APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

A. *Background*

1. The Respondents [hereinafter collectively referred to as "**Whirlpool**"] design, manufacture, market, distribute, import and/or sell major appliances, including the Whirlpool front loading washing machines [hereinafter the **"Washing Machines"**] in Canada.

2. The present matter involves a class action in relation to Whirlpool's Washing Machines which suffer from serious design flaws including the failure to, *inter alia*, (a) properly drain water and to avoid lingering moisture, (b) sufficiently rinse away high-efficiency ("HE") detergent and liquid fabric softener to prevent the accumulation of residues that contribute to the formation of mould, mildew and foul odours, (c) have stainless steel drums that fully and properly drain in connection with each and every wash cycle and/or to not sufficiently permit the rinsing away and/or prevent the accumulation of residues and growths, and (d) have a door seal (the "boot") that fully or properly drains and/or removes residues and growths after each wash.

3. The Whirlpool Washing Machines are susceptible to the build-up of "scrud" or "biofilm" which is a mixture of sludge, soils, mould or fungi and mildew due to the fact that they have not been designed to properly direct water to clean all the surfaces exposed to the water, soap, softener, dirt and debris and to provide air circulation to allow these surfaces to dry. This in turn results in a musty or mouldy smell being imparted on clothing washed in the Whirlpool Washing Machines, in the machines themselves and in the room in which the machines are placed.

4. As the mould problems became undeniable, Whirlpool began recommending that Washing Machine owners run successive washer cleaning cycles with an Affresh tablet in each cycle. Affresh is a product designed, manufactured, marketed, and sold by Whirlpool specifically to address the mould problems in the Washing Machines. Due to the ineffectiveness of the Affresh tablets, Whirlpool created, promoted, and sold the Affresh washing cleaner kit [Exhibit R-3].

5. Whirlpool has failed to recall, repair, and/or replace the Washing Machines nor to disclose the mould problem to its customers and instead continues to profit from the concealment of the design defects by charging premium prices for the Washing Machines, charging for repair services and selling its Affresh products to ineffectively palliate the Washing Machines' defects.

6. On March 13, 2004, the Applicant purchased a Whirlpool Duet Front-Loading Automatic Washing Machine (Model GHW9100LW2) for $1,804.45 including taxes.

7. In 2005, the Applicant noticed an odour emanating from his Washing Machine and in May 2005, he called Whirlpool to obtain information on how to solve his problems. The Applicant was referred by Whirlpool to Sears, from whom he had bought the Washing Machine.

8. Sears told the Applicant that he should leave the door of the Washing Machine open when not in use, that he should always use high efficiency detergent and that he must run empty laundry cycles using only bleach. At first, these techniques appeared to resolve the problem.

9. On May 5, 2005, the Applicant purchased a « Contrat de protection ou réparation » so as to be sure that if his Washing Machine ever needed to be maintained or repaired, he would not be charged. At the time of this purchase, the Applicant believed that the odour problem had been resolved through the use of Sears' recommended techniques; he was not aware of, nor did he suspect, that his Washing Machine suffered from a design defect. On the other hand, there is evidence that Whirlpool was aware of the design defect since as early as 2003.

10. Between 2005 and 2010, the Applicant continued to follow Sears' directives and the problem seemed to be solved, as the odours were less pronounced. From time to time, a smell returned, but by leaving the door open when not in use, by running empty cycles with bleach, and by using Affresh tablets, the smell would disappear again.

11. While the suggestions seemed to work intermittently for odour control, the problem escalated and in May 2010, the Applicant called Sears again. On May 18, 2010, a technician came and removed the rubber joint on the interior of the door seal and replaced it with a new one. For the first time, the Applicant saw black mould on the inside of the rubber joint. Once this

repair was done, the Applicant believed that the odour problem was repaired and resolved for good.

12. Between 2010 and 2012, the odour problem again appeared to be solved. However, in 2012, the foul odour returned and this time, the Applicant pulled out the rubber joint on the interior of the door seal himself (as the technician had done in 2010) and he found that the mould had returned.

13. At this point in time, the Applicant turned to the internet to learn more information about the problems he was experiencing. He had realized that all of Whirlpool's and Sears' recommended techniques and even the repairs that were performed were only band-aid solutions that masked the problem, but did not solve it. The Applicant learned that the mould affecting his Washing Machine was the same problem described by other consumers on the internet; he thus concluded that the problems he experienced were the result of a common and systemic design defect.

B. Procedure

14. On December 21, 2009, the original class action proceeding was filed. On February 20, 2012, an amended class proceeding was filed.

15. On February 14, 2013, the Applicant was substituted as representative plaintiff in the file through the filing of a Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative.

16. The Applicant was examined out of court twice, on June 11, 2013 [Exhibit R-18] and August 29, 2013 [Exhibit R-19]. The second out-of-court examination took place due to the fact that the Applicant was going to be out of town on his honeymoon and could not be present for the authorization[1] hearing, so the parties agree to proceed in this fashion.

17. Therefore, the Motion Judge never met, heard from, saw, or spoke to the Applicant at any time and relied solely on her reading of the transcripts of these out-of-court examinations.

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[1] Throughout this Memorandum of Argument, the word "Authorization" (Quebec term) and the word "Certification" (common law term) will be used interchangeably and are intended to have the same meaning.

18. A Re-Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative [hereinafter the **"Re-Re-Amended MforA"**] was filed at the authorization hearing on September 19, 2013[2]. It was this Re-Re-Amended Motion that judgment was rendered upon.

C. Proceedings in the Courts Below

19. The Honourable Madam Justice Danièle Mayrand J.C.S., sitting in and for the judicial district of Montreal [hereinafter the **"Motion Judge"**], heard the Applicant's Re-Re-Amended MforA on September 18, 19, and 20, 2013.

20. The Judgment in the first instance was rendered on November 19, 2013 [hereinafter the "**First Instance Judgment**"].

21. The Motion Judge rejected the Applicant's Re-Re-Amended MforA on the basis of art. 1003 (b) and 1003 (d) of the *Code of Civil Procedure*, CQLR c C-25 (***"C.C.P."***). However, the Motion Judge agreed that the criteria of art. 1003 (a) and (c) C.C.P. were satisfied.

22. The Re-Re-Amended MforA was rejected by the Motion Judge for the following reasons:

    a) She concluded that the Applicant's action was prescribed/statute barred; and

    b) She concluded that the Applicant was not an adequate representative plaintiff.

23. On December 17, 2013, the Applicant filed an inscription in appeal of the First Instance Judgment. The appeal was pled before the Court of Appeal of Quebec on December 1 and 2, 2014.

24. On March 11, 2015, the appeal was dismissed by a 2:1 majority of the Court of Appeal of Quebec. The majority, written by the Honourable Madam Justice Nicole Duval Hessler, C.J.Q. and to which the Honourable Mr. Justice Martin Vauclair, J.A. concurred, maintained the Motion Judge's decision. The Honourable Mr. Justice Paul Vézina, J.A. dissented and for his part would have allowed the appeal and authorized the class action.

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[2] The original Re-Re-Amended MforA was dated September 15, 2013 and was presented on September 18, 2013. It was accepted by the Motion Judge in part and rejected in part as it related to the Applicant's personal story. In consequence of that judgment, the Applicant was ordered to file a new Re-Re-Amended MforA which was dated September 19, 2013.

25. The majority dismissed the appeal, maintaining the First Instance Judgment in large part on the basis of deference to the Motion Judge, on a determination that "[p]rescription begins when the defect first manifests itself in a material fashion", and on a determination that the defect was "foul odours, followed by mildew and visible residue on the drum of the washing machine". The majority of the Court of Appeal of Quebec agreed with the Motion Judge that "the first significant manifestation of the prejudice in 2005, one year after purchase, when odours became [TRANSLATION] "continuous and repetitive"". However, the majority of the Court of Appeal did not address the Applicant's argument that the gradual and re-occurring nature of the damages suffered or the remedial instructions and products provided by Whirlpool, which temporarily assuaged the damages as well as Whirlpool's active concealment of the design defect, prevented him from becoming aware of the design defect and to thus be aware of his legal rights until approximately August 2012 [Exhibit R-17].

26. In the written dissenting opinion, Justice Vézina agreed with the Applicant that it was premature to determine that the action was prescribed[3] at the authorization stage, that prescription does not begin to run until the victim is aware that he/she has a right of action, that Whirlpool's conduct was fundamental to the determination of when prescription should begin to run, and that even an imperfect representative plaintiff should not deprive all class members of their right to have justice rendered, addressing these issues at paragraphs 25, 27 to 29, 34 to 45, 51 to 54 and 61 of his reasoning.

PART II – QUESTIONS IN ISSUE

27. The proposed appeal raises the following questions of law which are of public importance:

    a) What is the appropriate level of analysis regarding prescription/statute of limitations at the authorization/certification stage? What is the appropriate level of scrutiny thereof at the appeal level?

    b) When does prescription/statute of limitations begin to run in a civil action where the problems relating to a design defect appear, are resolved, and then re-occur again?

    c) When should a reasonably prudent person be deemed to be aware of all of the essential elements of a right of action? At what point should this same person conclude that what he thought was a maintenance issue is really a design defect?

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[3] Throughout this Memorandum of Argument, the words "Prescription" or "Prescribed" (Quebec terms) and the words "Statute of Limitations" or "Statute Barred" (common law terms) will be used interchangeably and are intended to have the same meaning.

d) How does the doctrine of fraudulent concealment of the part of the Respondents (or their agents) affect the above determinations? Are all of the provinces applying this doctrine consistently, including its application in Quebec through the seminal case of *Oznaga* v. *Société d'exploitation des loteries*, [1981] 2 S.C.R. 113?

e) If a representative plaintiff is adjudged to be inadequate, what is the appropriate procedure? Is there a less draconian remedy other than a complete dismissal of the class proceeding where there is evidence that the problem is widespread and several hundred other class members have been identified?

f) What deference should the appeal court give to the motion judge's determinations of fact where no *viva voce* evidence was ever adduced and all the proof was made by out-of-court examinations and the production of documents only?

PART III - ARGUMENT

Prescription/Statute of Limitations

28. The determination of the moment when prescription begins to run is one that has serious implications for the Canadian legal system as it operates to dispossess a plaintiff of his/her right of access to justice. A full appreciation of the potential consequences of prematurely barring a claim, even more so in the class action context, serves to emphasize the importance of determining this vital and sometimes complex factual issue on the basis of a complete record, which in the case at hand, neither the Motion Judge, nor the Court of Appeal possessed.

A. Prematurity and Overreaching

29. The primary thrust of the majority decision of the Court of Appeal was non-interference with the Motion Judge's conclusions concerning prescription notwithstanding the clear shortage of factual evidence presented at the authorization stage; facts that would have been necessary to correctly make this determination.

30. Given the general lack of factual evidence at the authorization stage, it is problematic to conclude, without a full hearing on the merits, that the Applicant's personal cause of action is prescribed. At a minimum, the Applicant has an arguable case on the issue of prescription with regard to the coming-together of the three (3) necessary elements of liability, namely fault, damage and causation as well as the Applicant's knowledge thereof, which did not materialize until August 2012 [Exhibit R-17], well within the proper limitation period, which

had been suspended with the filing of the original class action proceedings, namely, on December 21, 2009 [art. 2908 of the Civil Code of Quebec ("C.C.Q.")].

31. It is a well-established principle of class actions that the authorization stage is merely a filtering mechanism whereby the motion judge must determine whether the representative plaintiff has demonstrated an arguable case; any determinations on the merits of the case must be made at the trial stage on the basis of a complete evidentiary record. Prudence is fundamental when there is a question of prescription and, when in doubt, this question should be referred to the merits. In the case of *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59 [*Infineon*] at paras. 65 and 68, this Court stated:

> [65] […] First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "apparence sérieuse de droit", or a "prima facie case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.
> …
> [68] Any review of the merits of the case should properly be left for the trial, at which time the appropriate procedures can be followed to adduce evidence and weigh it on the standard of the balance of probabilities.

32. In the case of *Foyer du Sport inc.* c. *Coop fédérée*, 2008 QCCA 381 at paras. 15 and 17, the Quebec Court of Appeal also stated:

> [15] En l'espèce, le juge de première instance, ayant conclu que le recours de l'appelante était prescrit et par conséquent mal fondé, a fait droit à la requête de l'intimée et a rejeté l'action. Or, la question de la prescription est fort litigieuse, considérant que le point de départ de la prescription dépend de la caractérisation de la nature des dommages subis par l'appelante. En effet, selon l'article 2926 *C.c.Q.*, lorsque la faute et le préjudice ne se produisent pas simultanément, le délai de prescription commence à courir à partir du jour de la réalisation du préjudice. Mais encore, il faut distinguer la manifestation graduelle ou progressive d'avec la manifestation perpétuelle et ininterrompue d'un préjudice. Dans le premier cas, la prescription commence à courir à partir du jour où le préjudice se manifeste pour la première fois.
> …
> [17] […] Nous ne sommes pas ici devant un cas clair d'extinction du recours de l'appelante et un examen approfondi de la preuve est nécessaire pour déterminer le moment exact à partir duquel la prescription a commencé à courir.

33. In the case of *Brousseau* c. *Laboratoires Abbott ltée*, 2011 QCCS 5211 at paras. 31 and 32, the Quebec Superior Court stated:

> [31] Par ailleurs, s'il y a eu prescription du recours de l'un ou l'autre des membres, celui-ci requiert l'analyse par le juge saisi du mérite du dossier de l'à-propos ou non d'appliquer les conditions relatives à la suspension de la prescription telles qu'énoncées par l'article 2904 *C.c.Q.*

> [32] Encore là, cet élément que soulève Abbott appartient, de l'avis du Tribunal, à la détermination du fond du litige et non de la requête pour être autorisé à exercer un recours collectif.

34. Lastly, the Court of Appeal in *Fortier c. Meubles Léon ltée*, 2014 QCCA 195 at paras. 137 and 139 states:

> [137] Rien ne s'oppose à ce que la prescription du recours soit soulevée au stade de l'autorisation. L'argument n'est pas dénué d'intérêt en l'espèce, mais il me paraît préférable de laisser au juge du fond le soin d'en décider. Voici pourquoi.
> …
> [139] Cela dit, au stade de l'autorisation, le seuil de preuve est peu élevé. L'allégation de fausses représentations est tenue pour avérée, sans plus. On ne saurait pour autant tenir pour acquis que le juge du fond conclura nécessairement à fausses représentations. Il conclurait en ce sens que le débat sur la prescription ne serait pas clos pour autant. Le caractère imprescriptible du recours plaidé par les appelants est discutable en droit et, de toute façon, la qualification des représentations par le juge du fond ne sera pas sans incidence sur la question de prescription.

35. With the exception of a clear, unarguable situation of prescription, tenable arguments, including those relating to the time at which prescription should begin to run, the damages experienced, and the Respondents' conduct relating thereto, must be considered at a trial on the merits. Premature decisions with regard to prescription, which operate to terminate an entire class' access to justice, simply cannot be made on the basis of an incomplete factual record and such a decision must be subject to the review of an appellate court.

36. Instead of recognizing the need for a complete factual and evidentiary record to determine whether the Applicant's case was properly prescribed, the majority decision simply decided not to intervene; stating that the Motion Judge's factual determinations are "*a quo* [] error free on this point"; no in-depth analysis was undertaken.

37. This position is all the more unsettling as the determination that the Applicant's case was prescribed served to bar the claims of all of the class members, including the 408 Quebec resident class members that had signed up on the Applicant's attorneys' website.[4]

38. It was in the dissenting opinion that, Justice Vézina properly determined that it was premature to conclude that the Applicant's action was prescribed and he recognized the necessity and importance of a complete record in this conclusion:

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[4] Procès-verbal d'audience of September 19, 2013 at 9:31 A.M.

> [25] Les deux moyens d'appel de l'Appelant, qui représente le groupe, me paraissent fondes. La Juge a conclu prématurément à la prescription de son action individuelle […]
> …
> [42] Déclarer prescrite l'action personnelle de l'Appelant est prématuré. Seul le juge du fond aura tous les éléments pour trancher la question de la prescription.

B. The Applicant's Action is not Prescribed/Statute Barred

39. In an action for civil damages, prescription does not begin to run until the plaintiff is aware of the three elements of civil responsibility – fault, damages and causation – only with this knowledge, does the plaintiff have the ability to exercise legal rights.

40. This position is supported in doctrinal works as well as case law. In Céline Gervais' treatise, *La prescription,* Cowansville, Les Éditions Yvon Blais, 2009, at p.107 where it states:

> Le principe fondamental en la matière, tel qu'il a été expliqué par la Cour suprême, veut que la prescription ne puisse commencer à courir avant que ne soit né le droit de recourir à l'action. C'est pourquoi on peut facilement conclure que la prescription ne peut débuter avant le premier moment où la victime avait la possibilité d'agir. Ce moment survient lorsque la partie demanderesse a connaissance des trois éléments de la responsabilité, soit la faute, le dommage et le lien de causalité.
> […]
> La connaissance des éléments de la responsabilité pouvant fonder le point de départ de la prescription doit s'appuyer sur une base réelle, et non pas sur de simples craintes ou soupçons. La Cour d'appel l'a réitéré à deux reprises.

41. The majority opinion agreed with the Motion Judge's assessment of the Applicant's damages as "foul odours, followed by mildew and visible residue on the drum of the washing machine" and agreed that the Applicant "has always experienced problems with the machine" making these damages "continuous and repetitive" and causing prescription to begin to run.

42. With respect, the facts alleged and taken for true at the authorization stage do not indicate that the damages suffered by the Applicant are those quoted above (i.e. "foul odours, followed by mildew and visible residue on the drum of the washing machine"), these are merely symptoms of the damages claimed. The actual damages claimed in the Re-Re-Amended MforA are enumerated therein at paragraph 29.

43. The majority opinion deferred to and agreed with the Motion Judge in her erroneous assessment of the manifestation of the Respondents' fault as being the damages themselves. This position is flawed as the Applicant's damages were more than the symptoms of the design defect; they were the results thereof.

44. In order for prescription to begin to run, the Applicant must have been aware of the three elements of civil responsibility; namely, (i) Whirlpool's fault in manufacturing, marketing, distributing, and selling Washing Machines with a design defect, (ii) the damages enumerated at paragraph 29 of the Re-Re-Amended MforA, and (iii) that the design defect had caused these damages.

45. The majority opinion determined that as soon as there were "foul odours, followed by mildew and visible residue on the drum of the washing machine", that prescription began to run immediately despite the absence of the complete three elements of civil responsibility. In addition, the majority opinion wholly ignores Whirlpool's conduct in successfully concealing the design defect from the Applicant and of the various remedies that they offered which temporarily assuaged the symptoms of their fault.

46. This position has serious implications for the Canadian legal system as it dictates that plaintiffs must immediately sue at the first signs of any issues, prior to being aware of all three elements of civil liability. This would encourage unnecessary litigation by persons who wish to preserve their legal rights should they later become aware of the missing elements of civil responsibility.

47. The majority opinion correctly states the role of the Motion Judge as follows:

> [11] The motion judge filters frivolous actions at the authorization stage. In doing so, she furthers the administration of justice by weeding out untenable claims, sparing unnecessary procedures for the group, the representative, the defendant and the judicial system. […]

However, the determination that the Applicant's personal action was prescribed actually serves to promote a contradictory notion; that is, a plaintiff must initiate legal proceedings even if they are frivolous and untenable just in case they may prove to be serious and plausible in the future. This view neither furthers the administration of justice, nor spares unnecessary procedures and, in fact, if this viewpoint were endorsed, the court system would undoubtedly become overloaded.

48. The trend in Canada has been to resolve disputes without the unnecessary use of the court system; however, in juxtaposition to this positive movement, the strategy of prematurely dismissing the Applicant's claim would have the negative effect of actually encouraging unnecessary use of the courts, lest persons be deprived of their recourses for inaction.

49. In his dissenting opinion, Justice Vézina correctly understood the starting point of prescription as the point when the plaintiff has knowledge of his/her right of action in relation to a problem that he/she has experienced and not when a problem is first detected, as the majority opinion has stated:

> [28] Mais le point de départ de la prescription n'est pas le moment ou un problème est décelé, mais le moment où la victime a connaissance d'un droit d'action en rapport avec ce problème. La personne opérée qui souffre d'une douleur persistante ne peut prendre action avant de savoir qu'elle est causée par l'oubli d'une pince chirurgicale dans son abdomen.
>
> [29] Ici, le point de départ de la prescription est délicat à établir pour deux raisons. Le problème s'est manifesté de façon graduelle ou plutôt de façon récurrente et, d'autre part, l'intimée, à qui l'Appelant s'adresse en 2005, l'assure que le problème résulte d'une faute de l'Appelant lui-même dans l'utilisation ou l'entretien de l'appareil.

50. Whirlpool's conduct in relation to the problems that the Applicant experienced was also wholly ignored by the majority opinion and is expanded upon below.

C. The Respondents' Conduct – Fraudulent Concealment

51. It is due to Whirlpool's conduct that the Applicant did not discover the existence of the design defect and, therefore, did not have knowledge of his cause of action against Whirlpool prior to August 2012, after the original proceedings had been filed which suspended prescription on behalf of all class members (art. 2908 C.C.Q.).

52. The principle of *nemo auditur propriam turpitudinem allegans* dictates that Whirlpool is not entitled to claim the benefit of prescription (even if it were a plausible argument, which it is not) because even if the prescriptive period could theoretically have begun to run in 2005 or 2006 as the Motion Judge concluded and the majority agreed with, it is due to Whirlpool's wrongdoing that prescription did not actually begin until August 2012.

53. The documents that were produced as Exhibits R-7 to R-14 clearly establish that Whirlpool knew about the design defects for years, but took no corrective measures to rectify or to warn consumers of the propensity of the Washing Machines to develop mould.

54. In fact this very issue of Whirlpool's prior knowledge was stated quite succinctly by the United States Court of Appeals for the Sixth Circuit in a similar class action entitled *Glazer et al. v. Whirlpool Corporation*, No. 10-4188, May 3, 2012 at pages 4-6 [Exhibit R-4C][5]:

> Plaintiffs' evidence shows that Whirlpool knew the design of its Access and Horizon platforms contributed to residue buildup resulting in rapid fungal and bacterial growth. As early as September 2003, Whirlpool began receiving two to three customer complaints each day about the problem. When Whirlpool representatives instructed consumers to lift up the rubber door gaskets on their machines, the common findings were deposits of water, detergent, and softener, along with mold or mildew. Service call reports confirmed problems around the rubber door gaskets, as well as residue deposits and black mold inside the drain hoses. Whirlpool also knew that numerous consumers complained of breathing difficulties after repair technicians scrubbed the Duets in their homes, releasing mold spores to the air.
>
> In 2004 Whirlpool formed an internal team to analyze the problems and formulate a plan. In gathering information about the complaints, Whirlpool learned that the mold problem was not restricted to certain models or certain markets. Whirlpool also knew that mold growth could occur before the Duets were two to four years old, that traditional household cleaners were not effective treatments, and that consumer laundry habits and use of non-HE detergent might exacerbate the problem, but did not cause it. Whirlpool contemplated whether it should issue a warning to consumers about the mold problem. To avoid alarming consumers with words like "mold," "mildew," "fungi," and "bacteria," Whirlpool adopted the term "biofilm" in its public statements about mold complaints.
>
> Later in 2004, Whirlpool engineers discussed the need to redesign the tub on the "Horizon" platform because soil and water pooling served as the nucleation site for mold and bacterial growth. Chemical analysis Whirlpool conducted showed that the composition of biofilm found in the "Horizon" and "Access" platforms was identical. Engineers determined that the "Access" platform's webbed tub structure was extremely prone to water and soil deposits, and the aluminum basket cross-bar was extremely susceptible to corrosion from biofilm. Whirlpool found a number of design factors contributing to corrosion, including insufficient draining of water at the end of a cycle and water flowing backward after draining through the non-return valve between the tub and the drain pump. The company made certain design changes to later generations of Duets.
>
> By 2005, Whirlpool unveiled a special cleaning cycle in the Duets, but the company was aware that the new cycle would not remove all residue deposits. Engineers remained concerned whether the cleaning cycle would be effective to control odor and whether the use of bleach in the cleaning cycle would increase corrosion of aluminum parts. By March 2006 Whirlpool acknowledged that consumers might notice black mold growing on the bellows or inside the detergent dispenser, and that laundry would smell musty if the machine was "heavily infected."
>
> By late 2006, having received over 1.3 million calls at its customer care centers and having completed thousands of service calls nationwide, Whirlpool internally acknowledged its legal exposure, noting that it had already settled a class action concerning its Calypso machines, and that Maytag, another of Whirlpool's brands, had settled a class action concerning the Neptune washer.

[5] The U.S. Supreme Court rejected Whirlpool's Petition for Leave on February 24, 2014.

> At this point, Whirlpool decided to formulate a new cleaning product for all front-load washing machines, regardless of make or model. Whirlpool expected the "revolutionary" product to produce a new revenue stream of $50 million to $195 million based on the assumption that fifty percent of the 14 million current front-load washer owners might be looking for a solution to an odor problem with their machines.
>
> In September 2007 Whirlpool introduced to the market two new front-load washer cleaning products: Affresh™ tablets for washers in use from zero to twelve months, and Affresh™ tablets with six door seal cleaning cloths for machines in use more than twelve months. To encourage sales, the company placed samples of Affresh™ tablets in all new Whirlpool and Maytag HE washers. Whirlpool marketed Affresh™ as "THE solution to odor causing residue in HE washers." The company changed its Use and Care Guides for Whirlpool, Maytag, and Amana brands to advise consumers to use an Affresh™ tablet in the first cleaning cycle to remove manufacturing oil and grease. Whirlpool believed this advice would encourage consumers to use the cleaning cycle and Affresh™ tablets regularly, like teaching vehicle owners to change the oil in their cars. Service technicians and call centers were instructed to recommend the use of Affresh™ to consumers.

55. By failing to disclose the existence of the design defect in 2005 when the Applicant called Whirlpool to inquire about the symptoms he was experiencing and, given the position of the consumer who trusts the manufacturer due to their superior knowledge of the product, prescription must be suspended, as ignorance of the facts on which the Applicant's legal rights lay and his impossibility to act was caused by the active fault (i.e. concealment of the defect) of Whirlpool (Art. 2904 C.C.Q.).

56. In the present case, Whirlpool's offensive behaviour consists of having concealed facts and instead presented the situation to the Applicant as a simple "maintenance issue" when they knew full well that the odours were symptomatic of mould that systematically developed inside the Washing Machines as a result of a design defect.

57. In 2005, when the Applicant called Whirlpool, he was misled. The Applicant's ignorance of the facts flowed directly from the Whirlpool's actions which masked the problem and its root cause.

58. In his dissenting opinion, Justice Vézina correctly addressed this issue as follows:

> [36] Quant à la seconde raison, il faut s'arrêter au comportement des intimées à l'égard de l'Appelant.
>
> [37] Les documents au dossier établissent que les intimées connaissaient elles-mêmes le problème des 2005. Leur réaction est d'informer leurs clients que le problème est dû à un défaut d'entretien, lequel disparaîtra grâce à l'usage de divers produits. L'Appelant leur fait confiance et, de fait, le problème se fait oublier durant un bon moment.

> [38] Sa réapparition plus tard fait comprendre que la cause du problème n'est pas un simple défaut d'entretien, mais qu'il y a quelque chose de plus grave. L'allégation d'un vice de conception paraît alors plausible.
>
> [39] Dans ces circonstances, il me paraît quelque peu cynique et même spécieux de la part des intimées de faire reproche à l'Appelant d'avoir cru au départ, en 2005, qu'il s'agissait d'un simple problème temporaire causé par son mauvais entretien de la laveuse, alors qu'elles ont tout fait pour l'en convaincre, et ce, malgré qu'elles savaient que le problème était répandu et de nature plus permanente.
>
> [40] L'auteure Céline Gervais explique que : « dans le cadre de la suspension pour impossibilité d'agir, le principe fondamental veut que la prescription soit suspendue si l'ignorance des faits générateurs du droit du réclamant est causée par la faute de la partie adverse. »
>
> [41] Il faudra donc prendre en compte le comportement des intimées pour déterminer le point de départ du délai de prescription.

59. The decision of the majority of the Court of Appeal flies in the face of the teachings of this Honourable Court in the famous case of *Oznaga* v. *Société d'exploitation des loteries*, [1981] 2 SCR 113 at page 126, which arguably integrated the common law doctrine of fraudulent concealment into Quebec law, which states:

> […] Be that so, there however appears to be as much agreement, and I concur, in recognizing that lack of awareness of the legal facts giving rise to a right, when such lack of awareness results from the debtor's fault, is *de facto* impossibility of acting as provided for in art. 2232, and that the starting point for computing deadlines will be suspended until the creditor is aware of the existence of his right — provided, it should be added, that he acted with the care of a reasonable man.

60. This Honourable Court also applied similar reasoning in the case of *Bank of Montreal v. Bail Ltée*, [1992] 2 SCR 554 at page 603:

> With respect to the obligation to inform, it was in fact impossible for the Bank to act, since it was unaware of the facts which gave rise to its right because of the fault of the debtor, as set out in art. 2232 C.C.L.C. and *Oznaga v. Société d'exploitation des loteries et courses du Québec*, 1981 CanLII 28 (SCC), [1981] 2 S.C.R. 113, at p. 126. Here, the fault of Hydro‑Québec, which lies in the failure to disclose information, actually prevented the Bank from knowing that Hydro‑Québec had this information, and from being able to exercise its rights. The time at which the prescription starts to run was thus pushed back until February 1983, the moment when Laprise fortuitously discovered a plan which had accompanied the 1977 Report. The delictual action by the Bank against Hydro‑Québec for breach of the obligation to inform is not prescribed.

61. No one may profit from their own wrongdoing. As such, in 2005, prescription was suspended as against the Applicant because his inability to act was caused by Whirlpool. This suspension continued until the Applicant's independent discovery of the design defect in August 2012.

D. Prescription of the Applicant's Personal Claim is not a Sufficient Bar to Authorization/Certification

62. The majority of the Court of Appeal opinion states:

> [15] […] Prescription of the personal claim of the proposed representative may not, in and of itself, be a sufficient bar to the authorization of a class action in every case,[6] but in this case, it is closely linked to the issue of the adequacy of the appellant as a class representative.

63. The majority references the Quebec Court of Appeal decision in *Service aux marchands détaillants ltée (Household Finance) c. Option Consommateurs*, 2006 QCCA 1319 at para. 66 which holds:

> [66] D'une part, l'article 1012 *C.p.c.* prévoit que tout moyen préliminaire doit concerner une partie importante des membres du groupe. Comme la prescription devait être décidée par le juge du fond, il serait illogique de rejeter le recours collectif au motif que le recours d'un seul membre est prescrit, bien qu'il soit le membre désigné, alors que le recours individuel de la majorité des membres ne l'est pas.

64. With respect, it is unclear why the majority is distinguishing the present case from the above-cited case when they state that prescription is "closely linked to the issue of the adequacy of the appellant as a class representative". The only factor that is distinguishable from the present case is that the above-cited case was after authorization. Thus, the majority opinion seems to indicate that a different set of rules apply to the adequacy standard of the representative prior to authorization and afterward on the merits.

65. This Court, in *Bank of Montreal v. Marcotte*, 2014 SCC 55 [*Marcotte*] at para. 42, has held that the same standards apply to the analysis of standing whether it is before or after authorization.

> [42] Standing in the context of class actions must be analyzed through the lens of the criteria for authorization of class actions set out in the *CCP*. That analysis must have the same outcome regardless of whether it is conducted before or after the class action is authorized. As stated above, determining whether art. 55 of the *CCP* is satisfied requires interpreting that provision harmoniously with the class action authorization criteria of art. 1003 in order to take into account the collective nature of class actions. The nature of the interest necessary to establish the standing of the representative must be understood from the perspective of the common interest of the proposed class, and not solely from the perspective of the representative plaintiffs. The legal principles that govern a challenge to standing should be the same whether the challenge occurs at the authorization stage or at the merits stage, because, at both stages, the court must look to the authorization criteria of art. 1003 to resolve the issue. The difficulty of concluding otherwise is well illustrated in this case, where, by this reasoning, the entire class action could have been halted at the authorization stage had the Banks contested standing at that time instead of at the merits stage.

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[6] *Service aux marchands détaillants ltée (Household Finance) c. Option Consommateurs*, 2006 QCCA 1319.

66. While the case of *Marcotte* concerned standing to sue in the absence of a direct cause of action with each defendant, the same principle must apply – namely, that the rules established by art. 1003 *C.C.P.* do not change before or after authorization. If this reasoning is correct, then the decision in *Service aux marchands détaillants ltée (Household Finance)* should apply equally to the case at hand.

67. In addition, even if a substantial portion of representative plaintiff's claim became prescribed, the Applicant may still be substituted by another member of the class whose cause of action would not have been prescribed at the time of the filing pursuant to art. 1012 and 1024 C.C.Q:

> 1012. Except in the case where he claims to have a recourse in warranty, the defendant cannot urge a preliminary exception against the representative unless it is common to a substantial part of the members and bears on a question dealt with collectively.
>
> 1024. A member may, by motion, apply to the court to have himself or another member substituted for the representative.
>
> The court may substitute the applicant or another member consenting thereto for the representative if it is of opinion that the latter is no longer in a position to represent the members adequately.
>
> […]

68. Thus, the law already provides for a remedy should it be determined on the merits that the Applicant's personal action was in fact prescribed at the time of the filing of the original proceedings on December 21, 2009.

69. It should be noted that at the time of the authorization hearing 408 potential Quebec class members had joined the action.[7] At present, this number has risen significantly and can be provided to the Court upon request.

70. Given these redeeming possibilities, the Re-Re-Amended MforA should not have been dismissed based on the arguable prescription of one individual class member.

71. The question of what stance to take on the suitability of the representative plaintiff is of national importance as the Court of Appeal of Quebec has deviated from this Honourable Court's holdings, in particular in *Oznaga*, and implicates a provincial disaccord.

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[7] Procès-verbal, *supra* note 4.

72. The Ontario courts have been providing representative plaintiffs the opportunity to palliate any such difficulty. For example, the Ontario Superior Court case of *Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College)*, 2008 CanLII 1539 (ON SC) at para. 180 states:

> [180] In the circumstances, however, this should not result in the dismissal of this motion at this stage. […] Accordingly, the representative plaintiffs should have a reasonable opportunity, free from interference from the defendants, to make such persons aware of this claim, and to add any such person as an additional proposed representative plaintiff. […]

73. More recently, in the case of *6323588 Canada Ltd. v. 709528 Ontario Ltd.*, 2012 ONSC 2985 at paras. 101 and 107, the Ontario Superior Court stated:

> [101] I am not, however, prepared to dismiss the motion altogether. Having found the action otherwise suitable for certification, it would be a waste of time, money and judicial resources to require that the class start afresh [...]
>
> [102] This approach is supported by the authorities. In *Martin v. Astrazeneco Pharmaceuticals PLC*, [2009] O.J. No. 3847 (S.C.J.), Cullity J. observed, at para. 20, that our courts have not generally been receptive to arguments that the action has to go back to square one if the putative plaintiff is found wanting:
> …
> [107] The certification motion is adjourned, with leave to bring a motion to substitute a new representative plaintiff. […]

74. In addition, this Honourable Court has stated that the motion judge has an obligation to consider proportionality (article 4.2 *C.C.P.*) when assessing whether a representative is adequate. The case of *Marcotte* at paras. 44 and 45 states:

> [44] In addition, reading art. 55 of the *CCP* harmoniously with the requirements of art. 1003 is in line with this Court's jurisprudence on art. 4.2 and proportionality more generally. In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court recently confirmed that the principle of proportionality is an important factor in civil procedure, one that "must be considered in the assessment with respect to each of [the] criteria" found under art. 1003 (para. 66). This principle reinforces the judicial discretion already found in the language of art. 1003 (*Vivendi*, at paras. 33 and 68). The importance of the proportionality requirement of art. 4.2 has been underlined in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, in a passage that seems particularly apt in the context of the function of class actions:
>
> > Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. [para. 43]

> [45] In other words, the authorizing judge has an obligation to consider proportionality — the balance between litigants, good faith, etc. — when assessing whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant.

75. Where it is decided that a representative plaintiff does not have a cause of action against the respondents/defendants, it is highly inefficient to dismiss the action where it can simply be reinstituted by another class member; other remedies are surely available.

Adequacy of the Representative

A. Sufficient Interest to Sue

76. In his dissent, Justice Vézina criticizes the cumbersome requirements that the Motion Judge placed on the Applicant.

> [25] […] elle a trop exigé de lui pour déterminer s'il « est en mesure d'assurer une représentation adéquate des membres » (C.c.Q., art. 1003).
> …
> [48] L'essentiel pour les membres du groupe est que leur action soit bien présentée et bien plaidée.
>
> [49] La lecture de la demande introductive d'instance et l'ensemble des documents réunis à son soutien démontrent un travail professionnel.
>
> [50] La plaidoirie en appel démontre que l'avocat connaît bien le dossier et qu'il est en mesure de représenter adéquatement le groupe.
> …
> [60] L'Appelant fait confiance aux avocats qui ont monté le dossier et sont déterminés à le mener à terme, au bénéfice du groupe. Sa confiance est bien placée. Si les avocats prennent trop de place dans la dynamique des actions collectives - ce que plusieurs appréhendent – c'est là un problème de politique générale qui ne peut être pris en considération pour trancher le cas particulier en l'espèce.

77. Justice Vézina correctly states that the First Instance Judgment fails to recognize that there is a problem with the Washing Machines – that of odour and moisture – that this problem is presumed to be the design defect and that the Applicant has put his faith in his attorneys, who have demonstrated competence and the ability to effectively litigate this action.

78. The class action is the vehicle that provides consumers with access to justice and art. 1003 (d) *C.C.P.* must be liberally interpreted so as to accomplish just that. A representative plaintiff should not be declared inadequate unless their attributes are such that the case could not possibly proceed fairly. In addition and, as mentioned, if an issue arises, the court may consider ascribing the status of representative to another class member.

79. The case of *Infineon* at paras. 149 and 150, states:

> [149] Article 1003(d) of the C.C.P. provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [translation] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(d), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.
>
> [150] Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorization. As Lafond states, at p. 423, [translation] "[i]n the event of a conflict, denying authorization is in our opinion an overly radical step that would harm the absent members, especially given that the judge sitting at the stage of the motion for authorization has the power to ascribe the status of representative to a member other than the applicant or the proposed member."

80. Justice Vézina also identifies that the Motion Judge has criticized the Applicant in a manner that is contrary to the very essence of class actions and has erroneously conflated the legal concept of "interest to sue" with an individual's interest to sue, as follows:

> [52] Un paragraphe du jugement m'étonne:
>
> > [70] Le Requérant n'avait aucun intérêt à prendre des procédures, il a d'ailleurs reconnu qu'il n'aurait pas entrepris de recours contre Whirlpool s'il avait été seul à le faire. [citation omise]
>
> [53] On touche là à l'essentiel de l'institution des « recours collectifs », des actions de groupe.
>
> [54] Personne ne va entreprendre une action contre une grande entreprise dans le but de récupérer plus ou moins cent dollars.
>
> [55] Mais la situation prend une tout autre dimension lorsque le problème se révèle être celui de nombreuses autres personnes. Le combat judiciaire change de perspective.
>
> [56] L'obtention de dommages-intérêts compensatoires et peut-être même punitifs permet de consacrer de l'énergie et des ressources et d'avoir recours à des experts pour un débat d'égal à égal.
>
> [57] Certes, l'autorisation de l'action collective obligera les intimées à se défendre et à encourir les frais d'un procès. Mais je n'y vois rien d'inéquitable. Le problème de moisissure dans leurs laveuses frontales est réel et justifie le débat judiciaire pour déterminer s'il serait dû à un vice de conception dont elles sont responsables.

B. Credibility Assessments in the Absence of Viva Voce Testimony

81. The majority opinion deferred to the Motion Judge's judgment that the Applicant was not in a position to represent the class, addressing this issue at paragraphs 20-22 of its reasoning.

82. However, this Honourable Court, or any appellate court for that matter, is in the exact same position to evaluate the Applicant's credibility as the Motion Judge was during the authorization hearing considering the fact that no *viva voce* testimony from the Applicant was heard; Mr. Lambert's testimony was received through two out-of-court examinations [Exhibit R-18 and Exhibit R-19] and he never once attended any Court appearance.

83. The Motion Judge based her assessment of the Applicant's credibility on the fact that (i) he was unable to retrieve his purchase contract from Sears, (ii) he could not remember every detail about the mundane event of buying a Washing Machine nine years prior, and (iii) proof of an alleged purchase by his ex-wife of a second Washing Machine of which he had no knowledge of. These details should not be held against him, nor are they determinative of credibility. The Applicant made a forthright effort to retrieve his purchase contract from Sears, but was unable to; interestingly enough, however, Whirlpool seemed to have little problem locating it. Lastly, the attack on the Applicant's credibility was wholly inappropriate as the proof of a second purchase of a Washing Machine by his ex-wife was not brought out until the first day of the authorization hearing, when Whirlpool knew that the Applicant would not be present. The Applicant's attorney objected, but the evidence was nonetheless allowed into the record.

84. In any event, even if the Applicant's ex-wife did purchase another Whirlpool Washing Machine in 2009 while they were separated, it is indicative that in 2005, she clearly did not realize that it suffered from a design defect; otherwise why would she purchase the same defective Washing Machine? This is just another piece of evidence that shows that prescription did not and should not have run against the Applicant in 2005 because if the fault, damage, and causality had been known, it is highly unlikely that his ex-wife would have later bought the same washing machine.

85. In his dissent, Justice Vézina acknowledges that the Applicant may be disorganized; however, this does not affect the proof that would be presented on the merits, including calling his ex-wife as a witness.

> [34] Par ailleurs, même si l'Appelant est quelque peu désorganisé, comme la lecture de son interrogatoire préalable le fait voir, il ne faudrait pas confondre cet interrogatoire et la preuve qu'il pourra administrer lors de l'instruction sur le fond alors qu'il pourra apporter le témoignage de son épouse, citer à comparaitre les représentans *[sic]* des Intimées et de Sears et élaborer sur les problèmes vécus aux diverses époques.

Conclusion

86. This case raises critical questions regarding prescription and when it begins to run in an action for civil damages, which has far-reaching consequences for the administration of justice in Canada. In a supposed effort to "filter" out "frivolous actions" and to spare "unnecessary procedures", the two courts below have accomplished just the opposite – the unwarranted prescriptive limit on access to justice inadvertently encourages the institution of early and unnecessary litigation should a potential litigant wish to protect their right to sue.

87. The premature analysis of prescription in light of an incomplete factual record completely undermines this Honourable Court's jurisprudence regarding the proper role of the motion judge at an authorization hearing as well as the broader purpose of access to justice.

88. Finally, the doctrine of fraudulent concealment as outlined by this Honourable Court does not seem to be consistently applied by the Quebec Courts.

PART IV – COSTS

89. The Applicant has raised issues of public and national importance. The Applicant request costs in the cause.

PART V – ORDER SOUGHT

90. The Applicant requests that this application for leave to appeal from the Judgment of the Court of Appeal of Quebec, dated March 11, 2015, be granted.

ALL OF WHICH is respectfully submitted this 8th day of May, 2015.

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PART VI – TABLE OF AUTHORITIES

PART VII – LEGISLATION

Civil Code of Québec, CQLR c C-1991

LIVRE HUITIÈME DE LA PRESCRIPTION **TITRE PREMIER** DU RÉGIME DE LA PRESCRIPTION **CHAPITRE QUATRIÈME** DE LA SUSPENSION DE LA PRESCRIPTION	**BOOK EIGHT** PRESCRIPTION **TITLE ONE** RULES GOVERNING PRESCRIPTION **CHAPTER IV** SUSPENSION OF PRESCRIPTION
2904. La prescription ne court pas contre les personnes qui sont dans l'impossibilité en fait d'agir soit par elles-mêmes, soit en se faisant représenter par d'autres.	**2904**. Prescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others.
2908. La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête. Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription. Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible d'appel.	**2908.** A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion. The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription. In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.
TITRE TROISIÈME DE LA PRESCRIPTION EXTINCTIVE	**TITLE THREE** EXTINCTIVE PRESCRIPTION

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.	**2925**. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.

Code of Civil Procedure, CQLR c C-25

LIVRE I DISPOSITIONS GÉNÉRALES	**BOOK I** GENERAL PROVISIONS
TITRE I DISPOSITIONS INTRODUCTIVES	**TITLE I** INTRODUCTORY PROVISIONS
4.2. Dans toute instance, les parties doivent s'assurer que les actes de procédure choisis sont, eu égard aux coûts et au temps exigés, proportionnés à la nature et à la finalité de la demande et à la complexité du litige; le juge doit faire de même à l'égard des actes de procédure qu'il autorise ou ordonne.	**4.2.** In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.
TITRE III RÈGLES APPLICABLES À TOUTES LES DEMANDES EN JUSTICE	**TITLE III** RULES APPLICABLE TO ALL ACTIONS
CHAPITRE I DE L'ACTION, DES PARTIES, DES PROCUREURS	**CHAPTER I** ACTIONS, PARTIES TO ACTIONS AND ATTORNEYS
55. Celui qui forme une demande en justice, soit pour obtenir la sanction d'un droit méconnu, menacé ou dénié, soit pour faire autrement prononcer sur l'existence d'une situation juridique, doit y avoir un intérêt suffisant.	**55.** Whoever brings an action at law, whether for the enforcement of a right which is not recognized or is jeopardized or denied, or otherwise to obtain a pronouncement upon the existence of a legal situation, must have a sufficient interest therein.
LIVRE IX LE RECOURS COLLECTIF	**BOOK IX** CLASS ACTION
TITRE II L'AUTORISATION D'EXERCER LE RECOURS COLLECTIF	**TITLE II** AUTHORIZATION TO INSTITUTE A CLASS ACTION
1002. Un membre ne peut exercer le recours collectif qu'avec l'autorisation préalable du	**1002**. A member cannot institute a class action except with the prior authorization of

tribunal, obtenue sur requête. La requête énonce les faits qui y donnent ouverture, indique la nature des recours pour lesquels l'autorisation est demandée et décrit le groupe pour le compte duquel le membre entend agir. Elle est accompagnée d'un avis d'au moins 10 jours de la date de sa présentation et signifiée à celui contre qui le requérant entend exercer le recours collectif; elle ne peut être contestée qu'oralement et le juge peut permettre la présentation d'une preuve appropriée.	the court, obtained on a motion. The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act. It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action; the motion may only be contested orally and the judge may allow relevant evidence to be submitted.
1003. Le tribunal autorise l'exercice du recours collectif et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que: *a)* les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes; *b)* les faits allégués paraissent justifier les conclusions recherchées; *c)* la composition du groupe rend difficile ou peu pratique l'application des articles 59 ou 67; et que *d)* le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.	**1003**. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that: (a) the recourses of the members raise identical, similar or related questions of law or fact; (b) the facts alleged seem to justify the conclusions sought; (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.
1012. Sauf dans le cas où il prétend pouvoir exercer un recours en garantie, le défendeur ne peut opposer au représentant un moyen préliminaire que s'il est commun à une partie importante des membres et porte sur une question traitée collectivement.	**1012**. Except in the case where he claims to have a recourse in warranty, the defendant cannot urge a preliminary exception against the representative unless it is common to a substantial part of the members and bears on a question dealt with collectively.
1024. Un membre peut, par requête, demander au tribunal que lui-même ou un autre membre soit substitué au représentant.	**1024**. A member may, by motion, apply to the court to have himself or another member substituted for the representative.

Le tribunal peut substituer le requérant ou un autre membre qui y consent au représentant s'il est d'avis que ce dernier n'est plus en mesure d'assurer une représentation adéquate des membres.	The court may substitute the applicant or another member consenting thereto for the representative if it is of opinion that the latter is no longer in a position to represent the members adequately.
Le représentant substitué accepte le procès dans l'état où il se trouve; il peut, avec l'autorisation du tribunal, refuser de ratifier les actes déjà faits si ceux-ci ont causé un préjudice irréparable aux membres. Il ne peut être tenu au paiement des dépens et des autres frais pour les actes antérieurs à la substitution, à moins que le tribunal n'en ordonne autrement.	The substituted representative accepts the trial at the stage it has then reached; he may, with the authorization of the court, refuse to ratify the proceedings already had if they have caused an irreparable prejudice to the members. He cannot be bound to pay the costs and other expenses for proceedings prior to the substitution, unless the court orders otherwise.