COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
QUÉBEC REGISTRY

No. 200-09-009232-163
(200-06-000179-146)

DATE: February 8, 2017

CORAM : THE HONOURABLE GUY GAGNON J.C.A.
DOMINIQUE BÉLANGER J.C.A.
ROBERT M. MAINVILLE J.C.A.

SOCIÉTÉ QUÉBÉCOISE DE GESTION COLLECTIVE DES DROITS DE REPRODUCTION (COPIBEC)
APPELLANT – Petitioner
v.

UNIVERSITÉ LAVAL
RESPONDENT – Respondent
And
GUY MARCHAND, known under the artistic pseudonym GUY MARCHAMPS, JEAN-FRÉDÉRIC MESSIER, ÉDITIONS LES HERBES ROUGES INC., LÉMÉAC ÉDITEUR INC., CENTRE FRANÇAIS D'EXPLOITATION DU DROIT DE COPIE (CFC) and REPROBEL
IMPLEADED PARTIES – Designated persons

DECISION

---

[1] The appellant is appealing both the judgment of the Superior Court (the Honourable Justice Michel Beaupré), rendered on February 26, 2016, which dismissed its application for leave to institute a class action, and the judgment rendered on March 25, 2015 that dismissed its application for a safeguard order.

[2] For the reasons of Gagnon J., Bélanger and Mainville JJ. concurring, **THE COURT**:

[3] **ALLOWS** the appeal, in part, of the judgment of February 26, 2016, with legal costs;

[4] **QUASHES** the judgment of first instance and pronounces the judgment which should have been rendered;

[5] **AUTHORIZES** the instituting of a class action, costs to follow the outcome of the case;

[6] **ALLOWS** the motion to amend pleadings and **PERMITS** the modification of the class as proposed by the appellant at the appeal stage;

[7] **GRANTS** to the appellant Société québécoise de gestion collective des droits de reproduction (Copibec), Guy Marchand and Jean-Frédéric Messier, the status of representatives for the purposes of instituting a class action on behalf of the following group described:

> All natural or legal persons that own or are authorized to represent one or more owners of patrimonial and moral rights on a literary work (except computer programs, but including lyrics), a dramatic work or an artistic work (integrated into a literary or dramatic work) whose author did not die prior to January 1,1964, that Université Laval and its personnel, its mandataries and its subcontractors, have, without authorization from the copyright owners, reproduced, made available or communicated by telecommunication, to students or to other members of its personnel, in paper or digital format, for the purpose of all of the teaching and research activities of Université Laval since June 1, 2014 until the date of the Court of Appeal decision.

[8] **DEFINES** the following subclasses:

> A) All natural persons, part of the described class, who are authors of literary, dramatic or artistic works in Canada.
>
> B) All natural or legal persons, part of the described class, that are publishers of literary or dramatic works or that are entitled to represent one or more copyright owners in Canada.
>
> C) All natural or legal persons, part of the described class and domiciled outside of Canada, including the collective societies of foreign reproduction rights authorized to represent owners of copyright in their respective country.

[9] **IDENTIFIES** the questions of law and of fact that will be addressed collectively:

> (I) Did Université Laval and its personnel, its mandataries and subcontractors, in their teaching and research activities, breach the class members' patrimonial rights, under section 3 of the *Copyright Act*
>
> (a) by reproducing,
> (b) and by communicating by telecommunication,
> (c) including making available to the public by telecommunication

copyrighted literary, dramatic and artistic works without the authorization of the copyright owners or of their representatives?

(II) Did Université Laval and its personnel, its mandataries and its sub-contractors, in their teaching and research activities, breach the moral rights of the class members who are authors, under section 14.1 of the *Copyright Act*,

(a) by reproducing,
(b) by communicating by telecommunication,
(c) including making available to the public by telecommunication

short passages of copyrighted literary, dramatic, artistic and musical works without the authorization of the authors or of their representatives?

[10] **IDENTIFIES** the conclusions sought in the class action on the merits:

- **ALLOWS** the class action on behalf of and for the benefit of all class members;
- **ORDERS** the respondent Université Laval, its administrators, its mandataries, its sub-contractors, and its personnel, including all professors, associate professors, lecturers, and clinical medicine lecturers, to cease: (i) reproduction, in paper or digital format; (ii) making available and (iii) communicating by telecommunication on its computer network or otherwise, all copyrighted literary, dramatic and artistic works of the class members without having obtained, beforehand, the required authorizations;
- **ORDERS** the respondent Université Laval, its administrators, its mandataries, its subcontractors and its personnel including all professors, associate professors, lecturers and clinical medicine lecturers, to provide to the petitioner, within thirty (30) days of the forthcoming judgment, all collective works of texts or any other document in paper or digital format, any device or local storage medium containing copyrighted literary, dramatic and artistic works of the class members, or parts thereof;
- **ORDERS** the respondent Université Laval to give to the petitioner within thirty (30) days of the forthcoming judgment, a sworn attestation from its Rector to the effect that it has removed from its servers and networks all the copyrighted literary, dramatic and artistic works of the class members, or parts thereof, reproduced without the necessary authorizations;
- **ORDERS** the respondent Université Laval to reimburse the petitioner Copibec all costs incurred in destroying, by pulping or other reasonable means, the counterfeit material within fifteen (15) days of the communication of supporting documents;
- **ORDERS** the respondent Université Laval to make known to the members of its personnel, within five (5) days of the judgment to be rendered, the injunctions rendered by the Court by individualized letter to each and by

message on its intranet and on its website, asking the members to comply to it;

- **AUTHORIZES** the collective recovery of sums destined to the class members and **EMPOWERS** the petitioner to receive them and distribute them among the successor class members according to its by-laws and usual practices;
- **CONSEQUENTLY, CONDEMNS** the respondent Université Laval to pay Copibec, for the benefit of the class members and to distribute among the class members whose works have been reproduced illicitly, the following damages:

  (A) A sum, subject to the making up of the sum due, which can be adjusted, of $1 661 830 (or 11 217 839 pages copied, subject to the making up of the sum due, at the rate of 15¢ per page reproduced, less the sum of $20 846 already paid for 138 973 authorized copies), or $1 661 830.

  (B) An additional sum of $15 per student for continuing education and distance education, in which 20 000 persons were registered according to the figures published by the respondent, or an estimated sum, subject to the making up of the sum due, of $300 000.

  (C) A sum of $1 000 000 as exemplary damages.

- **CONDEMNS** the respondent Université Laval to pay Copibec, for the benefit of the class members and to distribute among them, all the profits made by the sale of collective works of texts used in the courses and by illicitly reproducing literary, dramatic and artistic works of the class members, a sum that it estimated, subject to the making up of the sum due, at $10 per collective work and per course, an additional sum estimated, subject to the making up of the sum due, at $120 000;
- **CONDEMNS** the respondent Université Laval to pay Copibec, for the benefit of the class member authors and to distribute the monies among the authors whose works were reproduced illicitly, for the breach of their moral rights, an additional sum of $1 000 000;
- **CONDEMNS** the respondent Université Laval to reimburse Copibec and Fonds d'aide au recours collectif, other than legal fees and costs, extrajudicial fees and lawyers disbursements, as well as all the extrajudicial fees incurred for the class action of the class represented, including all publication costs in the media, all experts' fees, all reasonable travel expenses and, where applicable, reasonable travel expenses for witnesses from abroad;
- **ORDERS** the collective execution and execution notwithstanding an appeal;
- **THE WHOLE** with interest as from the notification of the motion for leave, and the additional indemnity of the *Civil Code of Québec*, except as from the judgment for exemplary damages and for fees and costs incurred;

[11] **DETERMINES** that the class action must be instituted in the judicial district of Québec;

[12] **REFERS** the file to the senior associate chief justice so that he may designate a judge to ensure case management;

[13] **DEFERS** to the next case management judge the matter of the publication of the notice to the class members and of the opting-out period;

[14] **DISMISSES** the appeal of the judgment rendered on March 25, 2015, with legal costs.

(s)
GUY GAGNON J.C.A.

(s)
DOMINIQUE BÉLANGER J.C.A.

(s)
ROBERT M. MAINVILLE J.C.A.

Mtre. Daniel Payette
Payette avocats
For the appellant

Mtre. Samuel Massicotte and Mtre. David Ferland
Stein, Monast
For the respondent

Hearing date: November 23, 2016

REASONS OF GAGNON J.

[15] The appellant Copibec (Copibec) is appealing a judgment of the Superior Court (the Honourable Justice Michel Beaupré), rendered on February 26, 2016,[1] which dismissed its leave application to institute a class action against the respondent Université Laval (Université). The same judgment dismisses an application for a safeguard order which sought to force the Université to collect and protect certain information during the proceedings.

[16] Copibec charges the Université with breaching the authors' patrimonial and moral rights through the unauthorized reproduction of their works, thereby contravening the *Copyright Act* (CA).[2]

[17] In first instance, the discussion was initiated under the former *Code of Civil Procedure,* but was finally concluded, as required,[3] based on the provisions of the new *Code of Civil Procedure* (art. 571 and following C.C.P.).

FACTS

[18] Copibec is a partnership incorporated under Part III of the *Companies Act.*[4] It acts as a collective society within the meaning of the *Copyright Act*.[5] In this capacity, it ensures the collective administration of the copyright of several authors and associations[6] grouped under its direction.

[19] On behalf of its members, Copibec offers its clientele, notably universities, the possibility of using a license authorizing them to reproduce, in whole or in part, repertoires of works in return for the payment of pre-established fees. It pays copyright owners 86% of the sums collected and retains 14% for its administration services.

[20] The licensing system is the one that prevailed between the parties from 1990 to 2014.

[21] At the same time, the legislature amended the CA to allow the "fair dealing" of a work or any other object covered by copyright without the owner of the copyright being

---

1 *Société québécoise de gestion collective des droits de reproduction (Copibec) c. Université Laval*, 2016 QCCS 900 (Judgment impugned).

2 *Copyright Act,* R.S.C. 1985, c. C-42 [CA].

3 *Hôpital Maisonneuve-Rosemont c. Buesco Construction inc.*, 2016 QCCA 739, at paras. 256 to 259.

4 *Companies Act*, CQLR, c. C-38.

5 CA *supra* note 2, s. 2, definitions.

6 The Union des écrivaines et écrivains québécois (UNEQ), the Association nationale des éditeurs de livres, the Association des journalistes indépendants du Québec (AJIQ), the Fédération professionnelle des journalistes du Québec (FPJQ), the Regroupement des artistes en arts visuels du Québec, Les Quotidiens du Québec, Hebdos Québec and the Société de développement des périodiques culturels québécois (SODEP) – as described in the appellant's brief.

able to require compensation, provided that such dealing falls within the parameters of the law.[7]

[22] On March 10, 2014, the Université informed Copibec of its intention not to renew its comprehensive license ending on the following May 31. To mitigate this licensing system, on May 21, 2014, the Université adopted a policy in favour of its students and its teaching staff in order to promote the fair dealing of course material from works covered by the CA (the Policy).[8] The Université's objectives are laid out in it:

> [TRANSLATION]
>
> The purpose of the Policy is to outline the importance that the Université attaches to the protection of copyright, to establish the priority choices that must be made by teaching staff in relation to the dealings of the works of others for the purposes of teaching, learning, research and private study and define an administrative concept of the fair dealing of the work of others for these purposes.
>
> To facilitate the attainment of its objectives, the Policy recalls a few basic notions of copyright, clearly explains the Université's expectations with regard to the teaching staff related to the respect of copyright and of the legal and fair dealing of the work of others in course materials. It also provides guidelines for reaching these objectives by clarifying for administrative purposes certain user rights defined imprecisely in the *Copyright Act* and jurisprudence, as well as the information on the resources made available to the teaching staff for any other question pertaining to the Policy.[9]

[23] The Policy establishes binding administrative standards with respect to the Université and its users to govern the "fair dealing" of a work. It also provides for an authorization procedure in cases where the established standards would require an overrun.

[24] The Université also adopted by-laws to facilitate access to copyrighted works (the By-laws).[10] The By-laws provide, *inter alia*, for the establishment of a copyright office whose [TRANSLATION] "primary mandate is to ensure the respect of copyright and of the Policy and to make available a primary front-line resource to the teaching staff in order to ensure compliance with the By-laws and the Policy.[11]

---

7 See s. 29 of the CA whose current version went into force on Nov. 6, 2012, *Order Fixing Various Dates as the Dates on Which Certain Provisions of the Act Come into Force,* SI/2012-85, at 2447.

8 *Politique et directives relatives à l'utilisation de l'œuvre d'autrui aux fins des activités d'enseignement, d'apprentissage, de recherche et d'étude privée à l'Université Laval,* May 21, 2014, Exhibit R-11.

9 *Politique et directives relatives à l'utilisation de l'œuvre d'autrui aux fins des activités d'enseignement, d'apprentissage, de recherche et d'étude privée à l'Université Laval,* May 21, 2014, Exhibit R-11, at para. 3.

10 *Règlement sur le matériel de cours à l'Université Laval*, May 21, 2014, Exhibit R-12.

11 *Règlement sur le matériel de cours à l'Université Laval*, May 21, 2014, Exhibit R-12, art. 5.1.

[25] Notwithstanding the adoption of the Policy and its accompanying by-laws, Copibec submits that reproductions of works made by the Université are contrary to the protection conferred by the CA, the general rule of which reads as follows:

> 27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

[26] The original class action described thus the class that Copibec hoped to represent:

> [TRANSLATION]
>
> All natural or legal persons who own or are authorized to represent one or more owners of patrimonial and moral rights on a literary work (excluding computer programs, but including lyrics), a dramatic work or an artistic work (integrated into a literary or dramatic work) covered by copyright, that Université Laval and its personnel, its mandataries and subcontractors, without authorization, reproduced, made available or communicated by telecommunication, to students or other members of its personnel, in paper or digital format, for the purpose of all of the teaching and research activities of Université Laval since June 1, 2014.

[27] On appeal, Copibec requested that this class be changed. The proposed new description reads:

> [TRANSLATION]
>
> All natural or legal persons who own or are authorized to represent one or more owners of patrimonial and moral rights on a literary work (excluding computer programs, but including lyrics), a dramatic work, or an artistic work (integrated into a literary or dramatic work) whose author did not die before January 1, 1964, that Université Laval and its personnel, its mandataries and subcontractors, without the authorization of the copyright owners, reproduced, made available or communicated by telecommunication to students or other members of its personnel, in paper or digital format, for the purpose of all of the teaching and research activities of Université Laval since June 1, 2014.[12]
>
> [Retranscribed in accordance with the original.]

[28] According to Copibec, the class could include up to 1971 Québec authors and an unknown number of Canadian and foreign authors. In addition to these claimants, there are 1503 publishers, approximately 327 of whom would be from Québec in addition to a dozen collective societies of foreign production rights and all other authors, publishers or collective societies of the planet who had suffered moral damages, their successor or legatee; nothing less.

---

[12] *Demande d'autorisation de la modification d'un acte de procédure*, filed by the appellant on November 3, 2016, at para. 5.

[29] Copibec's application also shows the possibility of the class being subdivided into several subclasses:

> [TRANSLATION]
>
> A) All natural persons, being part of the class described, who are authors of literary, dramatic or artistic works in Canada.
>
> B) All natural or legal persons, being part of the class described that are publishers of literary and dramatic works in Canada or are authorized to represent one or more copyright owners in Canada.
>
> C) All natural or legal persons being part of the class described and domiciled outside Canada, including collective societies of foreign copyright authorized to represent copyright owners in their respective country.
>
> And any other subclass that the Court may determine with regard to questions of fact and questions of law raised by the class action.[13]

[30] If permission were to be granted, Copibec intends to apply to the trial judge to determine the following two questions which it considers to be identical, similar or related to all the class members (and to subclass members):

> [TRANSLATION]
>
> **(I)** Did Université Laval and its personnel, its mandataries and subcontractors, in their teaching and research activities, breach the class members' patrimonial rights, under section 3 of the *Copyright Act*
>
> (a) by reproducing
> (b) and by communicating by telecommunication,
> (c) including making available to the public by telecommunication
>
> copyrighted literary, dramatic and artistic works without the authorization of the copyright owners or their representatives?
>
> **(II)** Did Université Laval and its personnel, its mandataries and subcontractors, in their teaching and research activities, breach the moral rights of the class members who are authors, under section 14.1 of the *Copyright Act*,
>
> (a) by reproducing,
> (b) by communicating by telecommunication,
> (c) including the making available to the public by telecommunication
>
> short passages of copyrighted literary, dramatic, artistic and musical works without the authorization of the authors or their representatives?[14]

---

13 *Requête modifiée pour autorisation d'exercer un recours collectif*, May 13, 2015.

14 *Requête réamendée pour autorisation d'exercer un recours collectif, pour être représentante et pour l'émission d'ordonnances de sauvegarde*, May 13, 2015.

[31] It should be noted that on February 3, 2015, the parties agreed to certain safeguard measures confirmed by a judgment of the Superior Court.[15] The purpose of the agreement is to oblige the Université to retain evidence during the proceedings in first instance.[16] The Université also agreed to remain bound by this agreement during the appeal proceeding.

[32] It should also be noted that on March 25, 2015, another Superior Court judgment dismissed an application for an additional safeguard order in which Copibec requested that the Université produce a digital record to identify and compile the works reproduced.[17] Copibec appealed that judgment, as well.

THE JUDGMENT APPEALED FROM

[33] The judge acknowledges that the facts alleged in the application appear to justify the conclusions sought (article 575 (2) C.C.P.). He also accepts Copibec's proposal that the composition of the class makes it difficult to apply the rules for mandates to take part in judicial proceedings on behalf of others (article 575 (3) C.C.P.). However, he is of the view that Copibec did not discharge its burden of proof by proposing questions common to the class members (article 575 (1) C.C.P.) and by not identifying a representative having sufficient interest to properly represent them (article 575 (4) C.C.P). In view of the dismissal of the principal application, the judge found that the ancillary application for a safeguard order should have the same outcome.

Article 575 (1) C.C.P.

[34] The judge thus summarizes the syllogism advanced by Copibec:

> [TRANSLATION]
>
> 1) The subclass members are owners of copyright on the works covered in accordance with the CA, either as authors of the works themselves, or under the rights conferred to them by the authors;
>
> 2) The Université reproduced copyrighted works and substantial parts thereof without the authorization of the authors, copyright owners or Copibec;
>
> 3) Thus, the Université infringed the rights of the subclass members, by contravening sections 3 and 27 of the CA, paving the way for the conclusions.[18]

---

15 *Société québécoise de gestion collective des droits de reproduction (Copibec) c. Université Laval*, C.S. Québec, No. 200-06-000179-146, February 3, 2015, Beaupré J. (*Ordonnance de sauvegarde,* February 3, 2015).

16 *Ibid.*

17 *Société québécoise de gestion collective des droits de reproduction (Copibec) c. Université Laval*, 2015 QCCS 1156 (*Jugement sur requête pour ordonnances de sauvegarde additionnelles dont appel,* March 25, 2015).

18 Judgment impugned, at para. 76.

[35] The judge notes that Copibec's proceedings do not seek to have the Policy and the By-laws set aside and that it does not propose a common question with respect to these two elements that cannot be ignored by the leave application.

[36] More fundamentally still, he finds three reasons why the condition of article 575 (1) C.C.P. is not met. First, he concludes that there is no common question that would advance the resolution of the dispute. Secondly, given the real nature of the discussion before him, taking into account the principle of proportionality, would also militate for the rejection of the authorization because of the presence of a multitude of individual and [TRANSLATION] "exponential" questions requiring a case-by-case analysis. Lastly, the very definition of the class relative to the common questions proposed by Copibec would be problematic.

Article 571 (4) C.C.P.

[37] The judge pointed out that the executive director of Copibec admitted that it did not hold any copyright and did not operate in the field of publishing. Copibec would therefore not have sufficient interest to launch a class action in copyright matters.

[38] The judge added that none of the natural persons identified in Copibec's proceedings as a potential representative of the class (the impleaded parties) is a director, officer, executive or partner of this society, as required by article 571 C.C.P.

[39] Finally, the judge considers that in any event, Copibec and the impleaded parties do not have sufficient legal interest to bring a legal action with respect to the claim relating to moral rights. This assertion would be based on the principle of no assignment of rights of this kind under the CA.[19]

GROUNDS OF APPEAL

[40] The two main grounds of appeal put forward by Copibec are that the judge did not judiciously apply the conditions on which a class action could be commenced mentioned in articles 575 (1) and (4) C.C.P.

[41] If the Court were to respond favourably to its arguments, Copibec is asking us to review its application for the safeguard order, which had been denied in first instance.

THE ANALYSIS

[42] The judge rendered an impeccably crafted judgment. His study of the case demonstrates a good understanding of the issues facing the parties. Having said that, and I write with respect for his opinion, a careful reading of the judgment shows that the judge borrowed on a number of occasions from considerations reserved for the assessment of the trial judge before concluding that the application before him should be dismissed. The judgment impugned also shows that the judge imposed on Copibec a burden of proof at the authorization stage which was beyond the requirements set by the jurisprudence.

---

[19] CA, *supra* note 2, art. 14.1 (2).

[43] It must also be said that the judge did not benefit from the judgments of our Court in *Sibiga*[20] and *Charles*[21] rendered after the judgment impugned, whereas the decisions had to apply the teachings of the Supreme Court in *Infineon*[22] and *Vivendi.*[23]

[44] As to the rest of the matter, I bear in mind the standard of intervention applicable to the review of the judgment that denies authorization to exercise a class action, as identified by my colleague Kasirer J. in *Sibiga*:

> [33] The respondents are right to say that, barring an error of law, this Court owes deference to the motion judge's decision, given the inherently discretionary character of his findings relating to the criteria for authorization set forth in article 1003 C.C.P.
>
> [34] While the compass for appellate intervention is indeed limited, so too is the role of the motion judge. In clear terms, particularly since its decision in *Infineon*, the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The Court stressed that the law does not impose an onerous burden on the person seeking authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted".
>
> [35] Since *Infineon*, our Court has consistently relied upon this standard, invoking it when authorization has been wrongly denied because too high a burden was imposed.[24]
>
> [References omitted.]

i) law

[45] Before going on to the analysis itself, some legal clarifications are necessary in light of the main principles prevailing in copyright and their possible application in the case of a class action.

The Copyright Act

[46] Certain general rules drawn from the CA should be outlined. Essentially, this law grants the author of a work or the licensee the exclusive right to authorize the reproduction of a work or any "substantial part" thereof, as the case may be:

---

20 *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299.
21 *Charles c. Boiron Canada inc.*, 2016 QCCA 1716.
22 *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600, 2013 SCC 59.
23 *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 SCR 3, 2014 SCC 1.
24 *Sibiga c. Fido Solutions inc.*, *supra* note 20, at paras. 33-35.

Loi sur le droit d'auteur **L.R.C. 1985, ch. C-42**	*Copyright Act* **R.S.C., 1985, c. C-42**
Droit d'auteur sur l'œuvre	**Copyright in works**
3 (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :	**3 (1)** For the purposes of this Act, *copyright*, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;	**(a)** to produce, reproduce, perform or publish any translation of the work,
b) s'il s'agit d'une œuvre dramatique, de la transformer en un roman ou en une autre œuvre non dramatique;	**(b)** in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
c) s'il s'agit d'un roman ou d'une autre œuvre non dramatique, ou d'une œuvre artistique, de transformer cette œuvre en une œuvre dramatique, par voie de représentation publique ou autrement;	**(c)** in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;	**(d)** in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
e) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;	**(e)** in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;	**(f)** in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une œuvre artistique – autre qu'une carte géographique ou marine, un plan ou un graphique – créée après le 7 juin 1988;

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program,

i) s'il s'agit d'une œuvre musicale, d'en louer tout enregistrement sonore;

(I) in the case of a musical work, to rent out a sound recording in which the work is embodied, and

j) s'il s'agit d'une œuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur.

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

and to authorize any such acts.

. . .

. . .

Possession du droit d'auteur

Ownership of Copyright

13 . . .

13 . . .

Cession et licences

Assignments and licences

(4) Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right

ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.	by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.
. . .	. . .
Licence exclusive	**Exclusive licence**
(7) Il est entendu que la concession d'une licence exclusive sur un droit d'auteur est réputée toujours avoir valu concession par licence d'un intérêt dans ce droit d'auteur.	**(7)** For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

[47] The CA also assumes that a reproduction of a work or part thereof without the consent of the owner of the copyright constitutes copyright infringement.[25] There is, however, one exception to this rule[26] and it was raised by the Université during the discussion on the leave application. In the circumstances set out in the Act, certain works may be reproduced under the concept of "fair dealing" for educational purposes, without, however, breaching the protection of the originality and integrity granted to works by the CA:

Étude privée, recherche, etc.	**Research, private study, etc.**
29 L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.	**29** Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.
. . .	. . .
Reproduction à des fins pédagogiques	**Reproduction for instruction**
29.4 (1) Ne constitue pas une violation du droit d'auteur le fait, pour un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci, de reproduire une œuvre pour la présenter visuellement à des fins pédagogiques et dans les locaux de l'établissement et d'accomplir tout autre acte nécessaire pour la	**29.4 (1)** It is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it.

[25] CA, *supra* note 2, s. 27 (1).

[26] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339, 2004 SCC 13, at para. 48.

présenter à ces fins.

Questions d'examen	**Reproduction for examinations, etc.**
(2) Ne constituent pas des violations du droit d'auteur, si elles sont faites par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci dans le cadre d'un examen ou d'un contrôle :	**(2)** It is not an infringement of copyright for an educational institution or a person acting under its authority to
a) la reproduction, la traduction ou l'exécution en public d'une œuvre ou de tout autre objet du droit d'auteur dans les locaux de l'établissement ;	**(a)** reproduce, translate or perform in public on the premises of the educational institution, or
b) la communication par télécommunication d'une œuvre ou de tout autre objet du droit d'auteur au public se trouvant dans les locaux de l'établissement.	**(b)** communicate by telecommunication to the public situated on the premises of the educational institution a work or other subject-matter as required for a test or examination.
Accessibilité sur le marché	**If work commercially available**
3) Sauf cas de reproduction manuscrite, les exceptions prévues aux paragraphes (1) et (2) ne s'appliquent pas si l'œuvre ou l'autre objet du droit d'auteur sont accessibles sur le marché – au sens de l'alinéa a) de la définition de ce terme à l'article 2 – sur un support approprié, aux fins visées par ces dispositions.	**(3)** Except in the case of manual reproduction, the exemption from copyright infringement provided by subsections (1) and (2) does not apply if the work or other subject-matter is commercially available, within the meaning of paragraph (a) of the definition *commercially available* in section 2, in a medium that is appropriate for the purposes referred to in those subsections.

[48] Copibec's draft action raises also the matter of infringement of the author's moral rights. This is what the CA provides for on this subject*:*

Droits moraux	**Moral rights**
14.1 (1) L'auteur d'une œuvre a le droit, sous réserve de l'article 28.2, à l'intégrité de l'œuvre et, à l'égard de tout acte mentionné à l'article 3, le droit, compte tenu des usages raisonnables, d'en revendiquer, même sous pseudonyme, la création, ainsi que le droit à l'anonymat.	**14.1 (1)** The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to

remain anonymous.

Incessibilité

(2) Les droits moraux sont incessibles; ils sont toutefois susceptibles de renonciation, en tout ou en partie.

No assignment of moral rights

(2) Moral rights may not be assigned but may be waived in whole or in part.

[49] Lastly, the Act states certain presumptions aiming to facilitate the exercise of a judicial action raising the infringement of copyright and moral rights:

Droit d'auteur

34 (1) En cas de violation d'un droit d'auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours — en vue notamment d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise — que la loi accorde ou peut accorder pour la violation d'un droit.

Copyright

34 (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Droits moraux

(2) Le tribunal saisi d'un recours en violation des droits moraux peut accorder au titulaire de ces droits les réparations qu'il pourrait accorder, par voie d'injonction, de dommages-intérêts, de reddition de compte, de remise ou autrement, et que la loi prévoit ou peut prévoir pour la violation d'un droit.

Moral rights

(2) In any proceedings for an infringement of moral rights, the court may grant to the holder of those rights all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

. . .

. . .

Présomption de propriété

34.1 (1) Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

a) l'œuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;

Presumptions respecting copyright and ownership

34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

(a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case

	may be; and
b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.	**b)** the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

The class action

[50] With respect to the law applicable to the authorization of a class action, the Supreme Court recalled in *Vivendi*[27] that the C.C.P. did not require that the answer to the question be necessarily common to all class members. The sole condition imposed by paragraph 575 (1) C.C.P., which must be read with openmindedness and benevolence, is to identify a question capable of advancing the settlement of much of the dispute in a significant manner for the class members as a whole.[28] The Supreme Court summarized this idea:

> [58] There is one common theme in the Quebec decisions, namely that the *C.C.P.*'s requirements for class actions are flexible. As a result, even where circumstances vary from one class member to another, a class action can be authorized if some of the questions are common: *Riendeau v. Compagnie de la Baie d'Hudson*, 2000 CanLII 9262 (Que. C.A.), at para. 35; *Comité d'environnement de La Baie*, at p. 659. To meet the commonality requirement of art. 1003(*a*) *C.C.P.*, the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute: *Harmegnies*, at para. 54; see also *Lallier v. Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490, at paras. 17-21; *Del Guidice v. Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496, at para. 49; *Kelly v. Communauté des Sœurs de la Charité de Québec*, [1995] J.Q. nº 3377 (QL), at para. 33. All that is needed in order to meet the requirement of art. 1003(*a*) *C.C.P.* is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible: *Collectif de défense des droits de la Montérégie (CDDM)*, at paras. 22-23.
>
> [59] In short, it can be concluded that the common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(a) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

---

27 *Vivendi Canada Inc. v. Dell'Aniello*, *supra* note 23.

28 *Ibid.*, at paras. 4, 51, 58 and 72; see also *Infineon Technologies AG v. Option consommateurs*, *supra* note 22, at paras. 71 and 72.

> [60] In light of these principles, we are of the opinion that the motion judge was mistaken in emphasizing the possibility that numerous individual questions would ultimately have to be analyzed. He should instead have inquired into whether the condition provided for in art. 1003(*a*) was met, that is, whether the applicant had established the existence of a common question that would serve to advance the resolution of the litigation with respect to all the members of the group, and that would not play an insignificant role in the outcome of the case.[29]
>
> [Emphasis added.]

[51] From the foregoing, it appears that the threshold for establishing a common question is low and the presence of a single identical, similar or related question is sufficient to allow the authorization, provided that its importance is likely to have a significant influence on the outcome of the class action.[30] As such, the applicant is not required to demonstrate at the initial stage that the answer to the question posed will, alone, bring about a complete solution to the entire dispute,[31] just as the question proposed does not inevitably have to be common to all class members.[32] As the law provides, it might only be "related".

[52] In *Sibiga*, Kasirer J. recalls the importance of maintaining a liberal approach in deciding whether the condition of a common question is met:

> [123] The judge did not apply this test of a single, significant common question but focussed instead on what he presumed to be disparate contractual arrangement amongst members of the class that, he wrote, precluded him on finding commonality. Again in *Vivendi*, the Supreme Court warned against this kind of analysis that risks overemphasizing variation between members of the class and losing sight of one or more common questions that will advance the class action. Moreover in *Infineon*, the Court held that it is not necessary that the member of the class be in the same situation but that it is enough that they be in a sufficiently similar situation such that a common question for which the class action seeks answers can be identified. “At the authorization stage” wrote the Supreme Court, “the threshold requirement for common questions is low”. [33]
>
> [Emphasis added.]

---

29 *Vivendi Canada Inc. v. Dell’Aniello*, *supra* note 23, at paras. 58 to 60.

30 *Infineon Technologies AG v. Option consommateurs*, *supra* note 22, at para. 72; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534; 2001 SCC 46; *Collectif de défense des droits de la Montérégie (CDDM) c. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826, at para. 22.

31 *Brown c. B2B Trust*, 2012 QCCA 900; *Union des consommateurs c. Bell Canada*, 2012 QCCA 1287.

32 *Vivendi Canada Inc. v. Dell’Aniello*, *supra* note 23.

33 *Sibiga c. Fido Solutions inc.*, *supra* note 20, at para. 123; see also paras. 127 to 129.

[53] Moreover, in *Vivendi*, it is specified that "the motion judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the established criteria".[34]

[54] This appeal also raises, and I would add, again, the question of the representative's ability to act on behalf of the class. I will deal more specifically with this condition when discussing the involvement of Copibec and the impleaded parties in this dispute between them and the Université. Above all, the main principles established by the jurisprudence relating to this condition need to be reiterated.

[55] The *Code of Civil Procedure,* like its earlier version, requires that the plaintiff demonstrate that he is a proper representative.[35] Three factors must be considered in deciding this question. First, the plaintiff must demonstrate having (1) sufficient interest to sue, (2) the competence needed to advance the case with its legal advisors, and (3) be free of any conflict of interest with the group members.[36] In this case, only the first factor constitutes an issue for this appeal.

[56] On this point, the Supreme Court recalls that "[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly".[37]

[57] It follows from the foregoing that the representative need not be the best possible or the ideal representative,[38] whereas his interest in taking action must be analyzed in the light of the particular context of a class action. The jurisprudence even asserts that this condition is based on criteria whose threshold is minimal.[39] Again, Kasirer J. effectively sums up its application:

> [39] In fairness to the judge, it was not until after the judgment in appeal that the Supreme Court set aside *Agropur* in definitive terms. In *Bank of Montreal v. Marcotte*, the Court held that the notion of sufficient interest in article 55 C.C.P. must be adapted to the collective and representative character of a class action. As long as the appellant satisfies the criteria in article 1003, it was open to the

---

34 *Vivendi Canada Inc. v. Dell'Aniello*, *supra* note 23, at paras. 66 to 68.

35 *Banque de Montréal v. Marcotte*, [2014] 2 S.C.R. 725, 2014 SCC 55, at paras. 32, 43 and 45.

36 Pierre-Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (Montréal, QC: Thémis, 1996) at 419; These criteria were taken up in *Infineon Technologies AG v. Option consommateurs*, *supra* note 22, at para. 149 and in *Union des consommateurs c. Air Canada*, 2014 QCCA 523, at para. 82.

37 *Infineon Technologies AG v. Option consommateurs*, *supra* note 22, at para. 149. See also: *Union des consommateurs c. Air Canada*, *supra* note 36, at para. 40.

38 *Guilbert c. Vacances sans Frontière ltée*, [1991] R.D.J. 513, 517 (C.A.), *Hotte c. Servier Canada inc.*, [2002] R.J.Q. 230, at para. 39 (C.S.), *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.,* J.E. 2005-589, at para. 108 (C.S.); André Durocher and Claude Marseille, "Autorisation d'exercer un recours collectif", in JurisClasseur Québec, Vol. *Recours collectif* (Montréal, QC: LexisNexis, 2012) at 2/45, No. 111.

39 *Lévesque c. Vidéotron, s.e.n.c.*, 2015 QCCA 205, at para. 23; *Martel c. Kia Canada inc.*, 2015 QCCA 1033, at para. 29.

> judge to authorize the class action even if she herself did not have a direct cause of action against each defendant.[40]
>
> [Reference omitted. Emphasis added.]

[58] Let us now take a closer look at the considerations that led the judge to deny the authorization sought by Copibec.

ii) identical, similar or related questions

[59] The judge considers that the questions proposed by Copibec do not resolve what he considers to be the real issue of the case, namely, the determination of the importance of the reproduction of [TRANSLATION] "each" part of the work. He also considers that the answer to the questions posed does not lend itself to a collective approach since it would require a case-by-case study. The judge formulates these ideas in the following way:

> [TRANSLATION]
>
> [86] In the present case, even assuming that the Court answered the common questions formulated by Copibec affirmatively and that it thus found that the Université did not obtain the authorization of the persons designated to represent the authors, publishers or copyright owners outside Canada before reproducing the works in respect of which they are owners, or assignees, in law, [TRANSLATION] "once this aspect is decided", the parties would not have [TRANSLATION] "settled a significant part of the dispute." The decision on this matter of a lack of authorization would have, in effect, only a negligible impact, or even no impact, on the outcome of the members' remedy since the dispute over the question of the fault of the Université, in this case the infringement of copyright in contravention of the CA*,* would remain complete, given that those relative to the [TRANSLATION] "original" character of each work, to the determination of the [TRANSLATION] "importance" of each part of work reproduced and the Université's right to the fair dealing of these works would remain unresolved.
>
> [87] Moreover, according to the applicable law, these questions require an individualized study of the circumstances specific to each work and each member. Thus, the fault and liability of the Université toward each member, and thus the right of each of them to the conclusions sought, cannot be the result of [TRANSLATION] "a collective decision" that would advance the settlement of the dispute [TRANSLATION] "for all members of the class".
>
> . . .
>
> [107] Unlike the Supreme Court in *Vivendi*, or the Court of Appeal in the recent *Masella* case, with respect to the analysis made by the motion judge the Court does not find in this case, and at this stage of the verification and the filtering of

---

40 *Sibiga c. Fido Solutions inc.*, *supra* note 20, at para. 39.

> the remedy, that the right of the persons designated and subclass members to the claims and reparations sought is non-existent or that it "did not crystallize", and does not endorse the Université's claims on the merits of the dispute, but rather concludes that, at the very core, the common questions proposed by Copibec would not make it possible to settle a not insignificant part of the dispute for all class members, so as to enable progress to be made for all the members.[41]
>
> [References omitted.]

[60] With respect, I am of the view that the judge ventured on the merits of the case in order to decide whether the questions proposed by Copibec were common. In so doing, he deviated from the standard of simple [TRANSLATION] "demonstration" or even of a [TRANSLATION] "*prima facie* case". For my part, I find that Copibec's demonstration in first instance was sufficient to conclude that the condition of paragraph 575 (1) C.C.P. was satisfied. Let me explain.

[61] At the outset, and strikingly, I note the similarity of the questions posed by Copibec with those brought to the attention of the Ontario Court of Justice in *Waldman*.[42] In that case, it was a leave application by Mr. Waldman to bring a class action against Thomson Reuters, accused of violating the CA "by making available, without permission and for a fee, copies of court documents authored by the lawyers and the law firms." The authorizing judge accepted the following questions as questions common to all class members:

> [176] I conclude that within proposed question 3, there are certifiable common issues as follows:
>
> Thomson's Conduct
>
> > Did Thomson through its Litigator service reproduce, publish, telecommunicate to the public, sell, rent, translate, or hold itself out as the author or owner of court documents?
> >
> > Did Thomson through its Litigator service authorize subscribers to reproduce, publish, telecommunicate to the public, sell, rent, translate, or hold themselves out as the author or owner of court documents?

[62] This wording is similar to that used by Copibec in its common questions.

[63] Despite this similarity, the judge did not follow the Ontario judgment because the question in dispute before that authority bore on [TRANSLATION] "false representations and on the usurpation of copyright,"[43] which is different from the reproaches alleged by Copibec against the Université. I can easily conceive that the nature of the breach is of some importance when identifying the damage and establishing the injury. However, in

---

41 Judgment impugned, at paras. 86-87 and 107.
42 *Waldman v. Thomson Reuters Corporation*, 2012 ONSC 1138, at para. 176.
43 Judgment impugned, at para. 129.

principle, there is no difference between copyright infringement by usurpation and that related to the unauthorized reproduction of a work. Both contravene the prohibition contained in section 27 (1) CA.

[64] In the present case, I find that the judge of first instance was rather severe in his consideration of the authorization criteria.

[65] In particular, the judge made great reference to the Université's right to a fair dealing process as permitted by its Policy. He considers that the application of this Policy, adopted in accordance with section 29 of the CA, raises various sub-questions that are not amenable to a collective decision:

> [TRANSLATION]
>
> [38] In the meantime, and shortly before the last license between the parties came into force, on July 12, 2012, the Supreme Court of Canada filed five (5) decisions in the field of copyright, referred to by insiders as the [TRANSLATION] "pentalogy" of copyright. Suffice it to say at this point that, particularly in two of the cases, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* and *Socan v. Bell Canada*, the Supreme Court reiterated and clarified the scope of its 2004 decision *CCH v. Law Society of Upper Canada* and confirmed that the exceptions provided for in section 29 of the CA, which allow the fair dealing (*utilisation équitable* in the French version) of a copyrighted work for the purposes identified, without having to require the authorization of the copyright owner, or to compensate the owner for the dealing, must not be interpreted restrictively; these exceptions are not simply a technical defence against a charge of copyright infringement, but indeed a user right.
>
> . . .
>
> [87] Moreover, according to the applicable law, these questions require an individualized study of the circumstances specific to each work and each member. Thus, the fault and liability of the Université toward each member, and thus the right of each member to the conclusions sought, cannot be the result of a "collective decision" which would advance the settlement of the dispute [TRANSLATION] "for all class members".
>
> . . .
>
> [95] As the Supreme Court has pointed out, the exception of the fair dealing of a work for the purposes provided for in section 29 of the CA is not a simple means of defence, but indeed a right. The reproduction of a copyrighted work that is addressed by the fair dealing exception "does not infringe copyright".
>
> [96] And the fair nature of the use of a reproduction cannot result from an *in abstracto* analysis or the application of a standard rule, "whether something is fair is a question of fact and depends on the facts of each case", by weighing the six (6) criteria confirmed by the Supreme Court of Canada, which, for that matter, are not exhaustive. The following questions are to be answered:

- What is the purpose of the dealing of the work?
- What is the character of the dealing?
- What is the amount of the dealing?
- Are there any possible alternatives to the dealing?
- What is the nature of the work in question? and,
- What is the effect of the dealing on the work in question?

> [97] None of these questions lends itself to a "collective decision" based on the situation of the designated persons that would resolve "a not insignificant portion of the dispute" for all class members.
>
> [98] As a result of this observation, combined with the large number of possible permutations depending on the situation specific to each member of the proposed class, it can be concluded that, analyzed in conjunction with the proportionality requirement, the criterion of paragraph 575.1 C.C.P. is not satisfied. To be more convinced, one need only consider that in the letter of May 14, 2014 (R-9) of the chair of Copibec's board of directors to the president of the Université board, it is stated that without a license granted by Copibec, the Université's personnel would be forced to review [TRANSLATION] "on a piecemeal basis" a number of works that it estimated at the time at 7200. In the present case, the above questions should be analyzed and the criteria of fair dealing weighed with regard to an even higher number of works, given that this is merely the number of works making up Copibec's repertoire. The exercise would be exponential.
>
> . . .
>
> [107] Unlike the Supreme Court's finding in *Vivendi*, or the Court of Appeal in the recent decision *Masella* concerning the analysis conducted by the authorizing judge, the Court does not find, in this case and at this stage of the verification and filtering of the remedy, that the right of the persons designated and subclass members to the claims and reparation sought is non-existent or that it "did not crystallize", and does not endorse the Université's claims on the merits of the dispute, but rather concludes that, as a basic principle, the common questions proposed by Copibec would not resolve a not insignificant part of the dispute for all class members, so as to advance it for all the members.[44]
>
> [References omitted.]

[66] I consider that this view of things mistakenly anticipates the Université's defence, reverses the burden of proof to which Copibec was not bound and neglects to take into account the threefold presumption from which this party benefited at the authorization phase.

---

[44] Judgment impugned, at paras. 38, 87, 95 to 98 and 107.

The "fair dealing" exception defence

[67] Like the judge of first instance, I agree that fair dealing is a right within the purview of the Université. However, from a procedural point of view, it is up to the Université, which is raising this right, to demonstrate that it meets the conditions for the application of this exceptional measure.[45]

[68] The judge therefore erred by making the allegation of illegal reproduction raised by Copibec subject, at the authorization stage, to a simple *prima facie* demonstration, on the same footing as the Université's allegation respecting its right to fair dealing of the works that it was to have demonstrated on the merits in accordance with the balance of probabilities standard.

[69] It was thus premature for the judge at the authorization stage to anticipate the exception defence relied on by the Université. In *Sobiga* [*sic*], Kasirer J. recalls that at this stage, it is not appropriate to decide on the absolute value of a ground of defence:

> [83] By considering grounds of defence at this early stage, the judge thus trenched on the work of the trial judge. This Court has been clear in its direction to motion judges that the time to weigh such defences as against the allegations in the motion for authorization that are assumed to be true is, as a general rule, at trial. . . .[46]

The reversal of the burden of proof

[70] The judge also reversed the burden of proof by concluding that the criteria established by the Supreme Court in *CCH*[47] for founding the right to fair dealing did not lend itself to collective analysis, at least for the matter before him.

[71] Copibec is correct in arguing that it did not have to demonstrate how the Université's argument based on fair dealing could be integrated into its questions. This position is supported in particular by the comments of the Chief Justice in *CCH* rendered by the Supreme Court:[48]

> In order to show that a dealing was fair under s. 29 of the Copyright Act a defendant must prove: (1) that the dealing was for the purpose either of research or private study and (2) that it was fair.
>
> [Emphasis added.]

[72] This burden of proof attributable to the one who invokes the right to fair dealing was reiterated by Abella J. in *Alberta* rendered by the Supreme Court in 2012:[49]

---

45 *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 26, at paras. 48-50.

46 *Sibiga c. Fido Solutions inc.*, *supra* note 20, at para. 83. See also *Brown c. B2B Trust*, *supra* note 31; *Carrier c. Québec (Procureur général)*, 2011 QCCA 1231, at para. 37.

47 *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 26, at para. 52.

48 *Ibid.*, at para. 50.

49 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345, 2012 SCC 37, at para. 12.

> [12] . . . The onus is on the person invoking "fair dealing" to satisfy all aspects of the test. To assist in determining whether the dealing is "fair", this Court set out a number of fairness factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

[73] The onus will thus be on the Université and no one else to discharge itself, when the time comes, of the double burden of proof by demonstrating that its dealing of the works is done in compliance with its Policy and application by-laws and that its management tools are in themselves respectful of the law and criteria set out in the relevant jurisprudence, that is to say, that they are part of the process of fair dealing of the works reproduced.

[74] The judge therefore erred in assessing the commonality of the questions in light of the right to fair dealing relied upon by the Université. Again, it is appropriate to go back to the teachings of the Supreme Court in *Vivendi*:

> In short, it can be concluded that the common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(*a*) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.[50]
>
> [Emphasis added.]

The triple presumption

[75] I also consider that at the authorization stage, the judge should have paid particular attention to the presumptions of fact and law that apply to Copibec's application.

[76] First, the judge had to take the allegations contained in the application to be true.[51] In the present case and without wishing to limit the scope of the other allegations in the Copibec proceedings, the latter nevertheless contained the following statements:

> [TRANSLATION]
>
> 3. The class action that the petitioner wishes to undertake is based on the fact that the respondent, UNIVERSITÉ LAVAL, since June 1, 2014, by the actions of its personnel (including professors, associate professors, lecturers, research fellows, conference speakers, student trainees and its administrative personnel), its mandataries and subcontractors:
>
>   A) has been contravening the class members' patrimonial rights, according to the federal *Copyright Act*, by reproducing and communicating by

---

50 *Vivendi Canada Inc. v. Dell'Aniello*, *supra* note 23, at para. 59.

51 *Infineon Technologies AG v. Option consommateurs*, *supra* note 22, at para. 67; *Jasmin c. Société des alcools du Québec*, 2015 QCCA 36, at paras. 9 and 19.

telecommunication including making available, to students and to members of its personnel, in paper or digital format, copyrighted literary, dramatic or artistic works, without the authorization of the patrimonial right owners or monetary consideration to the successors.

B) has been contravening the moral right to the respect of the integrity of the work, according to the *Copyright Act*, to the prejudice of the member authors of the group, by reproducing short passages of works, and not their entirety, without having obtained the authorization of the works' authors.

. . .

17. The respondent's personnel, mandataries and subcontractors are thereby reproducing numerous copyrighted works or portions thereof, in its digital learning environment or in the form of documents in paper or digital format, that they distribute, make available or communicate by telecommunication to the students or other members of the personnel of Université Laval.

. . .

55. Université Laval thus unilaterally decrees, without any legal foundation, that the reproduction in paper or digital format of a "short passage" by the members of its personnel constitutes a "fair dealing" within the meaning of the *Copyright Act*.

. . .

60. During the 2014 summer and fall semesters, and the 2015 winter and summer semesters, the respondent's personnel, its mandataries and subcontractors continued to sell, distribute, make available, and communicate by telecommunication, for teaching and research purposes, collective works of texts and other reproductions of copyrighted material, as they had previously done when they benefited from the Copibec's comprehensive license for that purpose, but now without any authorization and without payment of monetary compensation, except where the limits set by the respondent in its policy have been exceeded.

61. According to the statements filed in 2013-2014 by the respondent's personnel, its mandataries and its subcontractors and which constitute only a portion of the paper or digital format reproductions made under the comprehensive license in effect at that time, 11 217 839 pages of 7113 Québec and foreign works from the Copibec repertoire had been reproduced. These pages were reproduced in the context of 893 courses and represented an average of 339 pages per full-time equivalent student. In return, the respondent had paid to the petitioner the sum of $642 085 in accordance with the tariff established in the comprehensive license.

. . .

69. The actions of the personnel, mandataries and subcontractors of the respondent Université Laval do not in any way fall under those actions that educational institutions were later permitted under sections 29.4 to 30 of the *Copyright Act*, or any other exception.

70. Section 29 of the *Copyright Act* provides a limited "fair dealing" exception for the purposes of private study, research and education, which cannot be used to contravene in an institutional and systematic manner the rights of authors, publishers and other owners of copyright in the copyrighted works.[52]

[77] These allegations, which are held to be true at the authorization stage, clearly indicate a violation of the general rule in section 27 (1) of the CA.

[78] Moreover, for all proceedings under the CA, the Act creates a presumption that the work in respect of which the legal action is sought is presumed to be covered by copyright:

Loi sur le droit d'auteur **L.R.C. 1985, ch. C-42**	***Copyright Act*** **R.S.C., 1985, c. C-42**
Présomption de propriété	**Presumptions respecting copyright and ownership**
34.1 (1) Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :	**34.1 (1)** In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,
a) l'œuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;	**(a)** copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and
b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.	**b)** the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

[79] This Court has expressly recognized this presumption in *Bonnette:*

[TRANSLATION]

[27] The onus is thus normally on the person who claims to hold copyright in a work to demonstrate that the work is original; however, the CA lists the

---

[52] *Requête réamendée pour autorisation d'exercer un recours collectif, pour être représentante et pour l'émission d'ordonnances de sauvegarde,* May 13, 2015.

> presumptions relative to the existence of the copyright in a work. The burden of proof is thereby turned upside down and rests on the shoulders of the defendant. According to section 34.1 (1)(a) CA, in proceedings for copyright infringement, such copyright is presumed to subsist in the work in question . . ..[53]

[80] The judge thus had to dwell on this presumed protection without its effects being nullified at the authorization stage by a right of the Université invoked in the context of its disputed case.

[81] Copibec could also plead the presumption related to the ownership of the work arising from the indication of the author's name on the work or that of the publisher, as the case may be.[54]

[82] All of these presumptions created sufficient evidence to allow the proposed action to easily cross the threshold of the "arguable case".

[83] In response to the foregoing, the Université states that, in any case, the analysis of the questions submitted by Copibec would inevitably lead to a multitude of small trials, which would make the conduct of the class action wholly tedious. It adds that this approach is contrary to the rule of proportionality.

[84] I note that the judgment impugned does not deny that the proposed class action evokes sufficient arguments to establish a valid right of action, in this case copyright infringement. The judge is of the view, however, that the class action will involve an analysis of fault on a case-by-case basis and micro-management of the quantum for each member of the group. In my opinion, he has erred. Let me explain.

[85] The low amount attached to each of the authors' claims is in itself a valid reason for allowing the class action. If each of the authors and other successors had to separately go before the courts with the damages claimed against the Université, there could be no doubt that this party would then be involved in a multitude of trials, all having the same legal basis, which could lead to an application to consolidate all the proceedings (article 210 C.C.P.). The draft class action avoids this anticipated difficulty.

[86] Moreover, the class action is designed to facilitate authors' access to justice while preserving judicial resources and, where appropriate, to effectively sanction acts that would otherwise remain protected from judicial intervention because of the low level of injury when assessed on an individual basis.[55] In this sense, the class action contemplated by Copibec meets these overriding considerations.

[87] In addition, the argument based on the individualized analysis of alleged fault neglects to take into account the important management powers vested in the trial

---

53 *Bonnette c. Dominion Blueline Inc.*, 2005 QCCA 342, at para. 27.

54 CA, *supra* note 2, s. 34.1 (2).

55 *Vivendi Canada inc. v. Dell'Aniello, supra* note *23*, at para. 1; *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534, 2001 SCC 46, at paras. 27-29; *Citoyens pour une qualité de vie / Citizens for a quality of life c. Aéroports de Montréal,* [2007] J.Q. No. 10997, 2007 QCCA 1274, at para. 53; *Pharmascience inc. c. Option Consommateurs,* [2005] J.Q. No. 4770, 2005 QCCA 437, at para. 20; Sean Finn, *L'action collective au Québec* (Cowansville, QC: Yvon Blais, 2016) at 48.

judge. The judge, in collaboration with the counsel for the parties, can always agree, when establishing the judicial contract, on ways to facilitate evidence and limit the scope to the class members or to those of a particular subclass.

[88] Lastly, while I consider this question to be premature, I disagree with the Université's assertion that the analysis of the fault being alleged against it must necessarily be on an individual level.

[89] As I understand the Université's position in first instance, the Université intends to state that its Policy respects the tenets of the law and the jurisprudence in fair dealing. It also intends to demonstrate that its By-laws provide for the establishment of means to use the works of others for the purposes only of teaching, learning, research and private studies and that its practices are fair.

[90] First, as Copibec acknowledged at the appeal hearing, if the Université demonstrates its Policy to be valid, its By-laws sound and the way they are implemented on a daily basis, the class action is likely to lead to a foreseeable outcome.

[91] Seen in this light, not only are the questions asked common, but the answers given to those questions will also be common since they may be set against all the class members.

[92] Secondly, the Université's argument disregards the jurisprudence that has already identified the nature of the evidence that it will have to present if it wishes to effectively address the allegation of copyright infringement. The Chief Justice in *CCH* writes:

> This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright." The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.[56]
>
> [Emphasis added.]

[93] The Ontario Superior Court of Justice reiterated the same lessons in the following terms:

---

[56] *CCH Canadian Ltd. v. Law Society of Upper Canada*, *supra* note 26, at para. 63.

> In my opinion, Thomson's fair dealing, public policy, and implied consent defences can be established by general practice evidence and, therefore, questions about these defences have commonality.[57]
>
> [Emphasis added.]

[94] I note in passing that this authority had also concluded that the notion of fair dealing lent itself to a collective analysis:

> [183] I conclude that within question 4, there are certifiable common issues as follows:
>
> Defences
>
> Did Thomson have the copyright owner's implicit consent to reproduce, publish, telecommunicate to the public, sell, rent, translate, or hold itself out as the author or owner of court documents?
>
> Does Thomson have a public policy defence to copyright infringement or to the violation of moral rights based on (a) fair dealing, (b) the open court principle, (c) freedom of expression, (d) the necessity of using the idea of the court document as it is expressed, or (e) a business or professional custom or public policy reason that would justify reproducing, publishing, telecommunicating to the public, selling, renting, translating, or holding itself out as the author or owner of court documents?

[95] It is clear from the foregoing that evidence of the general practices of the Université in fair dealing, without falling into anecdote, exceptional or outright marginal situations, will be sufficient to demonstrate its right to benefit from this measure of exception. It will be for the trial judge to rule on the adequacy of the evidence.

iii) moral rights

[96] The appellant's application is also dismissed on the grounds that the matter of infringing on the authors' moral rights would require a subjective analysis in the same way as does the main question relative to copyright infringement.

[97] The courts have often had to deal with moral damages and extra-patrimonial prejudice in the case of a class action. Class actions have been authorized in cases of defamation,[58] interference with inviolability and dignity,[59] discrimination,[60] for problems

---

57 *Waldman v. Thomson Reuters Corporation*, *supra* note 42, at para. 178.
58 *Bou Malhab c. Métromédia CMR Montréal inc.*, J.E. 2003-711 (C.A.).
59 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.
60 *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429.

and annoyances,[61] for anguish and anxiety[62] or for mental suffering and for the loss of enjoyment of life.[63]

[98] The doctrine shares this generous approach:

> [TRANSLATION]
>
> Moreover, if it lays down the right of a group designated to act . . . in order to enforce the individual remedies of its members, the class action does not recognize the concept of collective interest. This notion, which is distinct from the general interest of all citizens, aims to promote and defend the specific interests of a diffuse group: those of consumers, workers, victims of racism and interests related to environmental protection, to cite just these examples.
>
> . . .
>
> Subject to the limitations inherent to the admissibility of the public action, the representative can raise any right that it would normally be able to rely on by way of individual action.
>
> . . . There is no reason why the scope of class proceedings should be limited to representing only private interests.[64]

[99] In sum, a class action does not, in principle, preclude a claim of an extra-patrimonial nature.

[100] Moreover, as I consider that the main question bearing on the alleged copyright infringement may be the subject of a class action, this in itself is sufficient to allow the related question regarding the infringement of the authors' moral rights to be accepted at the authorization stage. It is important only that the main question satisfy the criteria of the law, whereas the jurisprudence insists that "the threshold requirement for common questions is low".

[101] Ultimately, it will be up to the trial judge to decide whether the remedy as shaped by the appellant is capable of resolving this other aspect of its judicial action on the question of the infringement of the class members' moral rights.

iv) the interest of the representatives

[102] Our Court recalled in *Sibiga* that, in the case of class actions, the notion of interest to act should be contextualized.[65]

[103] In the case at hand, I note that under the CA, an author may make grants with respect to his copyright:

---

61 *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 SCR 392, 2008 SCC 64.

62 *Fédération des médecins spécialistes du Québec c. Conseil pour la protection des malades*, 2014 QCCA 459.

63 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCCA 944.

64 Pierre-Claude Lafond, *supra* note 36, at 267 and 268; see also: Shaun Finn, *supra* note 55, at 45 and 46.

65 *Sibiga c. Fido Solutions inc.*, *supra* note 20, at para. 39.

Possession du droit d'auteur	**Ownership of copyright**
13 (1) Sous réserve des autres dispositions de la présente loi, l'auteur d'une œuvre est le premier titulaire du droit d'auteur sur cette œuvre.	**13 (1)** Subject to this Act, the author of a work shall be the first owner of the copyright therein.
. . .	. . .
Cession et licences	**Assignments and licences**
(4) Le titulaire du droit d'auteur sur une œuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.	**(4)** The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

[104] Again, according to the same law, Copibec, as a collective society, has the role of operating a licensing scheme, setting out classes of use and the royalties and terms and conditions (section 2). It must also see to collecting and distributing royalties or levies payable. In short, according to this description of its mandate, Copibec clearly has an interest in asserting the claims of the authors grouped under its common management.

[105] Copibec also benefits from statutory authorization allowing it to take legal action for these same authors and successors. In this sense, the CA grants collective societies the power to collect royalties or levies owing to authors (section 2 b)).

[106] In view of the above, even if Copibec did not personally own any copyright, there can be no doubt that it had sufficient interest to act on behalf of the class members for the purpose of asserting their patrimonial rights.

[107] To me, the following remarks by author Pierre-Claude Lafond, made when the former *Code of Civil Procedure* was in force, seem relevant:

> [TRANSLATION]
>
> The Court of Appeal sets the record straight with respect to the representativeness or [TRANSLATION] "typicality" of the representative's claim,

> stating unequivocally that this American test, which has not been adopted by the Québec legislature, must not be used in assessing the adequacy of representation. The representative character of the petitioner's claim is more a matter of assessing the common questions (art. 1003 (a) C.C.P.), and the Court must not revisit that condition in assessing adequate representation. Each condition of authorization set out in article 1003 must be assessed independent of the other. The effect of such an interpretation is to free the condition of article 1003 (d) of an irritant inherited from the restrictive interpretation of the 1980s and to make it easier to satisfy.[66]

[108] It is true that Copibec extended the class to authors other than those who entrusted it with the mandate to represent them. However, at the authorization stage, there is no way of distinguishing the situation of these authors from those more intimately linked to Copibec. In fact, according to the allegations in the application, these other authors would also be victims of the same infringement.

[109] Even if the relationship between the proposed representatives and the members of the class who have not given Copibec any mandate appears less concrete, it is sufficient at the authorization stage. Again, it should be reiterated that the trial judge will always be able to redefine the class based on the evidence that he accepts.

[110] The Université argues, however, that the statutory authorization cannot be extended to the matter of moral rights. In this respect, it reiterates the argument of the judge who found in accordance with section 14.1 (2) of the CA that an author's moral rights cannot be assigned.

[111] It is important here not to confuse the fact that an author's moral rights cannot be assigned with his capacity to entrust a third party with a mandate to obtain substantive justice on his behalf for an infringement of his moral rights. In the present case, the appeal file does not show that the class members have assigned their moral rights or agreed that Copibec could retain the amounts associated with the damages suffered for the infringement of their moral rights.

[112] In any event, I find the question to be theoretical given that the impleaded parties, all authors and publishers who have agreed to act as representative,[67] allege that they have suffered an infringement of their own moral rights.

[113] In these circumstances, there is no need to resolve the Université's contention that the impleaded parties are not members of Copibec.

[114] Indeed, the Université is making a mistake in attempting to contain the status of the impleaded parties, in particular the natural persons, to that of persons designated by Copibec. There is nothing preventing them from acting not as a designated member, but rather as individuals. In my view, it would be indisputable that if the latter qualification

---

66 Pierre-Claude Lafond, *supra* note 36, at 101.

67 This acceptance was confirmed by Copibec's counsel during the appeal hearing.

were to prevail, the class and subclasses proposed by Copibec would then have representatives raising the same infringement as that invoked by the class.

[115] In this regard, I note that professors Ferland and Emery, in the third edition of their work, considered at the time that there could be only one petitioner in a class action.[68] This proposal was not taken up again in their fourth edition.[69]

[116] With respect to this question, our Court has already allowed an appeal of a judgment that refused to authorize a class action because two members, rather than one, had been designated as representative of the class:

> DESIGNATION OF TWO MEMBERS
>
> As regards question 1, I can see no merit in respondent's argument that the motion for authorization had to be dismissed because appellant had designated two, and not one, of its members as required under Article 1048 C.C.P. It is true, of course, that Article 1048 C.C.P. contemplates that a Part III Corporation wishing to apply for representative status must designate one of its members who is a member of the group on behalf of which it intends to exercise a classe section. But, in my view, that provision was not intended to exclude the possibility that more than one member would be designated. The provision simply requires that at least one of the members designated by the corporation be a member of the group for whom the action will be brought.
>
> [*sic*]
>
> In any event, I fail to see how the designation of two members, who have each signed the affidavit required by Article 1048 C.C.P., could invalidate the request for authorization to institute a class action.
>
> Nor did the Superior Court dismiss the application on that account.[70]

[117] In addition, the jurisprudence recognizes that the trial judge needs to exercise discretion in making the necessary adjustments to promote the harmonious flow of proceedings while preserving the possibility that the group may be represented by more than one representative, in order to avoid unnecessary multiplication of judicial actions:

> [TRANSLATION]
>
> [29] In conclusion, in its initial recourse, the petitioner alleged that each and every one of the above banks claimed more than the actual cost for registering the respondents' rights with the register of personal and movable real rights (RPMRR). As the petitioner had dealt only with the Bank of Nova Scotia, it opted to withdraw from the other banks and the Fédération, given the absence of any

---

68 Denis Ferland and Benoît Emery, *Précis de procédure civile du Québec*, volume 2 (Art. 482 - 1051 *C.p.c.*), 4th ed. (Cowansville, QC: Yvon Blais, 2003) at 892 and 893.

69 *Ibid*., at 608 to 610.

70 *Comité d'environnement de La Baie Inc. c. Société d'électrolyse et de chimie Alcan Ltée*, [1990] RJQ 655 (C.A.).

> legal relationship with the exception of the Bank of Montréal where it now asks to add a copetitioner, Ms. Corbin, who, like Ms. Fournier, saw herself being charged fees higher than the actual cost for registering with the RPMRR.
>
> [30] The Court adds that neither the judgment rendered by the Court of Appeal in *Agropur*, nor the lengthy analysis that the Honourable Justice Gascon made in Option Consommateurs and *Normand Painchaud c. Banque Amex du Canada et al.*, do not preclude the petitioner's motion to amend in this case.
>
> [31] Thus, and as we have seen, the legal basis of the two petitioners' remedy is identical and in the absence of any injury, the Court deems that the procedure should be simplified rather than multiply the actions.[71]
>
> [Emphasis added.]

[118] I would also point out that, if the judge had chosen to allow the leave application, he would have been able at that time, and under the discretion conferred to him at this preliminary stage, [TRANSLATION] "to attribute the status of representative to another member rather than the petitioner himself or the proposed member".[72] This question, if it is still problematic at the substantive stage, may always be resolved in a management conference to be held in a timely manner.

[119] Again, it is worth recalling the Supreme Court's invitation to interpret liberally the conditions for instituting a class action:

> [149] . . . In determining whether these criteria have been met for the purposes of art. 1003(*d*) [575 (4) C.C.P.], the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.[73]

[120] Certainly, the fact that a representative did not have the interest required to represent a particular subclass did not in itself justify rejecting Copibec's entire application.

[121] In sum, I am of the view that at the authorization stage, Copibec and the impleaded parties share with all class members the essential legal bases of the class action contemplated. I also consider that, in the event of a difficulty with peripheral questions related to representativeness, it was preferable for the judge to leave to a later stage of the judicial actions the decisions required with regard to the questions.

---

71 *Fournier c. Banque de Nouvelle-Écosse*, 2007 QCCS 2647; see also: *Desgagné c. Québec (Ministre de l'Éducation, du Loisir et des Sports)*, 2007 QCCS 4443; *Réal Marcotte c. Banque de Montréal*, [2007] R.J.Q. 158 (C.S.). See also *Croteau c. Air Transat AT inc.*, 2007 QCCA 737 – Two representatives are named; *Maltais c. Hydro-Québec*, 2012 QCCS 3291 – [TRANSLATION] "Attribute to the copetitioners the status of representative for the purposes of instituting the class action on behalf of the class described . . ."; *Tardif c. Hyundai Motor America*, REJB 2001-29724 (C.S.).

72 Pierre-Claude Lafond, *supra* note 36, at 423.

73 *Infineon Technologies AG c. Option consommateurs*, *supra* note 22, at para. 149.

[122] Ultimately, I find that the irritants raised by the Université as to the question of representativeness were not sufficient to dismiss Copibec's application.

v) the dismissal of the safeguard order

[123] On March 25, 2015, in a separate judgment, the judge dismissed a motion for additional safeguard orders[74] containing the following conclusions:

> [TRANSLATION]
>
> ALLOWS this motion
>
> RENDERS THE ADDITIONAL SAFEGUARD ORDERS requested by the petitioner for the conservation of the evidence and for the protection of the rights of the members of the proposed class as follows:
>
> ORDERS the respondent Université Laval to require from all the members of its personnel, its mandataries, subcontractors, and more generally all persons under its control, to transmit and record, during the entire proceeding and up to final judgment, in a digital register, the data (title of the work, author's name, publishers' name, publication title of the books, journals and periodicals from which the passage is taken, total number of pages of the works reproduced, number of pages reproduced, print run or number of users having access to the works, the ISBN or ISSN number, title of the collective work or number of the course concerned) of literary, dramatic and artistic works reproduced since June 1, 2014, as well as the number of pages reproduced and the print run or the number of students to which a digital reproduction is destined and in the case of a book, the number of chapters reproduced with the corresponding page numbers.
>
> ORDERS Université Laval to communicate to the petitioner, on May 31, 2015, then every six months, the data of this digital register.
>
> ORDERS the respondent Université Laval to make known to its administrators, mandataries, subcontractors and members of its personnel, in the five (5) days following the judgment to be rendered, the additional safeguard orders of the Court by letter or by email individualized to each, and by message on its Intranet and on its website, asking that they comply with it.
>
> SPECIFIES that the words used in these additional orders have the same meaning as that already defined by the orders rendered by the Court in this case on March 3 [*sic*], 2015.
>
> ORDERS the performance notwithstanding an appeal,
>
> AND renders any other order necessary to ensure the safeguard of the rights of the class members during the proceeding.
>
> THE WHOLE COSTS TO FOLLOW.

---

[74] Other than that agreed to consensually.

[124] These findings were taken up again, but in a less elaborate manner, in the context of the leave application. The judge summarized them as follows:

> [TRANSLATION]
>
> [7] Should its remedy be authorized, Copibec is also requesting safeguard orders to, in short, require that the Université:
>
> - record in a digital register the data of the works reproduced since June 1, 2014;
> - keep this register;
> - communicate the register to Copibec every six (6) months;
> - render an account every six (6) months of all profits made from the sale of any collective work of texts or material containing reproductions of the class members' works.[75]

[125] In light of the dismissal of the leave application, the judge found that it was no longer necessary to rule on the ancillary application for a safeguard order.

[126] The amended notice of appeal of April 4, 2016 filed by Copibec creates a certain confusion with respect to the scope of its appeal. The reference to the interlocutory judgment of March 25, 2015, the appeal of which is governed by the provisions of the former *Code of Civil Procedure,* suggests that Copibec wishes to appeal that judgment, whereas the procedures that gave rise to the judgment of February 26, 2016 already take up, to a large extent, the findings dismissed on March 25, 2015.

[127] If, therefore, the appeal should have been directed to the latter judgment, I am of the opinion that it is improperly initiated (first paragraph of article 29 and first paragraph of article 511 C.C.P.) and, in any event, too late (third paragraph of article 494 C.C.P.).

[128] If, on the other hand, the appeal seeks to challenge the conclusion of the judgment of February 26, 2016 dismissing the safeguard order application,[76] I am of the view that this part of the appeal is unfounded and must be dismissed.

[129] First, the order sought by Copibec is more of the nature of an order to do something than a mere matter of safeguarding. Copibec essentially asked the Université to provide evidence (obligation to put certain data in a digital register), which is clearly foreign to the obligation to safeguard existing information, which the Université was in any case already required to do under the law (article 20 C.C.P.).[77] However, the Université is not responsible for preparing on behalf of Copibec the evidence whose merits Copibec intends to invoke.

[130] In addition, a safeguard order was rendered by the Superior Court on February 3, 2015, by consent.[78] This order continues to apply at the appeal stage. Copibec is not

---

75 Judgment impugned, at para. 7.
76 Judgment impugned, at para. 221.
77 See also *Jacques c. Ultramar ltée,* 2011 QCCS 6020, at paras. 17 to 21.
78 *Ordonnance de sauvegarde*, February 3, 2015, *supra* note 15.

alleging any infringement in its regard or any change in the parties' situation that would justify additional orders to reinforce the initial one.

[131] In my view, this aspect of the appeal should be dismissed.

CONCLUSION

[132] I propose that the appeal be allowed in part with legal costs against the Université and the leave application to institute a class action against that party also be allowed, with legal costs to follow the outcome of the application decided on its merits. As well, the class will need to be redefined according to Copibec's amended application in appeal.

[133] In addition, I would dismiss the part of the appeal challenging the conclusion of the judgment that dismisses the ancillary application for obtaining a safeguard order, as well as the appeal of the judgment of March 25, 2015.

[134] Incidentally, I am not expressing any opinion on the conclusions of the class action on the merits. I add that it will be up to the trial judge to amend the class or the subclass, as the case may be, and as the case progresses.

[135] That said, I would not want the proposed intervention to be perceived as a restriction of the discretionary power of the judge hearing an application for authorization to institute a class action. I am very much aware of the apparent contradiction existing between the discretion conferred to the judge on the application of the screening mechanism at the time of the leave application and the liberal approach advocated by the jurisprudence at the pre-trial stage.

[136] It is, however, for the legislature to decide whether to maintain the preliminary stage, remodel it if such is desired and, where applicable, to tighten the conditions giving rise to this type of judicial action. In this regard, I endorse the comments of my colleague, Bich J. in *Charles*[79] relating to the process of authorizing a class action. There is no need for me to write further on the subject.

(s)
GUY GAGNON J.C.A.

---

[79] *Charles c. Boiron Canada inc*. *supra* note 21, at paras. 69 to 75.