1) Intervention of the Court of Appeal

[233] The appellants submit that the Court of Appeal rewrote the respondent’s cause of action against Firm. This argument is based in part on the comments the court made at para. 33 of its reasons:

[TRANSLATION] First, while it is true that one must not be satisfied with vagueness, generalities and imprecision, it would be wrong to close one’s eyes to allegations that are perhaps not perfect, but whose true meaning is nonetheless clear. One must therefore be able to read between the lines. To do otherwise would be to adopt an unduly literal or rigid approach and to give what the Supreme Court stated in this regard a meaning that it does not have. [Emphasis added.]

[234] It is true that strict formalism is not compatible with the flexible approach that must be taken at the authorization stage. But even if it is assumed for the purposes of discussion that it is sometimes necessary to “read between the lines”, lines must still exist; the court cannot write them itself.

[235] I would adopt the interesting metaphor made by Rennie J., as he then was, in speaking of administrative law:

Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. . . . *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page. [Emphasis added.]

(*Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11)

[236] In the same way, “reading between the lines” does not allow an appellate court to reorient an action however it likes, particularly in the absence of allegations. While a motion may lack clarity, as the Court of Appeal acknowledged with respect to the record in this case (at para. 47), there must still be a common thread that makes it possible to connect the dots so that the court hearing the motion can infer the cause of action on the basis of deductions from the alleged facts (*A v. Frères du Sacré-Coeur*, 2017 QCCS 5394, at para. 31 (CanLII)). However, this cannot be done in the absence of allegations, and it certainly cannot be done where there are conflicting allegations. That would go beyond facilitating the authorization of class actions as favoured by the courts. And in my opinion, with respect, that is what happened in the Court of Appeal.

[237] The authorization judge analyzed the action against Firm as it had been presented by the respondent in his motion for authorization, that is, from the standpoint of Firm’s contractual liability for a breach of the duty to inform. This alleged breach of

the duty to inform was analyzed in relation to, among other things, a contractual basis for the action arising from the mandator-mandatory relationship between Firm's representatives and the clients (para. 208). I reiterate here that the judge's assessment of the authorization conditions is entitled to deference on appeal absent a palpable and overriding error.

(2) Common Questions Requirement (Article 1003(a) C.C.P.)

[238] Firm essentially argues that unless the representations or omissions alleged against all of its financial advisers are shown to have been systematic in nature, the class action cannot be authorized, since the condition of identical, similar or related questions of law or fact is not met.

[239] I agree with the authorization judge that this condition is not met in this case. The liability of financial advisers for a breach of the duty to inform and the duty to provide advice is not well suited to a class action because of the highly individual nature of the relationship between a client and an adviser in the context of a contract for investment services. In such a case, the liability analysis would have to be repeated for each individual claim. The case law is consistent in this regard: there can be no common questions in such circumstances. This does not mean, however, that financial advisers are shielded from any class action for a breach of the duty to inform. If an applicant can show that the breach was *systematic in nature*, the common questions condition will not be an impediment to authorizing the action. This was what the applicant in *Oratoire* did by preparing a table of victims that, he argued, showed what

appeared to be systematic fault on the part of the defendant institutions. The respondent here, on the other hand, has neither alleged nor shown any kind of systematic breach of the advisers' duty to inform that might be imputed to Firm. By the respondent's own admission, he has no idea whether other clients were in the same situation as him. In short, it is the absence of a systematic breach that is fatal to the respondent's action, not the fact that the action concerns financial advisers.

[240] The question to be dealt with collectively as regards Firm's duty to inform is described as follows by the respondent:

[TRANSLATION] [D]id [Firm] breach this duty [to inform] by failing to clearly inform the members of the . . . Group . . . that the PP and ALT Investments would include investment strategies that might eliminate, before maturity, any possibility of a return?

(A.R., vol. II, at p. 158)

[241] Even if it is assumed for the purposes of discussing the condition of art. 1003(a) *C.C.P.* that the respondent has an arguable case against Firm, I am of the view that the action cannot be authorized because of the absence of common questions. Determining whether Firm committed the fault it is alleged to have committed, namely a breach of its duty to provide information concerning the safety of the PP and ALT investments, requires a contextual analysis involving a number of factors, including the nature of the relationship between the financial adviser and the client, the information provided by the financial adviser, each individual's investor profile, age and experience, each investor's understanding of the risks associated with the investments,

and each investor's level of sophistication and risk tolerance — all factors that essentially highlight the fact that the duty to inform is an individual and not a common one unless it is shown that the duty was systematically breached.

[242] I agree with my colleague that the duty to inform is more general than the duty to provide advice owed by Firm's representatives. The duty to inform is, however, a variable obligation shaped by the circumstances of each case, such as the client's characteristics and the nature of the client's relationship with his or her adviser (D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 2006; N. L'Heureux and M. Lacoursière, *Droit bancaire* (5th ed. 2017), at No. 644). This Court affirmed the variable nature of the duty to inform in *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, at pp. 586-87. The variable nature of the duty is especially true in cases where it is an accessory to a main prestation whose object is the giving of advice (reasons of Kasirer J., at para. 59). In the case at bar, the duty to inform did not arise as an accessory to the deposit agreements for the PP and ALT investments, since the parties to those agreements were the clients and their caisses populaires. The obligation to inform in this case clearly arose in a broader context, namely the provision of a financial adviser's services, which varies in accordance with several factors, including the length of the relationship, the client's goals and the client's level of expertise, to name a few. It is therefore not surprising that the respondent does not know whether there are other members in the same situation as him.

[243] The duty to inform owed by a professional who provides services to a lay client therefore includes a duty to become informed of facts that may be of interest to the client (Lluelles and Moore, at No. 2009.1). In this regard, one of the most important obligations of securities dealers and financial advisers is to know their clients. This obligation of means is necessarily an individual one whose content and extent vary (S. Rousseau, “L’obligation du courtier de connaître son client en droit canadien des valeurs mobilières” (2008), 2 *R.D.B.F.* 11). The obligation of advisers or dealers to know their clients shapes their relationship with them; it is clear that the clients’ specific circumstances are of significant importance.

[244] This Court in fact recognized the variable content of the obligations resting on market intermediaries in *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638:

The content of the obligations that rest on the manager will vary with the object of the mandate and the circumstances. One of the most fundamental of these obligations is that the manager exercise reasonable skill and all the care of a prudent administrator (art. 1710 *C.C.L.C.*). The conduct expected is not that of the best of managers, nor the worst. Rather, it is the conduct of a reasonably prudent and diligent manager performing similar functions in an analogous situation. Thus the portfolio manager’s conduct must [TRANSLATION] “be analysed having regard to his role as a specialist in this kind of transaction, and to the practices of each profession” ([N. L’Heureux, “La révocation d’un agent et le statut d’intermédiaire de commerce” (1977), 18 *C. de D.* 397], at p. 425). The *Regulation respecting securities*, (1983) 115 G.O. II, 1269, further defines this obligation by requiring that in his relations with his client the manager use “the care that one might expect of an informed professional placed in the same circumstances” (s. 235). He must also deal in good faith, honestly and fairly with his clients (s. 234.1). [Emphasis added; para. 29.]

The Court also stated the following:

The scope and nature of this duty will vary with the circumstances. Specifically, we note the importance of the client’s personality. . . . The substantive content of the duty to provide advice will vary inversely with the client’s knowledge of investments (*Mines v. Calumet Investments Ltd.*, [1959] C.S. 455; *Proulx v. Société de placements & Co.*, [1976] C.A. 121). A dealer who is a manager is also required to be well informed as to his client (*Securities Act*, s. 161; *Regulation respecting securities*, s. 232; Commission des valeurs mobilières du Québec, *Instructions générales québécoises Q-9*, s. 57). [Emphasis added; para. 34.]

Although these comments were made in the context of an action against a securities dealer acting as a portfolio manager, I consider them to be equally relevant in the context of this case.

[245] In *Richter & Associés inc. v. Merrill Lynch Canada inc.*, 2007 QCCA 124, [2007] R.J.Q. 238, at para. 73, the Quebec Court of Appeal also recognized that a dealer’s obligations vary with the circumstances, which may include [TRANSLATION] “the specific object of the mandate, the client’s goals, the client’s knowledge in the field of the contemplated investment, the risks associated with the transaction, and the client’s financial situation and personality”.

[246] More recently, the Quebec Superior Court also affirmed that a class action is not the appropriate vehicle for an action based on a breach of the duty to inform because of the variability in each member’s circumstances. In *Louisméus v. Compagnie d’assurance-vie Manufacturers (Financière Manuvie)*, 2017 QCCS 3614, which also concerned the sale of financial products, the Honourable Hamilton J. (as he then was)

found that there were no common issues because analyzing the breach of an adviser's duty to inform required consideration of the specifics of each individual relationship, including what information each adviser had received, how the instructions received from each client had been understood, what each adviser had communicated to each of his or her clients, and what had led each client to purchase the products (paras. 91-94 (CanLII); see also *Brunelle v. Banque Toronto Dominion*, 2009 QCCS 4605). I do not see the same limitations that my colleague Kasirer J. sees in these comments. Even though they were *obiter*, *Louisméus* still has persuasive force.

[247] While I agree that the court should not focus on each member's specific characteristics at the authorization stage of the class action (Lafond, at p. 63), the fact remains that here the elements of fault, causation and injury raised by the respondent on behalf of the group are highly variable. Given the need for such a contextual analysis, there can therefore be no commonality to the question of whether the duty to inform was breached unless it is shown that the breach occurred systematically. The individualized analysis required by the action precludes the possibility of proceeding on a collective basis.

[248] In Quebec, it was so held prior to *Vivendi* and *Infineon*. An action should not proceed on a collective basis where the analysis on which it hinges is specific to each individual. For example, in *Rosso v. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61, per Lalonde J., the Superior Court found that there can be no common questions where the causation analysis has to be repeated for each

member, resulting in a multitude of individual proceedings (para. 45; see also *Paré v. Desjardins Sécurité financière*, 2007 QCCS 4566, at paras. 59-61, per Jasmin J. (CanLII)). Relying on *Louisméus*, the Superior Court also stated the following in *Farber v. N.N. Life Insurance Co. of Canada*, [2002] AZ-50123096:

If, on the other hand, as Mr. Farber claims, he was a victim of misrepresentation, such a claim would be dependent upon his subjective understanding either of the contract documents or of the illustration used by the broker who sold him the policy. He could not on that account extend his state of error to all the members of the group because each situation would vary, according to the individual purchaser's understanding of what it was he or she was purchasing, and the particular goals of insurance or savings that he or she was setting. The possibilities are simply too varied and too complex factually to permit the efficiencies in time and money which the class action is intended to achieve. [para. 2]

[249] This interpretation of the requirement of art. 1003(a) *C.C.P.* continued to prevail following *Vivendi* and *Infineon*, as shown by *Louisméus*, described above.

[250] My colleague argues that I have added a requirement that the common questions predominate over the individual ones (para. 25). I agree completely with him that there is no requirement in Quebec law that the common questions predominate, provided, of course, that one or more common questions exist. However, the meaning of the condition set out in art. 1003(a) *C.C.P.* as discussed in *Infineon* and *Vivendi* must not be forgotten. This condition is designed to ensure that the *collective* nature of the proposed action is preserved by verifying that the case raises, at a minimum, one question that allows for a *collective* analysis that will advance the litigation in a “not insignificant” manner (*Vivendi*, at para. 58; see *Rozon v. Les Courageuses*, 2020 QCCA

5, at para. 68, per Hamilton J.A. (CanLII)). In other words, the common question must be significant enough “to affect the outcome of the class action” (*Infineon*, at para. 72). The analysis of the common question must therefore be made by reference to the action being proposed. Fundamentally, the purpose of this condition is to “avoid duplication of fact-finding or legal analysis” (*Dutton*, at para. 39; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29; *Vivendi*, at para. 44; see Lafond, at p. 92).

[251] It is clear that where an action requires the duplication of fact-finding in relation to the provision of services by each of the financial advisers as well as the duplication of legal analysis in relation to each of their breaches in the circumstances of each case, it must be concluded that the resolution of the proposed common question will not advance the action in a not insignificant manner. Such an approach recognizes the role of proportionality — a cardinal principle of civil procedure — in an action that raises mainly questions of a highly individual nature by preventing the costly and enormous vessel of the class action from being put in motion where there are no efficiency gains to be made and where individual actions would not unduly encumber the resolution of the case (art. 4.2 *C.C.P.*; art. 18 of the new *C.C.P.*).

[252] In this case, I am therefore of the view that no common question can arise given the manner in which the respondent has presented the action. There is no allegation that other members are in a situation sufficiently similar to his; on the

contrary, as I discuss below, it is unknown whether there are other members in the same situation as the respondent.

[253] I therefore agree with Firm that it was an error for the Court of Appeal, in light of the motion as presented, to treat the respondent's situation as a systematic one involving a similar fault committed by each financial adviser in relation to each member of the group. With respect, this was merely speculation, and the Court of Appeal took reading "between the lines" too far on this point.

[254] To identify the systematic nature of the alleged fault, Kasirer J. relies heavily on the respondent's allegation that Firm did not give its representatives sufficient instructions regarding the PP and ALT investments. This allegation reads as follows:

107.1 Moreover, the representatives of [Firm] were not given sufficient instructions regarding the characteristics and risks of the PP and ALT Investments and were not therefore in a position to evaluate their advantages and disadvantages;

However, this allegation does not suffice to make any fault committed by the representatives a systematic one. Because it is based only on generalities, it cannot be assumed to be true. As is required by the authorities, a general allegation such as this must therefore be supported by some evidence before it can be taken into account (*Infineon*, at paras. 67 and 134; *Oratoire*, at para. 59). But the respondent has produced

no evidence that specifically supports this allegation. In fact, he has instead presented evidence contradicting the systematic nature of the alleged fault.

[255] The respondent admitted that he did not know whether there were other investors in a situation similar to his:

[TRANSLATION]

[Counsel for the appellants]:

... And so, you also don't know, because these are exhibits that do not concern you personally, you don't know the circumstances in which the other members, if this is the case, how they received them, in what circumstances they received them?

[Counsel for the respondent]:

It has been admitted that the witness does not know those circumstances. Do you want another admission?

[Counsel for the appellants]:

And you also don't know which representations may or may not have been made to a member when the member received any of those documents?

RONALD ASSELIN:

I know nothing.

...

[Counsel for the appellants]:

He does not know the circumstances in which the members concerned happened to receive those exhibits [exhibits disclosed by members of group or by third parties]?

[Counsel for the respondent]:

I have already admitted it to you. He does not know the circumstances.

(A.R., vol. XII, at pp. 125-26)

It has therefore not been alleged or shown that the fault said to have been committed by Firm and its representatives in relation to their clients was systematic in nature. In

my opinion, the Court of Appeal erred in extrapolating the respondent's situation to the other members of the proposed group (paras. 51-52, 76-79 and 149).

[256] Without concluding that a claim for a financial adviser's breach of the duty to inform can never be the subject of a class action, I am of the view that it cannot be in this case. It is not alleged that a systematic fault was committed by Firm's representatives, which, in my opinion, is essential for a common question to be found to exist. Any common question that might be identified would not advance the action in a not insignificant manner, particularly in light of the host of individual questions to be resolved.

[257] The question of what fault may be committed by such an adviser, which, as I explained above, involves a variety of issues for each individual who purchased a PP investment, an ALT investment or both, and the question of causation in particular are highly variable, because individual trials will be needed to establish the context that led to each investment. This is true regardless of whether the obligation to inform or the obligation to provide advice is in issue. This evidence will have to be adduced individually for each relationship between a financial adviser and a client, and it is likely to be highly personalized and subjective given the nature of the action. A systematic duplication of fact-finding and legal analysis will be required, which means that the proposed question cannot advance the litigation in a not insignificant manner. As a result, that question cannot be characterized as a common question in this case (see *Lallier v. Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490, at

para. 21). In short, the instant case would not lead to a collective analysis (*Vivendi*, at para. 58), and the contemplated class action would not avert the duplication of proceedings.

[258] I therefore agree with the authorization judge that the condition of art. 1003(a) *C.C.P.* is not met in this case.

[259] In my view, the absence of systematic fault is, on its own, a persuasive enough ground for declining to authorize the action. This conclusion concerning the condition of art. 1003(a) *C.C.P.* is sufficient to dispose of Firm's appeal and to dismiss the action against it. It is therefore unnecessary to deal with the second sub-issue submitted by Firm, namely whether there is no arguable case under art. 1003(b) *C.C.P.*

B. *The Proposed Action Against Management*

(1) Intervention of the Court of Appeal

[260] I reiterate here that an appellate court's power to intervene at the authorization stage is limited. It can intervene only if the authorization judge made a palpable and overriding error in considering the conditions of art. 1003 *C.C.P.* or an error of law. If an appellate court intervenes with regard to the assessment of one of the conditions of art. 1003 *C.C.P.*, it can substitute its own opinion only with respect to that condition.

[261] For the reasons that follow, I am of the view that in the case of the respondent's action against Management, the Court of Appeal's intervention was warranted only in part.

(2) Punitive Damages

[262] The respondent seeks an award of \$1,000 in punitive damages for each member of the group against Management. He argues that Management owes punitive damages to the group's members because a significant portion of the investments making up the PP and ALT investments consisted of ABCP. He submits that the appellants therefore interfered unlawfully and intentionally with the right of the group's members to the peaceful enjoyment and free disposition of their property by retaining ABCP in the investments after it became a risky and illiquid asset and by issuing new investments consisting of ABCP.

[263] The authorization judge found that if the action were to be authorized, this claim would be barred because of the release with respect to ABCP found in the Sanction Order made by the Ontario Superior Court of Justice under the CCAA. That release would have the effect of barring or terminating any claim based on the use of ABCP.

[264] The Court of Appeal was of the view that the motion judge should have rejected this argument outright. The Court of Appeal found that it was not possible to

determine with certainty from the terms of the release which of its provisions might apply in this case.

[265] Two questions must be decided in order to ascertain whether the respondent's claim is barred by the release.

[266] The first question is whether an authorization judge can consider a release at the authorization stage and, if so, to what extent the judge can interpret the release and apply it to the facts.

[267] The second question relates to the circumstances of this appeal. It requires a determination of whether the release bars the respondent from claiming punitive damages based on Management's actions relating to ABCP as an investment in the PP and ALT investments.

[268] For the reasons that follow, I am of the opinion that the authorization judge correctly decided to consider the release and its scope in order to determine whether the proposed action against Management claiming punitive damages in relation to ABCP established an arguable case (*Oratoire*, at para. 55). In this case, the terms of the release, and the respondent's admission that the release with respect to ABCP covers the investments made prior to August 2007, show that the proposed action against Management cannot be authorized insofar as its purpose is to obtain punitive damages.

(a) *The Application of a Release May Be Considered at the Authorization Stage*

[269] The defences available to a defendant are generally considered at the trial on the merits (*Oratoire*, at para. 41). As I explained, however, a court may decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so. This principle, which applies to the interpretation of legislation, also extends to the interpretation of a release included in the Sanction Order made by the Ontario Superior Court of Justice, which has “full force and effect” in Quebec under s. 16 of the *CCAA*. The question is whether, if the facts are assumed to be true, the conclusions sought by the respondent are tenable in light of that release.

[270] In the case at bar, the outcome of the part of the proposed action that concerns punitive damages in relation to ABCP depends on how the terms of the release are interpreted, and the authorization judge was right to interpret the release in considering whether this part of the proposed action was tenable.

[271] Where evidence is necessary to determine the applicability of a release found in a sanction order, this question should be decided at the trial on the merits. Conversely, where such evidence is not necessary, it would be neither logical nor desirable, from the standpoint of judicial economy and of proportionality of proceedings, to defer making a decision on this question of law when the court has an opportunity to decide it at the authorization stage. Therefore, the fact that a question of interpretation presents some difficulty at the authorization stage does not make it an

improper question if it does not require evidence to be adduced (see, for example, *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at paras. 86-87). In law as in life, it is preferable not to put off until tomorrow that which should be done today. Once it is plain and obvious in law that a release has the effect of barring an action, the resources of the parties and the courts should not be wasted by postponing a decision that can be rendered by an authorization judge on the basis of the record before him or her.

[272] This is especially true for releases resulting from a compromise or arrangement sanctioned by a court under the *CCAA*. These releases benefit creditors, as they reduce the risk of litigation against parties protected under the *CCAA*, the risk of delay caused by complex litigation and the depletion of assets to fund such litigation (*Nortel Networks Corp., Re*, 2010 ONSC 1708, 63 C.B.R. (6th) 162, at para. 81, per Morawetz J.). They advance one of the *CCAA*'s important objectives, which is to favour restructuring by preventing the risk of litigation (L. Pearce, "Catch and Release: Class Actions and Solvent Third Parties Under the *CCAA*" (2016), 11 *Can. Class Action Rev.* 171).

[273] These principles are well illustrated by *Holley v. Northern Trust Co. Canada*, 2014 ONSC 889, 10 C.B.R. (6th) 162, aff'd on other grounds, 2014 ONCA 719, 18 C.B.R. (6th) 162. In that case, Perell J., accepting the facts as proven, struck out a class action because it was plain from reading the release included

in the sanction order made under the CCAA that the release applied to the causes of action alleged by the claimants.

[274] The unique nature of a judicial release under the CCAA militates in favour of considering it at a preliminary stage of an action, such as the authorization stage. Like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the CCAA creates a nationwide system dealing with the insolvency and restructuring of companies as defined in the Act: “[t]he national implementation of bankruptcy decisions rendered by a court within a particular province is achieved through the cooperative network of superior courts of the provinces and territories” (*Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 25, citing *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (C.A.), at p. 246, per Rivard J.A.).

[275] In this regard, ss. 16 and 17 of the CCAA provide that orders made under the CCAA are binding on the other courts that have jurisdiction under the CCAA and must be enforced by those courts in the same manner as if they had made the orders themselves (*Canadian Red Cross Society (Re)* (1998), 165 D.L.R. (4th) 365 (B.C.S.C.), at para. 31; B. Boucher, *Faillite et insolvabilité: Une perspective québécoise de la jurisprudence canadienne* (loose-leaf), vol. II, at p. 6-134). Accordingly, it is imperative that Quebec courts give effect to CCAA orders regardless of the jurisdiction where the proceedings took place. The release included in the Sanction Order is therefore directly applicable in Quebec.

[276] This principle is clearly illustrated by *Hy Bloom inc. v. Banque Nationale du Canada*, 2010 QCCS 737, [2010] R.J.Q. 912, in which Wagner J. (as he then was) considered the application of the same release being relied on in the case at bar to another claim made in Quebec. The plaintiffs, who had invested in ABCP, had brought an action against the bank on the ground that ABCP had been represented to them as being a guaranteed, risk-free investment. In dismissing the claim, Wagner J. held the following:

[TRANSLATION] . . . under sections 16 and 17 of the *CCAA*, [the Superior Court] need only be satisfied that the order emanates from the court designated under the *CCAA*, and it cannot reopen the debate already finished before another court that was lawfully seized of all the issues in dispute.

Without deciding on the veracity or merits of the allegations in the amended motion to institute proceedings, the Court is of the opinion that the plan as approved will allow the plaintiffs to continue their actions insofar as they can establish fraud . . . as defined in the plan. However, they may no longer sue National Bank for any other claim arising from the sale of ABCP. [paras. 101-2]

[277] Releases are therefore relevant not only for the purposes of art. 1003(b) *C.C.P.*, which relates to colour of right, but also for the purposes of art. 1003(a) *C.C.P.*, which relates to the existence of common questions. This is a matter falling within the role of the court that hears the motion for authorization.

[278] In order to implement the *CCAA* framework, an authorization judge should be able to consider the terms of a release in order to determine whether it bars a claim in whole or in part. If, when the alleged facts are assumed to be true, the terms of the

release make it clear that part of the action cannot proceed, that aspect should not be authorized, because it no longer meets the colour of right condition.

(b) *The Release With Respect to ABCP Bars the Claim for Punitive Damages*

[279] Before I turn to the application of the release to Mr. Asselin's motion, some additional facts are necessary.

[280] In August 2007, a liquidity crisis threatened the Canadian ABCP market. The crisis was triggered by a loss of confidence among investors stemming from the news of widespread defaults on subprime mortgages in the United States. On August 13, 2007, the Canadian ABCP market was frozen with a view to resolving the crisis by restructuring that market.

[281] The major participants in the Canadian ABCP market met in Montréal in August 2007. The purpose of the meetings was to come up with a common solution to prepare for the possible restructuring of the Canadian ABCP market, which was worth nearly \$32 billion at the time. The meetings resulted in what is known as the Montreal Accord.

[282] The Desjardins Group, as a participant in the ABCP market, was involved in the discussions that led to the Montreal Accord, which it signed on August 16, 2007. The Accord included an agreement in principle concerning a proposal for restructuring the market. Following the conclusion of the Accord, the Pan-Canadian Investors

Committee for Third-Party Structured Asset-Backed Commercial Paper, which was made up of ABCP investors, was incorporated to negotiate the terms of the market restructuring on behalf of investors. The Committee later put forward a creditor-initiated plan of arrangement that formed the subject matter of the proceedings in *Metcalf & Mansfield (C.A.)*.

[283] An agreement in principle was reached on December 23, 2007, and an application was filed in March 2008 under the CCAA for the restructuring of the ABCP market. The agreement in principle served as the basis for the plan of compromise and arrangement in the CCAA process. That plan was sanctioned by Campbell J. (see Third Amended Plan of Compromise and Arrangement).

[284] Under the plan, the creditors released their claims against the dealers that had sold them investments containing ABCP. The plan called for the release of Canadian banks, dealers, noteholders, asset providers, issuer trustees, liquidity providers and other market participants, or virtually all participants in the Canadian ABCP market, from any liability associated with the sale or use of ABCP, with the exception of certain narrow claims relating to fraud.

[285] The terms of the release in that case, as set out in art. 10.1 of the Third Amended Plan of Compromise and Arrangement (art. 17 of the Sanction Order), were as follows:

[E]very Person (regardless of whether or not such Person is a Noteholder) . . . hereby fully, finally, irrevocably and unconditionally releases and forever discharges each of the Released Parties of and from any and all past, present and future claims, rights, interests, actions, rights of indemnity, liabilities, demands, duties, injuries, damages, expenses, fees . . . costs, compensation, or causes of action of whatsoever kind or nature whether foreseen or unforeseen, known or unknown, asserted or unasserted, contingent or actual, liquidated or unliquidated, whether in tort or contract, whether statutory, at common law or in equity, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly: any act or omission existing or taking place on or prior to the Plan Implementation Date relating to or otherwise in connection with the Third-Party ABCP market in Canada, the ABCP Conduits, the Affected ABCP, the business and affairs of any of the Released Parties relating to or otherwise in connection with the Affected ABCP [Emphasis added.]

[286] The sanctioned plan contained a limited exclusion for an “Excepted Claim” as defined in the release. An Excepted Claim was primarily one based on fraudulent misrepresentations (art. 20(d)(i) Sanction Order; art. 10.4(c) Third Amended Plan of Compromise and Arrangement). The release required that the pleadings for such claims provide specific information concerning: the authorized representative who made the misrepresentation, the person to whom the misrepresentation was made, the dates on which ABCP was purchased, the text of the representation said to be untrue, and the action taken by the potential plaintiff in reliance on the representation (art. 20(d)(ii) Sanction Order; art. 10.4(d)(ii) Third Amended Plan of Compromise and Arrangement). A potential plaintiff had the right to bring an Excepted Claim only within nine weeks of the date of delivery of notice by the Monitor in the proceeding under the CCAA (art. 20(f)(ii) Sanction Order; art. 10.4(f)(ii) Third Amended Plan of Compromise and Arrangement).

[287] On appeal from Campbell J.’s Sanction Order, the Ontario Court of Appeal upheld the plan of arrangement and noted that the release exempted virtually all participants in the Canadian ABCP market from any liability associated with ABCP (*Metcalfe & Mansfield (C.A.)*, at para. 29).

[288] In subsequent decisions, it was affirmed that the release was a necessary component of the plan and that it had been drafted very broadly in order to bar all claims relating to ABCP, except the claims for misrepresentations that had been specifically carved out (*Mull v. National Bank of Canada*, 2011 ONCA 488, at para. 9 (CanLII)).

[289] The respondent takes the position that the issue of whether the release applies to the appellants could not be argued at the authorization stage because the appellants adduced no evidence from which the authorization judge could determine whether Management was a Released Party within the meaning of the release or whether the ABCP to which the PP and ALT investments may have been exposed was “Affected ABCP”. This argument is untenable in view of the respondent’s judicial admission at the hearing on May 7, 2015:

[TRANSLATION] [Counsel for the appellants] stated that [counsel for the respondent] had admitted on Monday that he was withdrawing the claim on the first component, acknowledging that the release does in fact release [Management] in this respect and that he therefore has no action or claim for punitive damages against [Management] based on the first component.

[Counsel for the respondent] confirmed that this was correct, that this was what he had pleaded before Justice Godbout.

The Court summarized the judicial admission as follows: [Counsel for the respondent] acknowledged that the release with respect to ABCP covers the investments made before August 2007.

(A.R., vol. II, at p. 194)

[290] While an authorization judge must assume the facts alleged by an applicant to be true, the judge cannot then disregard the admissions made by that applicant. The respondent is not alleging that Management was no longer a Released Party after August 2007. Nor is he arguing that the ABCP sold by Management was no longer Affected ABCP after August 2007. It can therefore be assumed that the release must apply to Management and its investments before, during and after August 2007.

[291] What I understand, rather, is that according to the respondent, the only important change that occurred in August 2007 was that Management became aware of the risk associated with the continued use of ABCP in its investments and that it nevertheless retained this type of investment in the PP and ALT investments (A.R., vol. II, at p. 150).

[292] Management's alleged awareness of the risk has no effect on the continued application of the release to the parties or to the investments. Ultimately, it only changes the basis for the respondent's claim. The question is therefore whether the claim can survive the terms of the release, which allows only claims falling within the definition of an Excepted Claim. However, the respondent's claim cannot be an Excepted Claim.

[293] The release thus presents two impediments that are fatal to the claim for punitive damages based on ABCP.

[294] The first impediment arises from the limited cause of action authorized for an Excepted Claim: the claim must be based on express fraudulent misrepresentations made to the potential plaintiff by an “authorized representative” of the potential defendant. The exception for misrepresentations must be interpreted narrowly to avoid the “potential cascade of litigation” that would result from a broad interpretation (*Metcalf & Mansfield* (S.C.), at para. 113). The misrepresentation requirement is applicable in both the civil and the common law jurisdictions (para. 118).

[295] However, Mr. Asselin’s claim for punitive damages is not based on a misrepresentation. Rather, he submits that Management’s fault in relation to ABCP lies in [TRANSLATION] “flawed design and management . . . contrary to its obligations and duties to act prudently and diligently and to adhere to sound and prudent management practices” (A.R., vol. II, at p. 150). Moreover, the allegations are not sufficiently detailed, because the release requires details concerning the date, content and source of the misrepresentation. The motion therefore does not allege a cause of action covered by the definition of an Excepted Claim.

[296] Even if other parts of the motion are considered, the respondent is not arguing that any “authorized representative” of Management acted with fraudulent intent. This fact alone means that there is no legal syllogism in respect of which authorization could be granted, as it is the representative who must have the fraudulent

intent. Campbell J. himself was aware of the possibility that the release would “preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false” (*Metcalfe & Mansfield* (S.C.), at para. 119).

[297] The second impediment to the claim for punitive damages relates to the strict time limit for asserting a claim. The nine-week time limit began to run on the date of delivery of notice by the Monitor, which was essentially the date on which the Sanction Order was made, namely June 5, 2008 (J. Carhart and J. Hoffman, “Canada’s Asset Backed Commercial Paper Restructuring: 2007-2009” (2010), 25 *B.F.L.R.* 35, at p. 56). Mr. Asselin’s motion for authorization to institute a class action was served on September 16, 2011. His claim for punitive damages based on Management’s use of an investment strategy that included ABCP was therefore filed out of time.

[298] Courts with jurisdiction under the *CCAA* have “[t]he ability to conclusively cap liability and close the door on future litigation” (Pearce, at p. 193). This is the case here. To permit claims to be considered regardless of the previous decisions and the release would operate as a manifest unfairness to all the other participants that incurred losses (*Mull*, at para. 2). Allowing the claim relating to ABCP to proceed would amount to reopening a debate on the release in the Quebec Superior Court, which [TRANSLATION] “would short-circuit the economy of the judicial system” (*Hy Bloom inc.*, at para. 84).

[299] In conclusion, the release stands in the way of the respondent's legal syllogism with regard to Management's fault, and the claim based on ABCP must be dismissed. It is clear from the allegations, the terms of the release and the respondent's admission that the claim for punitive damages based on ABCP does not have the colour of right required by art. 1003(b) *C.C.P.*

(3) Compensatory Damages

[300] Insofar as it is argued that Management is liable as the designer and manager of the products, I agree with the Court of Appeal that the action can be authorized in relation to the compensatory damages sought by the respondent against Management.

[301] The respondent alleges that Management breached its duty of competence and management by taking risks that were contrary to its legal and contractual obligations (A.R., vol. II, at p. 63, para. 120). Among other things, he alleges that Management liquidated the amounts allocated to the return on the PP and ALT investments in order to honour the capital guarantee, which, he says, shows the scale of the risk associated with the investments. Thus, in addition to the use of ABCP, the investment strategies included the use of a leverage ratio of five to one, which, according to the respondent, was in violation of Management's obligations because it put the capital at risk and forced the liquidation of the amounts allocated to the return (para. 122.1). The respondent submits that all of this was contrary to Management's

obligation to act prudently and diligently and that it resulted in a loss of 100 percent of the assets allocated to the return (para. 127).

[302] The authorization judge declined to authorize this part of the action, in particular because she found that the losses in question were attributable to the market collapse during the crisis of 2008 and that, as a result, the action did not have the colour of right required by art. 1003(b) *C.C.P.* I agree with the Court of Appeal that this was an error that warranted its intervention. By referring to the effects of the 2008 financial crisis, the authorization judge decided the merits of the action. Thus, even though one may find tenuous this aspect of the action, it is not devoid of foundation. The allegations are sufficiently precise for this aspect of the action against Management to be authorized.

[303] I would therefore answer the second question at issue partly in the negative, as I am of the view that the Court of Appeal properly authorized the action against Management except in relation to the claim for punitive damages.

X. Disposition

[304] I would allow the appeal in part. I would decline to authorize the action against Firm, and I would authorize the action against Management, but only in relation to the claim for compensatory damages.

Appeal allowed in part, MOLDAVER, CÔTÉ and ROWE JJ. dissenting in part.

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