



SUPREME COURT OF CANADA

CITATION: Bou Malhab v. Diffusion Métromédia CMR inc.,
2011 SCC 9

DATE: 20110217
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BETWEEN:

Farès Bou Malhab
Appellant
and
Diffusion Métromédia CMR inc.
and **André Arthur**
Respondents
- and -

**Conseil National des Citoyens et Citoyennes d'origine Haïtienne,
Canadian Broadcasting Corporation, Canadian Civil Liberties Association,
Canadian Newspaper Association, Ad IDEM/Canadian Media lawyers
Association
and Canadian Association of Journalists**
Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and
Rothstein JJ.

REASONS FOR JUDGMENT: Deschamps J. (McLachlin C.J. and Binnie, LeBel, Charron
(paras. 1 to 94) and Rothstein JJ. concurring)

DISSENTING REASONS: Abella J.
(paras. 95 to 122)

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BOU MALHAB v. DIFFUSION MÉTROMÉDIA CMR

Farès Bou Malhab

Appellant

v.

**Diffusion Métromédia CMR inc.,
and André Arthur**

Respondents

and

**Conseil National des Citoyens et Citoyennes d'origine Haïtienne,
Canadian Broadcasting Corporation,
Canadian Civil Liberties Association,
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Ad IDEM/Canadian Media Lawyers Association and
Canadian Association of Journalists**

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Indexed as: Bou Malhab v. Diffusion Métromédia CMR inc.

2011 SCC 9

File No.: 32931.

2009: December 15; 2011: February 17.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil procedure — Class actions — Defamation — Action in defamation on behalf of group following racist comments made during radio show — Whether representative plaintiff must prove that each group member suffered personal injury — Civil Code of Québec, R.S.Q., c. C-1991, art. 1457.

Civil liability — Defamation — Injury — Objective standard of “ordinary person” — Action in defamation on behalf of group following racist comments made during radio show — Whether ordinary person would have found that the group members had sustained personal injury — Civil Code of Québec, R.S.Q., c. C-1991, art. 1457.

Through a class action, M sought compensation for the injury allegedly suffered by the members of the group he represents as a result of discriminatory comments made by A — a radio host known for his provocative remarks — concerning Montréal taxi drivers whose mother tongue is Arabic or Creole. While commenting on the taxi industry in Montréal, A made accusations of uncleanness, arrogance, incompetence, corruption and ignorance of official languages. The Superior Court allowed the class action and ordered that \$220,000 be paid to a non-profit organization. The judge was of the view that the comments were defamatory and wrongful, and that even if the evidence did not show that each member of the group had sustained a personal injury, the collective recovery

mechanism could make up for this. A majority of the Court of Appeal set aside the judgment, finding that an ordinary person would not have believed the comments and would have thought that the offensive accusations had been diluted by the size of the group concerned.

Held (Abella J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, **Deschamps**, Charron and Rothstein JJ.: The concept of defamation requires that the right to the protection of reputation be reconciled with the right to freedom of expression. In reconciling these two rights, the principles on which a free and democratic society is based must be respected, and the intersection point will change as society changes. In Quebec, actions in defamation are governed by the general principles of civil liability. An attack on a person's reputation can involve allegations of fact or merely offensive and insulting comments. The plaintiff is entitled to compensation if fault, injury and a causal connection are all present. Fault is determined by looking at the defendant's conduct, while injury is assessed by looking at the impact of that conduct on the victim, and a causal link is established where the decision maker finds that a connection exists between the fault and the injury.

Here, injury is the only question in issue. The type of injury that defines defamation is damage to reputation, which is assessed from the perspective of an ordinary person. Injury exists where an ordinary person believes that the remarks made, when viewed as a whole, brought discredit on the reputation of the victim. The

ordinary person is the counterpart, for injury, of the reasonable person used to assess fault. While both concepts are objective, they are not one and the same. The conduct of the reasonable person establishes a standard of conduct whose violation constitutes a fault. The ordinary person, by contrast, is the embodiment of the society that receives the impugned comments. Although the ordinary person reacts like a sensible person who, like the reasonable person, respects fundamental rights, care must be taken not to idealize the ordinary person and consider him or her to be impervious to all negligent, racist or discriminatory comments, as the effect of this would be to sterilize the action in defamation. In assessing injury, the judge considers the fact that the ordinary person has accepted that freedom of expression is protected and that exaggerated comments can be made in certain circumstances. However, the judge must also ask whether there is a decrease in the esteem that the ordinary person has for the victim.

Since the right to the protection of reputation, which is the basis for an action in defamation, is an individual right that is intrinsically attached to the person, only those who have suffered personal injury become entitled to compensation. The requirement of proof of a personal injury contributes to maintaining the balance between freedom of expression and the right to the protection of reputation, and also applies where the defamatory comments are made about a group. However, an individual will not be entitled to compensation solely because he or she is a member of a group about which offensive comments have been made. The member or members of the group who bring an action must have sustained personal injury. Even

if the members of a group are indirectly covered by comments that mention the group, it will be necessary, in order to establish their right to compensation, that the members prove that they personally suffered damage to their reputations.

The requirement of proving the existence of the elements of fault, injury and causal connection in respect of each member of the group is not dispensed with in the context of a class action. The plaintiff must prove an injury shared by all members of the group so the court can infer that personal injury was sustained by each member. Proof of injury suffered by the group itself and not by its members will not in itself be enough to give rise to such an inference, but the plaintiff is not required to prove that each of the members sustained exactly the same injury. He or she must prove that an ordinary person would have believed that each of the persons personally sustained damage to his or her reputation. It is not until the existence of personal injury sustained by each member of the group has been proved that the judge will focus on assessing the extent of the injury and choosing the appropriate recovery method, whether individual or collective.

To determine whether personal injury has been sustained, the judge must analyse the impugned comments, taking into account all the circumstances in which they were made. The following non-exhaustive criteria may be relevant. Generally speaking, the larger the group, the more difficult it is to prove that personal injury has been sustained by its members. The more strictly organized and homogeneous the group, the easier it will be to establish that the injury is personal to each member.

The imputing of a single characteristic to all members of a group that is highly heterogeneous would make an allegation of personal injury implausible. Where the group's members are identifiable or very visible in the community, it will be easier to prove that they sustained personal injury. The same is true where the offensive comments are made about a group that has historically been stigmatized. The plaintiff's status, duties, responsibilities or activities in the group can also make it easier to prove personal injury. The precision or generality of the allegations will also influence the analysis. The more general the allegations, the more difficult it will be to go behind the screen of the group. Similarly, where allegations apply to only one segment of a group, it will be more difficult for them to reflect personally on all members of the group. The seriousness of the comments can help prove personal injury, but in some circumstances, this will have the opposite effect: an ordinary person will see exaggeration or excessive generalization in the allegations and will give them less credence as a result. Generally speaking, a plausible or convincing allegation will capture the ordinary person's attention more and thus make it easier for that person to connect the allegation with each or some of the group's members personally. Finally, several other factors, related to the maker or target of the comments, the medium used and the general context, can cause comments that appear to be general to be attached to certain persons in particular and defame them personally.

Here, an ordinary person would not have believed that the wrongful, scornful and racist comments made by A damaged the reputation of each member of

the group of taxi drivers working in Montréal whose mother tongue is Arabic or Creole. First of all, the relevant group is of considerable size (1,100 members). Furthermore, while the drivers share a language and a job and belong to two visible minorities, no one could reasonably believe that their common attributes extend to their personal knowledge of English and French, their knowledge of driving routes in the city of Montréal, their thoughtfulness with customers, their personal hygiene or the cleanliness of their vehicles. These characteristics could be attributed to such a heterogeneous group only by extrapolation and could only stem from an intolerance of immigrants in general. Finally, there is simply nothing rational about the suggestion that the drivers should be blamed for all the problems A said existed in the taxi industry in Montréal. The impugned comments were an extreme generalization by a known polemicist in the area where the show was broadcast, and had very little plausibility from the point of view of the ordinary person, who would have recognized that they were a generalization on the part of A, based on an unpleasant personal experience. This ordinary person would not have associated the allegations of ignorance, incompetence, uncleanliness, arrogance and corruption with each taxi driver whose mother tongue is Arabic or Creole personally. In the absence of proof that a personal injury was sustained by the members of the group, the Superior Court should have dismissed the class action.

Per Abella J.: To prove defamation under the *Civil Code of Québec*, a plaintiff must prove that the defendant committed a fault and that the plaintiff suffered an injury as a result. To prove injury, the plaintiff must show that the

remarks are defamatory. The question is whether an ordinary person would believe that the remarks, when viewed as a whole, brought discredit to someone's reputation. Once this objective standard is met, injury is established.

The fact that comments are aimed at a group is not, in itself, reason to deny a claim. If the members of the group can show that the defamatory words were such as to impugn not only the group, but also the plaintiffs as individuals in that group, the claim can succeed. It is not only the size of the group which is relevant, it is also the extent to which the group is sufficiently defined or identified such that each person in the group can be said to be harmed.

Here, an ordinary person would conclude that the remarks were defamatory of the plaintiffs and therefore injurious. The talk show host accused Arab and Haitian taxi drivers of creating "Third World" public transportation in Montréal, of corruption, of incompetence and of keeping unsanitary cars. He said that neither Arab nor Haitian drivers knew their way around the city and that they could not communicate in either English or French. He denigrated Arab drivers as "fakirs" and the Creole language as "nigger". The remarks were blatantly racist, highly stigmatizing, and vilified members of vulnerable communities. While the group targeted was large, it was not so diffuse as to be indeterminate. The comments were aimed at a group of individuals who were of particular racial backgrounds in a particular industry and in a particular city. The group was defined with sufficient precision and the comments were specific enough to raise, objectively, the clear

possibility not only of harm to reputation, but also of harmful economic consequences from customers.

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By Deschamp J.

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St. Lawrence Cement Inc. v. Barrette, 2008 SCC 64, [2008] 3 S.C.R. 392; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Société Radio-Canada v. Radio Sept-Îles inc.*, [1994] R.J.Q. 1811; *Métromédia C.M.R. Montréal inc. v. Johnson*, 2006 QCCA 132, [2006] R.J.Q. 395; *Sim v. Stretch*, [1936] 2 All E.R. 1237; *Chohan v. Casdsky*, 2009 ABCA 334, 464 A.R. 57; *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97, leave to appeal refused, [1998] 2 S.C.R. vii; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Ouellet v. Cloutier*, [1947] S.C.R. 521; *Hervieux-Payette v. Société Saint-Jean-Baptiste de Montréal*, [1998] R.J.Q. 131, inf. [2002] R.J.Q. 1669; *Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491; *Bouchard v. Agropur Coopérative*, 2006 QCCA 13442, [2006] R.J.Q. 2349; *Cabay v. Fafard*, [1986] J.Q. n° 2823 (QL), aff'd [1998] J.Q. n° 1052 (QL); *Bisaillon v. Université Concordia*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Ortenberg c. Plamondon* (1915), 24 B.R. 69, 385; *Zhang v. Chau*, 2008 QCCA 961, [2008] R.R.A. 523, leave to appeal refused, [2008] 3 S.C.R. xi; *Raymond v. Abel*, [1946] C.S. 251; Cass. crim., January 29, 2008, *Bull. crim.*, No. 23; Cass. Crim., December 6, 1994, Dr. Pénal 1995, comm. 93, obs. M. Véron; Cass. crim., January 16, 1969, *Bull. crim.*, No. 35; Cass. crim., November 22, 1934, D.P. 1936.36.1, note M. Nast; *Knuppfer c. London Express*, [1944] A.C. 116; *Butler v. Southam*, 2001 NSCA 121, 197 N.S.R.

(2d) 97; *Bai c. Sing Tao Daily Ltd.* (2003), 226 D.L.R. (4th) 477; *O'Brien v. Williamson Daily News*, 735 F. Supp. 218 (1990); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (1952); *Adams v. WFTV Inc.*, 24 Med. L. Rptr. 1350 (1995), aff'd 691 So.2d 557 (1997); *A.U.P.E. v. Edmonton Sun* (1986), 49 Alta. L.R. (2d) 141; *Gauthier v. Toronto Star Daily Newspapers Ltd.* (2004), 188 O.A.C. 211, leave to appeal refused [2005] 1 S.C.R. ix; *McCullough v. Cities Service Co.*, 676 P.2d 833 (1984); *Fawcett Publications Inc. v. Morris*, 377 P.2d 42 (1962); *Jackson v. TCN Channel 9*, [2001] NSWCA 108 (AustLII); *Trahan v. Imprimerie Gagné Ltée*, [1987] R.J.Q. 2417; *Booth v. British Columbia Television Broadcasting System* (1982), 139 D.L.R. (3d) 88; Cass. Crim., May 26, 1987, *Bull. crim.*, No. 217; Cass. Crim., September 16, 2003, *Bull. crim.*, No. 161; *Farrington v. Leigh*, Times Law Report, December 10, 1987; *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163 (1977); *Algarin v. Town of Wallkill*, 421 F.3d 137 (2005); *Gross v. Cantor*, 270 N.Y. 93 (1936); *Farrell v. Triangle Publications, Inc.*, 159 A.2d 734 (1960); *Eastwood v. Holmes* (1958), 1 F. & F. 347, 175 E.R. 758; *Association des policiers de Sherbrooke v. Delorme*, [1997] R.J.Q. 2826; *Sarrazin v. Duquette* (1935), 41 R. de J. 365; *Gauthier v. Toronto Star Newspapers Ltd.* (2003), 228 D.L.R. (4th) 748.

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Loi sur la presse (France)

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Jean El Masri and Éric Dugal, for the appellant.

David Stolow, Nicholas Rodrigo and Marie-Ève Gingras, for the respondents.

Stefan Martin and Mélisa Thibault, for the intervener Conseil National des Citoyens et Citoyennes d'origine haïtienne.

Guy J. Pratte and Jean-Pierre Michaud, for the intervener the Canadian Broadcasting Corporation.

Christian Leblanc et Marc-André Nadon, for the intervener the Canadian Civil Liberties Association.

Ryder Gilliland, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media lawyers Association and the Canadian Association of Journalists.

English version of the judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron and Rothstein JJ. delivered by

DESCHAMPS J. —

[1] The law of defamation is a tool for protecting personal reputations. This right keeps pace with changes in society and in the importance attached by society to freedom of expression. In Quebec, actions in defamation are governed by the general principles of civil liability. The flexibility of those principles makes it possible to address society's growing concerns about freedom of expression. In two recent cases, this Court considered the impact of freedom of expression on the element of "fault" in civil liability: *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at paras. 38-45; *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, at paras. 48-51 and 54-55. In

this appeal, it is the element of “injury” that must be examined in light of freedom of expression. The Court must examine the factors to consider when determining whether racist comments made about a group can cause a compensable injury.

[2] Through a class action, the appellant sought compensation for the injury allegedly suffered by the members of the group as a result of racist comments made by a radio host concerning Montréal taxi drivers whose mother tongue is Arabic or Creole. The respondents argued, successfully in the Court of Appeal, that the members had not been personally affected and cannot be compensated. I find that there was no personal injury in this case and that the rules of civil liability accordingly do not authorize compensation. I would therefore dismiss the appeal.

I. Facts

[3] On November 17, 1998, André Arthur — a host known for his provocative remarks — was hosting the morning show on the CKVL radio station, which is operated by the respondent Diffusion Métromédia CMR inc. One topic during the show was whether Quebeckers were satisfied with restaurants and hotels, particularly in Montréal. While his co-host was getting ready to present the results of a survey on that topic, Mr. Arthur made, *inter alia*, the following comments about the taxi industry in Montréal:

[TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that’s French and English? . . . I’m not very good at speaking “nigger”. . . . [T]axis have

really become the Third World of public transportation in Montreal. . . . [M]y suspicion is that the exams, well, they can be bought. You can't have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams. . . . Taxi drivers in Montreal are really arrogant, especially the Arabs. They're often rude, you can't be sure at all that they're competent and their cars don't look well maintained.

[4] As well, Mr. Arthur tolerated and even encouraged similar remarks made by a listener who phoned in and who said she was a taxi driver.

[5] The appellant, Mr. Bou Malhab, is a taxi driver whose mother tongue is Arabic. He applied to the Superior Court for authorization to institute a class action against the respondents.

II. Judicial History

A. *Judgments on the Application for Authorization to Institute the Class Action*

[6] Marcelin J. of the Superior Court dismissed the application for authorization to institute the class action (SOQUIJ AZ-01021767). Because of the large size of the group covered by Mr. Arthur's comments, she was of the opinion that it would be impossible to prove a causal connection between those comments and injury sustained by each member of the group personally. She also found that, even if the group had been small enough for the members' reputations to have been personally damaged, the members should have used the procedure for joinder of

actions (arts. 59 and 67 of the *Code of Civil Procedure*, R.S.Q., c. C-25 (“C.C.P.”)) rather than the class action mechanism.

[7] The Court of Appeal set aside that decision and authorized the appellant to institute the class action on behalf of [TRANSLATION] “[e]very person who had a taxi driver’s licence in the region of the Island of Montréal on November 17, 1998 . . . and whose mother tongue is Arabic or Creole” ([2003] R.J.Q. 1011, at para. 8). Rayle J.A., writing for a unanimous court, first found that there was a colour of right. While she agreed with the Superior Court that the size of the group covered by wrongful comments might make it difficult to establish individual injury, she found that it would be up to the court to determine [TRANSLATION] “the extent to which the size of the group in question limits or eliminates the individual nature of the damage to reputation, having regard to the nature of the comments made and the circumstances in which the defamation occurred” (para. 51). Second, she acknowledged that moral damages are difficult to assess in a class action context, but she refused to see this as precluding such an action at the outset and suggested that an order to pay damages to a charity could be a way to get around this problem. The matter was referred back to the Superior Court for a hearing on the merits.

B. Judgments on the Merits of the Class Action

[8] Guibault J. of the Superior Court was of the view that Mr. Arthur’s comments were defamatory and wrongful (2006 QCCS 2/24, [2006] R.J.Q. 1145). On the issue of the injury sustained, he noted that only a taxi driver who had heard the

impugned comments could claim compensation. The evidence showed that, at most, about 20 of the drivers concerned had listened to the show on November 17, 1998. Guibault J. was therefore of the opinion that the evidence did not show that each member of the group had sustained a personal injury. However, since he considered himself bound by the Court of Appeal's decision on the application for authorization, he made up for this by using the collective recovery mechanism (arts. 1028 and 1034 *C.C.P.*). He allowed the class action with costs and ordered the respondents solidarily to pay \$220,000 to the Association professionnelle des chauffeurs de taxi, a non-profit organization. He dismissed the claim for punitive damages and refused to consider awarding damages in lieu of compensation for the appellant's extrajudicial fees. His judgment was appealed.

[9] The Court of Appeal set aside the trial judgment (2008 QCCA 1938, [2008] R.J.Q. 2356). Bich J.A., who wrote the majority's reasons, began by pointing out that the existence of a fault was no longer contested and that Mr. Arthur and Diffusion Métromédia CMR inc. were instead disputing the existence of personal injury. She noted that an action in defamation presupposes [TRANSLATION] "injury that is individual and personal, in other words, specific and particularized, commensurate with the attack, which is also specific and particularized" (at para. 44). The existence of such injury is determined using an objective test, namely the ordinary person test. According to the judge, three situations are possible where the impugned comments are made about a group: (1) the group is large and the comments become lost in the crowd; (2) certain members of the group are named or

can easily be identified; or (3) the group is small enough for the members to be personally affected. There is a right to compensation only in the latter two cases. Bich J.A. found that this case was of the first type. She found that an ordinary person would not have believed Mr. Arthur's comments and would have thought that the offensive accusations had been diluted by the size of the group concerned, leaving intact the personal reputation and dignity of the drivers in question. She noted that broadening the concept of defamation by ignoring the need to establish the existence of a personal injury would weaken freedom of expression in an unacceptable manner.

[10] In dissenting reasons, Beauregard J.A. proposed a series of factors for assessing the personal nature of the injury. Applying them to this situation, he concluded that the drivers had sustained an injury for which compensatory damages could be awarded. He would have dismissed the principal appeal but would have allowed the incidental appeal and confirmed the fee agreement between the appellant and his counsel so that those fees might be paid out of the damages.

III. Positions of the Parties

[11] Mr. Bou Malhab argues that, because of the serious nature of Mr. Arthur's conduct, the limited size of the group and the identification of the victims through their origins and occupation, the victims were individualized enough for compensable injury to have resulted from Mr. Arthur's comments. As regards the requirement that each member of the group sustain a personal injury, the court does not have to consider this until it determines the compensation due to individual

members, that is, after the respondents are found liable to the group. The appellant also requests that punitive damages be awarded and that his fee agreement be confirmed.

[12] The respondents for their part argue that the action can succeed only if Mr. Arthur's comments were specially directed at each of the drivers and if each of them sustained an injury that was direct, personal and separate from the injury suffered by the group. The respondents submit that these conditions are not met in this case.

IV. Issues

[13] The appellants raise issues relating to compensatory damages, punitive damages and the fee agreement. In light of my answer on the first issue, it will not be necessary to deal with the other two. The issue that is determinative of this appeal can therefore be stated as follows:

Can discriminatory comments made about a group of individuals form the basis for an action in damages for defamation and, if so, on what conditions?

V. Analysis

[14] I will begin by considering the concept of defamation in Quebec civil law. I will then look at its specific characteristics where the allegedly defamatory

comments were made about a group. Finally, I will apply these rules to the facts of this appeal.

A. *Defamation in the Civil Law*

(1) Development of the Law of Defamation

[15] Roman law sanctioned the use of the term *injuria*, which referred to anything said or done to offend someone. That concept was adopted by old French law, which gradually limited its scope to causing offence through speech or writing. France subsequently chose to pass special legislation concerning the delict of injury and distinguished it from defamation. The latter necessarily involved an allegation or imputation of fact interfering with honour, while the former referred to an offensive expression, term of contempt or insult. This distinction was not retained in Quebec, where the term defamation was chosen to refer to the injury of old French law (T. Grellet-Dumazeau, *Traité de la diffamation, de l'injure et de l'outrage* (1847), vol. 1, at pp. 1-10; C. Bissonnette, *La diffamation civile en droit québécois*, mémoire de maîtrise, Université de Montréal (1983), at pp. 11-14). In Quebec civil law, an attack on a person's reputation can involve allegations of fact or merely offensive and insulting comments. In Quebec civil law, it does not matter whether the assertions are made in writing, orally or through images or gestures or whether they attack another person's reputation directly or by intimation or innuendo.

[16] The concept of defamation requires that the right to the protection of reputation be reconciled with the right to freedom of expression, since that which belongs to the former is generally taken away from the latter. Several international agreements reflect this need to strike a balance between the two rights. For example, the *International Covenant on Civil and Political Rights*, Can. T.S. 1976, No. 47, Art. 19(2) and (3), to which Canada is a party, makes the exercise of the right to freedom of expression subject to respect for the reputation of others. Similar guarantees are found in the *American Convention on Human Rights*, 1144 U.N.T.S. 123, Arts. 11, 13(1) and (2), and the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, Art. 10, both of which have been widely ratified.

[17] Freedom of expression is protected by the *Canadian Charter of Rights and Freedoms*, s. 2(b), and the *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 3 (“*Quebec Charter*”). It is one of the pillars of modern democracy. It allows individuals to become emancipated, creative and informed, it encourages the circulation of new ideas, it allows for criticism of government action and it favours the emergence of truth (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2). Freedom of expression is essential in ensuring that social, economic and political decisions reflect the aspirations of the members of society. It is broad in scope and protects well-prepared speech and wrath-provoking comments alike (*R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452). However, it is not absolute and can be limited by other rights in a democratic society, including the right

to protection of reputation (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 102-106; *Prud'homme*, at para. 43; *Néron*, at para. 52).

[18] The right to the safeguard of reputation is guaranteed by the *Quebec Charter* (s. 4) and the *Civil Code of Québec*, R.S.Q., c. C-1991, arts. 3 and 35). Since good reputation is related to dignity (*Hill*, at paras. 120-21), it is also tied to the rights protected by the *Canadian Charter*. Reputation is a fundamental feature of personality that makes it possible for an individual to develop in society. It is therefore essential to do everything possible to safeguard a person's reputation, since a tarnished reputation can seldom regain its former lustre (*Hill*, at para. 108).

[19] Of course, there is no precise measuring instrument that can determine the point at which a balance is struck between the protection of reputation and freedom of expression. In reconciling these two rights, the principles on which a free and democratic society is based must be respected. The intersection point will change as society changes. What was an acceptable limit on freedom of expression in the 19th century may no longer be acceptable today. Indeed, particularly in recent decades, the law of defamation has evolved to provide more adequate protection for freedom of expression on matters of public interest. In the common law, for example, this Court has reassessed the defence of fair comment (*WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at paras. 49 *et seq.*) and recognized the existence of a defence of responsible communication on matters of public interest (*Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640).

[20] The Canadian approach is part of a trend that can be observed in many democracies, including England (*Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.); *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44, [2007] 1 A.C. 359), Australia (*Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1 (H.C.)); *Lange v. Australian Broadcasting Corp.* (1997), 189 C.L.R. 521 (H.C.)), New Zealand (*Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385 (C.A.)), the United States (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) and Germany (BVerfGE 82, 272, June 26, 1990 (Stern - Strauß case); BVerfGE 93, 266. October 10, 1995 (soldiers are murderers case)). This phenomenon can also be seen in the decisions of the European Court of Human Rights (*Bladet Tromsø and Stensaas v. Norway* (G.C.), No. 21980/93, ECHR, 1999-III; *Colombani v. France*, No. 51279/99, ECHR 2002-V). In France, while freedom of expression has been protected by passing a special penal statute, recent cases have recognized that this was a system distinct from the system of civil liability found in the French Civil Code (Cass. ass. plén., July 12, 2000, bull. civ. No. 8).

[21] What is of interest for my purposes is not so much the specific solutions proposed by these courts, which vary depending on the legal traditions, constitutional guarantees and social norms that exist in each country, as the general trend that emerges from the cases. Just like Canadian courts, including those in Quebec, all of these courts are increasingly concerned about protecting freedom of expression. The law of defamation is changing accordingly. This is the general context in which this

case must be considered. I will now look at the legal rules applicable to defamation in Quebec civil law.

(2) Constituent Elements of Defamation in Quebec Civil Law

[22] In Quebec, there is no specific form of action for punishing defamation. Actions in defamation come under the general system of civil liability established in art. 1457 *C.C.Q.* The plaintiff is entitled to compensation if fault, injury and a causal connection are all present. Fault is determined by looking at the defendant's conduct, while injury is assessed by looking at the impact of that conduct on the victim, and a causal link is established where the decision maker finds that a connection exists between the fault and the injury. This is an area of law where it is important to make a clear distinction between fault and injury. Proof of injury is not a basis for presuming that a fault was committed. Proof that a fault was committed does not, without more, establish the existence of a compensable injury.

[23] Actions in defamation also bring the Quebec *Charter* into play, since, as I have already noted, they are based on interference with the right to the safeguard of reputation guaranteed by s. 4 of that instrument. Under s. 49 of the Quebec *Charter*, there is a right to obtain compensation for the prejudice caused by unlawful interference with human rights. However, the Quebec *Charter* has not created an independent, autonomous system of civil liability that duplicates the general system (*de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 44). The general principles of civil liability still serve as a starting point for

awarding compensatory damages for interference with a right (*Béliveau St-Jacques v. Fédération des employées et employés des services publics inc.*, [1996] 2 S.C.R. 345, at para. 119 (*per* Gonthier J.) and paras. 16 and 25 (*per* L’Heureux-Dubé J., dissenting in part), and *de Montigny*). Civil liability actions that are based on interference with a right, such as an action in defamation, are therefore a point of intersection between the Quebec *Charter* and the *Civil Code*. This convergence of instruments must be considered in defining the three constituent elements of civil liability, namely fault, injury and causal connection. I will say only a few words about fault, since it is not in dispute here. Causal connection is not in issue either. I will instead focus on injury, which is the main issue here.

(i) *Fault*

[24] Generally speaking, fault is conduct that departs from the standard of conduct of a reasonable person (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 21). It should be noted that the concept of a reasonable person is normative in nature rather than descriptive. It refers to the way an informed person would behave in the circumstances. Despite the importance attached by the Quebec *Charter* to the protection of individual rights, conduct that interferes with a right guaranteed by the *Charter* does not necessarily constitute civil fault (*Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, at para. 116; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1

S.C.R. 789 (“*Laroque*”). The interference must also violate the objective standard of conduct of a reasonable person under art. 1457 *C.C.Q.*, and there must be nothing else that limits the finding on fault, for example the existence of immunity (*Laroque* and *Prud’homme*) or the consideration of competing rights such as freedom of expression.

[25] In an action in defamation, the definition or limits of fault reflect the increasing importance attached to freedom of expression (*Société Radio-Canada v. Radio Sept-Îles inc.*, [1994] R.J.Q. 1811 (C.A.), at p. 1818). However, defamatory conduct may result from mere negligence. The truth of the message will be only one of the factors used to determine whether conduct is wrongful. Even if a comment is true, it may have been made in a wrongful manner. Scandal mongering and lies are both punished (*Prud’homme*, at para. 38; *Néron*, at para. 59).

(ii) *Injury*

[26] The type of injury that defines defamation is damage to reputation. In our law, damage to reputation is assessed objectively, from the perspective of an ordinary person (*Néron*, at para. 57; *Prud’homme*, at para. 34; *Métromédia C.M.R. Montréal inc. v. Johnson*, 2006 QCCA 132, [2006] R.J.Q. 395, at para. 49).

[27] This level of analysis is justified by the fact that damage to reputation results in a decrease in the esteem and respect that other people have for the person about whom the comments are made. Therefore, the maker of the comments and the person about whom they are made are not the only ones involved. A person is

defamed where the image reflected back to the person by one or more other people is inferior not only to the person's self-image but above all to the image the person projected to "others" in the normal course of social interaction. In our society, every person can legitimately expect equal legal treatment. However, damage to reputation is at a different level. Defaming a person means damaging a reputation that has been legitimately earned. The effect of defamation is therefore not so much to interfere with the dignity and equal treatment recognized to each person under the Charters as to reduce the esteem in which a person should be held as a result of his or her interactions with society.

[28] It is the importance of "others" in the concept of reputation that justifies relying on the objective standard of the ordinary person who symbolizes them. Therefore, the fact that a person alleging defamation feels humiliated, sad or frustrated is not a sufficient basis for an action in defamation. In such an action, injury is examined at a second level focussed not on the actual victim but on the perceptions of other people. Injury exists where "an ordinary person . . . believe[s] that the remarks made, when viewed as a whole, brought discredit on the reputation" of the victim (*Prud'homme*, at para. 34). However, care must be taken to avoid shifting the analysis of injury to a third level by asking, as the majority of the Court of Appeal seems to have done (at para. 73), whether an ordinary person, acting as a trier of fact, would have found that the victim's reputation was discredited in the eyes of a public that was likely to believe Mr. Arthur's comments. The judge must instead focus on the ordinary person, who is the embodiment of "others".

[29] There are definite advantages to relying on the objective standard of the ordinary person. Bich J.A. described them well in her reasons:

[TRANSLATION] [This standard] has the advantage of not making the characterization of the impugned comments, and thus the determination of injury, dependent on the purely subjective emotions or feelings of the person who has allegedly been defamed. If comments could be shown to be injurious simply by referring to one's feeling of personal upset, humiliation, mortification, vexation, indignation or sadness or to the fact that one's sensibilities or feelings have been offended, hurt or even trampled on, little would be left of freedom of opinion and expression. The very concept of defamation would also become entirely dependent on the particular emotions of each individual. [at para. 40]

[30] My discussion of fault demonstrates how reliance on an objective standard is nothing new. In fact, the ordinary person is the counterpart, for injury, of the reasonable person used to assess fault. While both concepts are objective, they are not one and the same. The conduct of the reasonable person establishes a standard of conduct whose violation constitutes a fault. The ordinary person, by contrast, is the embodiment of the society that receives the impugned comments. Injury is therefore assessed through the eyes of this ordinary person who receives the impugned comments or gestures.

[31] The judge responsible for assessing fault requires the person who uttered the words to behave the way that a reasonable person would have behaved in the circumstances. In defamation cases, the judge takes account of that person's right to freedom of expression, and will even accept, in some cases, that the person has expressed exaggerated opinions. In assessing injury, the judge also considers the fact

that the ordinary person has accepted that freedom of expression is protected and that exaggerated comments can be made in certain circumstances. However, the judge must also ask whether there is a decrease in the esteem that the ordinary person has for the victim. As a result, even though the standard is an objective one in both cases, it is preferable to use two different terms — reasonable person and ordinary person — because they are concepts that relate to two distinct situations: assessing the conduct and assessing the effect of that conduct from society's perspective. The questions asked at these two stages are different.

[32] The use of a standard such as the ordinary person as a test for determining whether someone's reputation has been damaged has an undeniable practical advantage. Such a standard is a reference point that is rational and objective. It makes it easier to prove injury, which can be hard to prove. Very often, injury can be established only indirectly. One example of this is *Néron*, in which the impugned remarks resulted in a loss of business that could be related only to them. In other cases, the facts supporting the finding that a reasonable person would not have made the remarks in question will permit the inference that an ordinary person would hold the victim in lower esteem as a result of those remarks. However, this is not a legal presumption that arises from finding that a fault has been committed; rather, it is merely an inference that a judge may draw from the facts adduced in evidence. The practical value of the objective standard is even greater in cases involving comments made about a group, since the injury may be similar for all those who were affected in the same way by the same comments and who sustained damage to the common

aspects of their reputations. Nevertheless, the analysis will always be a two-step process. First, the court has to determine whether a reasonable person would have made the impugned remarks in the same context. Second, if the court answers no and finds that the person who made the remarks has committed a fault, it must ask whether the remarks have decreased the ordinary person's esteem for the victim. It is necessary, of course, that a causal connection be established between fault and injury, but that issue does not arise here.

[33] Given the importance of the ordinary person and reasonable person standards, we should consider what they involve.

[34] In France, a standard of acceptable conduct is used to assess damage to honour and reputation within the meaning of the *Loi sur la presse* (N. Mallet-Poujol, "Diffamation et injures", in B. Beignier, B. de Lamy and E. Dreyer, eds., *Traité de droit de la presse et des médias* (2009), 441, at p. 450). To assess the wrongfulness of conduct in actions based on the general law of civil liability, the reasonable person standard is used, as in our law. French commentators and courts have said that a reasonable person is more than moderately prudent and informed but less than highly prudent and informed. A reasonable person approves of average behaviour, that is, the behaviour of the majority of people, only if it is rational and consistent with the nature of things (P. Jourdain, "Notion de faute: contenu commun à toutes les fautes", *Juris-classeur Responsabilité civile et Assurances* (2002), fasc. 120-1, No. 106).

[35] The common law also uses an objective standard, that of the right-thinking person, to ascertain the meaning of impugned comments and assess whether they are defamatory. This standard is taken from English common law and is based on the famous case of *Sim v. Stretch*, [1936] 2 All E.R. 1237 (H.L.), in which Lord Atkin stated the following, with which his colleagues concurred:

The conventional phrase exposing the plaintiff to hatred, ridicule or contempt is probably too narrow [. . .]. I do not intend to ask your Lordships to lay down a formal definition, but [. . .] after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in estimation of right-thinking members of society generally? [p. 1240]

[36] Despite the reservation expressed by Lord Atkin about the test he was proposing, it has not been forgotten. In fact, the right-thinking person standard was subsequently adopted, including in Canadian case law (*Chohan v. Casdky*, 2009 ABCA 334, 464 A.R. 57 (C.A.); *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 (C.A.), leave to appeal refused, [1998] 2 S.C.R. vii; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 62; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1079 (*per* Ritchie J.) and p. 1095 (*per* Dickson J., dissenting)). In *Color Your World*, the Ontario Court of Appeal, *per* Abella J.A., outlined the right-thinking person standard as follows:

The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of

any broadcast — or written statement — should be assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers. [p. 106]

[37] Raymond Brown conducted an extensive review of Canadian and foreign case law and summarized the ordinary person's perspective as follows:

The court will assume that the ordinary reasonable person is someone who is thoughtful and informed and of fair, average intelligence. They are persons who have a common understanding of the meaning of language and who, in their evaluation of imputation, entertain a sense of justice and apply moral and social standards reflecting the views of society generally. . . .

The reasonable reader or listener makes an effort to strike a balance between the most extreme meaning the words will bear and the most innocent meaning. . . .

The ordinary reader will draw conclusions from general impressions. He or she is likely to read an article casually or uncritically and not give it concentrated attention or read it a second time. . . .

(R. Brown, *The Law of Defamation in Canada*, 2nd ed. (loose-leaf), vol. 1, at pp. 5-45 - 5-61, citations omitted)

[38] While these common law principles cannot be directly transposed into Quebec civil law because of the major differences between the two systems (*Prud'homme*, at paras. 54-59), they often serve as a source of inspiration. The two legal communities have the same broad social values. Indeed, there is a striking similarity between the civil law and the common law approaches.

[39] As Abella J.A. stated in *Color Your World*, it is difficult to precisely articulate the parameters of the reasonable person standard of conduct, which the ordinary person standard also incorporates. Systematizing these models would mean taking a snapshot of our society's values, beliefs and attitudes, which is impossible because these components are intrinsically fluid and vary with the context. A few characteristics can nonetheless be emphasized.

[40] The reasonable person acts in an ordinarily informed and diligent manner. He or she shows concern for others and takes the necessary precautions to avoid causing them reasonably foreseeable injury (*Ouellet v. Cloutier*, [1947] S.C.R. 521, at p. 526). He or she respects fundamental rights and therefore cannot disregard the protection established in the charters. Since the standards maintained by the reasonable person are consistent with Charter values, he or she is careful not to violate the rights of others.

[41] Although the ordinary person reacts like a sensible person who, like the reasonable person, respects fundamental rights, care must be taken not to idealize the ordinary person and consider him or her to be impervious to all negligent, racist or discriminatory comments, as the effect of this would be to sterilize the action in defamation. As the Superior Court stated in *Hervieux-Payette v. Société Saint-Jean-Baptiste de Montréal*, [1998] R.J.Q. 131 (reversed by the Court of Appeal on other grounds, 2002 CanLII 8266), [TRANSLATION] “[t]his ordinary person is neither an encyclopedist nor an ignoramus” (p. 143). As I have noted, in assessing

injury in an action in defamation, the ordinary person is only an expedient used to identify damage to reputation. Judges must therefore avoid limiting themselves to an inflexible test that would prevent them from recognizing actual damage to reputation where it occurs.

[42] The instant case also raises the additional question of group defamation. It presents some specific problems that need to be considered.

B. Defamatory Nature of Comments Made About a Group of People

(1) Need to Prove Personal Injury

[43] An action in defamation can succeed only if personal injury has actually been sustained by the plaintiff or plaintiffs. This requirement also applies where the defamatory comments are made about a group. Three rules of Quebec law are applicable here.

[44] First, to have the necessary interest to bring an action, a person must have sustained personal injury. An action can be brought only by a person who is able to be a party to an action (art. 56, para. 1 *C.C.P.*) and who has a sufficient interest (arts. 55 and 59 *C.C.P.*). Except in cases where the legislature has intervened, a group without juridical personality does not have the necessary capacity to be a party to an action. This means that a group cannot bring an action based on injury it claims to have suffered as a group without juridical personality. Moreover, a person does

not, simply as a member of a group, have a sufficient interest to bring an action in damages for injury sustained by the group as a group. An interest will not be sufficient unless, *inter alia*, it is direct and personal. Even if the group's attributes and those of the plaintiff are not mutually exclusive, the plaintiff must nonetheless be able to assert a right that belongs to the plaintiff (*Jeunes Canadiens pour une civilisation chrétienne v. Fondation du Théâtre du Nouveau-Monde*, [1979] C.A. 491, at p. 494).

[45] The requirement of proving the existence of a personal interest is not dispensed with in the context of a class action. The general provisions of the *Code of Civil Procedure* apply to class actions to the extent that they are not excluded or inconsistent with the specific rules governing such proceedings (art. 1051 *C.C.P.*). This is the case for the provisions requiring the demonstration of a sufficient interest (*Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349 (C.A.), at para. 103). A non-personal interest based on injury that has been sustained by the group as a group will therefore not be sufficient to permit the institution of a class action in defamation. (See also *Cabay v. Fafard*, [1986] J.Q. n° 2823 (QL) (Sup. Ct), *aff'd* [1988] J.Q. n° 1052 (QL) (C.A.).)

[46] Second, the scheme of the *Quebec Charter* confirms the requirement of proof of a personal injury. The right to the protection of reputation, which is the basis for an action in defamation, is an individual right that is intrinsically attached to the person, whether the person is legal or natural. A group without juridical personality

does not have a right to the safeguard of its reputation. Moreover, s. 49 of the *Quebec Charter* provides that only the “victim” of interference with a right is entitled to compensation, which confirms that only those who have suffered personal interference may obtain compensation. As Bernier J.A. wrote in *Jeunes Canadiens pour une civilisation chrétienne*, at p. 495:

[TRANSLATION] [The *Charter*] is directed at the person considered individually and makes these remedies [under s. 49] available to the person where the person’s rights under the *Charter* are violated; a party can pursue these remedies only as a person whose *Charter* rights have been infringed, that is, as a “victim”.

In defamation law, the requirement of proof of a personal injury also contributes to maintaining the balance between freedom of expression and the right to the protection of reputation.

[47] Third, the rules of civil liability in the *C.C.Q.* provide that injury is compensable if it is personal to the plaintiff. The purpose of compensation is to put *the victim* back in the situation he or she was in prior to the injury. The wording of arts. 1607 and 1611 *C.C.Q.* confirms that the compensated injury must be personal to the creditor of the right to compensation:

1607. The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor’s default.

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

Future injury which is certain and able to be assessed is taken into account in awarding damages.

[48] It must be inferred from this that an individual will not be entitled to compensation solely because he or she is a member of a group about which offensive comments have been made. The member or members of the group who bring an action must have sustained personal injury. In other words, defamation must go behind the screen of generality of the group and affect its members personally.

[49] That being said, the victim does not have to be expressly named or designated to be able to bring an action in defamation. The attack does not have to be specific or particularized. The person who made the impugned comments cannot avoid liability by hiding behind the fact that he or she used general terms applying to a group. Attacks on a group may in fact personally affect some or all of the group's members. While the injury must be personal, it does not have to be unique, that is, different from the injury sustained by the other members of the group. The reputation of more than one person may be tarnished by the same wrongful comments. While the law does not punish the defamation of groups having no juridical personality, it does punish multiple individual defamation (D. Buron, "Liberté d'expression et diffamation de collectivités: quand le droit à l'égalité s'exprime" (1988), 29 *C. de D.* 491, at pp. 497-98). Even if the members of a group are covered by comments that mention the group, it will be necessary, in order to establish their right to compensation, that the members prove that they personally suffered damage to their reputations.

[50] Moreover, as we will see, the personal injury requirement does not change in class action proceedings.

(2) Impact of the Procedural Vehicle Used

[51] Before instituting a class action, authorization must be obtained under arts. 1002 and 1003 *C.C.P.* If such authorization is granted, the parties proceed on the merits and the plaintiff must prove the defendant's liability. If the judge allows the action, the judge may order collective or individual recovery. The appellant argues that the use of a class action means that he does not have to prove personal injury at the time the merits of the action are being examined, since the question of the personal nature of the injury should be considered at the time of individual recovery proceedings (factum, at paras. 22 and 52). This argument must be rejected, since it is based on confusion between the type of injury required to ground civil liability, the process used to prove such injury and the assessment of the extent of such injury.

[52] This Court has stated on several occasions that a class action is merely a procedural vehicle and that its use does not have the effect of changing the substantive rules applicable to individual actions (*Bisailon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 105-108; *St. Lawrence Cement*, at para. 111). In other words, the class action mechanism cannot be used to make up for the absence of one of the constituent elements of the cause of action. A

class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.

[53] The law of defamation therefore applies in its entirety in the class action context. As I mentioned above, for a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group (*Hôpital St-Ferdinand*, at para. 33). Of course, the class action procedure permits the judge to draw inferences from the evidence, but the judge must still be satisfied on a balance of probabilities that each element is present for each member (for injury, see *Hôpital St-Ferdinand*, at paras. 34-35).

[54] However, there can be no question of requiring each member of the group to testify to establish the injury actually sustained. Proof of injury will usually be based on presumptions of fact, that is, on an attempt to find “an element of damage common to everyone . . . to be able to infer that there were serious, precise and concordant presumptions that all the [members of the group sustained personal injury]” (*Hôpital St-Ferdinand*, at para. 41, citing the opinion of Nichols J.A.). In this regard, the plaintiff must prove an injury shared by all members of the group so the court can infer that personal injury was sustained by each member. Proof of injury suffered by the group itself and not by its members will not in itself be enough to give rise to such an inference. On the other hand, the plaintiff is not required to prove that each of the members sustained exactly the same injury. The fact that the wrongful conduct did not affect each member of the group in the same way or with

the same intensity does not prevent the court from finding the defendant civilly liable. This was in fact what happened in *St. Lawrence Cement*. While the injury sustained by the members of the group in question varied in intensity, this Court confirmed that it could be inferred that each member had sustained injury based on the similarities between them.

[55] It is not until the *existence* of personal injury sustained by each member of the group has been proved that the judge will focus on assessing the *extent* of the injury and choosing the appropriate recovery method, whether individual or collective. If personal injury is not proved, the class action must be dismissed. Thus, contrary to what is argued by the appellant, the possibility of ordering individual recovery of damages does not relieve the plaintiff of the burden of first proving that each member of the group sustained personal injury. In other words, the recovery method cannot make up for the absence of personal injury.

[56] The various factors used to determine whether such injury has been sustained must now be considered.

(3) Factors Used to Determine Whether Personal Injury Has Been Sustained

[57] In any action in defamation, injury is proved if the plaintiff satisfies the judge that the impugned comments are defamatory, that is, that an ordinary person would believe that they tarnished the plaintiff's reputation. The same test is used

where the comments apply *a priori* to a group of individuals, but special attention will then have to be paid to the personal nature of the injury. The plaintiff or plaintiffs must prove that an ordinary person would have believed that each of them personally sustained damage to his or her reputation.

[58] The judge must thus analyse the impugned comments, taking into account all the circumstances in which they were made. Although it is impossible to draw up an exhaustive list of the criteria used to determine whether personal injury has been sustained, a number of factors can nevertheless help the judge in this process. Very similar factors are used for this purpose in the countries to which Canada and Quebec look for comparative law purposes. They have to do with the affected group, the comments made and the circumstances extrinsic to the comments or gestures. These factors provide guidance in determining whether one, some or all members of the group have sustained personal injury as a result of the impugned comments or gestures. This list is not exhaustive, however, and none of the factors it contains is determinative on its own.

(i) *Size of the Group*

[59] The size of the group is the factor to which the courts have attached the greatest importance in Quebec and elsewhere. Generally speaking, it is recognized that the larger the group, the more difficult it is to prove that personal injury has been sustained by the member or members bringing the action.

[60] In Quebec, the leading case on defamation resulting from comments made about a group is *Ortenberg v. Plamondon* (1915), 24 B.R. 69, 385 (C.A.). In that case, Mr. Ortenberg, a Jewish merchant, said that he had been defamed by a speech made by Mr. Plamondon, who had attacked Jews and their religion, called for a boycott of their businesses and predicted that the Jews of Quebec City would commit heinous crimes. Carroll J.A. found that, because of their small number (75 families out of a total population of 80,000), the members of Quebec City's Jewish community had all come under suspicion and therefore had a cause of action.

[61] The size of the group is a constant in the Quebec courts' analysis of whether an injury is personal (see, for example, *Zhang v. Chau*, 2008 QCCA 961, [2008] R.R.A. 523, leave to appeal refused, [2008] 3 S.C.R. xi; *Raymond v. Abel*, [1946] C.S. 251).

[62] In France, apart from certain statutory mechanisms whose singularity limits their usefulness for comparative purposes, the *Loi sur la presse* requires a personal interest and personal damage in order to claim compensation. When comments are made about a group, these requirements are satisfied if the group is [TRANSLATION] "small enough that each member can feel affected" (Cass. crim., January 29, 2008, *Bull. crim.*, No. 23, at p. 94). The Court of Cassation, for example, has found defamation where comments were made about a medical team made up of ten surgeons (Cass. Crim., December 6, 1994, *Dr. Pénal* 1995, comm. 93, obs. M. Véron). It also found that four members of a political action committee had been

sufficiently covered by comments referring to the committee (Cass. crim., January 16, 1969, *Bull. crim.*, No. 35). However, it dismissed an action in defamation where the impugned comments concerned Catholic clergy in general (Cass. crim., November 22, 1934, *Bull. crim.*, D.P. 1936.36.1, note M. Nast).

[63] In the common law, the comments must have been made “of and concerning” the plaintiff (*Knupffer v. London Express Newspaper Ltd.*, [1944] A.C. 116; *Butler v. Southam*, 2001 NSCA 121, 197 N.S.R. (2d) 97, at para. 17; *Restatement of the Law, Second, Torts 2d* (1977), vol. 3, § 564). This corresponds to the personal nature of injury in the civil law. The size of the group is an important consideration (*Butler v. Southam*, at para. 62; *Bai v. Sing Tao Daily Ltd.* (2003), 226 D.L.R. (4th) 477 (Ont. C.A.), at para. 15). For example, in *Knupffer*, the British House of Lords held that a member of a group of about 2,000 Russian immigrants could not bring an action in defamation based on an article written about the group. As well, in the United States, no cause of action was found to arise from articles attacking a group of 27 teachers (*O’Brien v. Williamson Daily News*, 735 F. Supp. 218 (E.D. Ky. 1990)), comments made about 382 saleswomen (*Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952)) or allegations made about 637 fishermen (*Adams v. WFTV Inc.*, 24 Med. L. Rptr. 1350 (Fla. Cir. Ct. 1995), aff’d 691 So.2d 557 (Fla. Dist. Ct. App. 1997)). On the other hand, the Alberta Court of Queen’s Bench found that an article concerning correctional officers from the Fort Saskatchewan Correctional Centre, of whom there were about 200, was defamatory (*A.U.P.E. v. Edmonton Sun* (1986), 49 Alta. L.R. (2d) 141).

[64] However, the size of the group is not a decisive factor and must be balanced with other considerations. There is no maximum size beyond which the members of a group no longer have a cause of action in defamation. The personal nature of injury can be determined only through a contextual analysis. In the common law, this multi-factored approach involves assessing the “intensity of suspicion” the comments could create in the mind of a sensible person (*Butler v. Southam*, at para. 56, and *Gauthier v. Toronto Star Daily Newspapers Ltd.* (2004), 188 O.A.C. 211, leave to appeal refused, [2005] 1 S.C.R. ix, and it is used even in the United States, where the size of the group is more important than anywhere else. (See, for example, *McCullough v. Cities Service Co*, 676 P.2d 833 (Okla. 1984); *Fawcett Publications Inc. v. Morris*, 377 P.2d 42 (Okla. 1962), at pp. 51-52.)

(ii) *Nature of the Group*

[65] In general, the more strictly organized and homogeneous the group, the easier it will be to establish that the injury is personal to each member of the group. In *Jackson v. TCN Channel 9*, [2001] NSWCA 108 (AustLII), a case which involved determining whether a television program referring to outlaw bike gangs was defamatory, an Australian Court of Appeal found that the group’s structure was a significant factor:

While “all lawyers” are members of the same profession, they are not members of a cohesive and disciplined group with a command structure such as a gang. The statement about “all lawyers” is an obvious over-generalisation which no reasonable reader or listener would

understand applied or was intended to apply literally to every single member of the group.

On the other hand outlaw bike gangs of the type described in the programme would only attract and retain members who accepted and were willing to conform to the prevailing culture and ethos of the gang. In my judgment the statements made in this programme are akin to statements about organised groups such as the SS, the Klu Klux Klan or the Mafia, rather than statements such as: “all lawyers are thieves”. It would be well open to a jury to conclude that general statements made about groups such as those applied, and would be understood to apply, to every member of those groups. [paras. 23-24]

[66] Conversely, the imputing of a single characteristic to all members of a group that is highly heterogeneous, has no specific organization or has flexible, broadly defined admission criteria would make an allegation of person injury implausible. For example, the Quebec Court of Appeal has dismissed actions in defamation based on comments made about Scientology (*Cabay dite Chatel*) and the Falun Gong doctrine (*Zhang*).

[67] Where the group’s members are identifiable or very visible in the community, it will be easier to prove that they sustained personal injury. In *A.U.P.E.*, for example, the Alberta trial court noted that correctional officers could easily be recognized by their uniforms and, from that fact, drew an inference in favour of the plaintiffs’ position.

[68] Finally, in certain circumstances, the fact that a group has historically been stigmatized may mean that insults and offensive comments made about the

group will stick more easily to its members. The vulnerability of the members of the group thus makes them targets more susceptible to personal defamation.

(iii) *Plaintiff's Relationship with the Group*

[69] The plaintiff's status, duties, responsibilities or activities in the group can make it easier to prove personal injury. For example, in *Trahan v. Imprimerie Gagné Ltée*, [1987] R.J.Q. 2417, the Court of Québec found that the plaintiffs had been affected by comments made about fur traders because they occupied 90 to 98% of the market. Likewise, in *Booth v. British Columbia Television Broadcasting System* (1982), 139 D.L.R. (3d) 88, the British Columbia Court of Appeal held that allegations made about narcotics squad officers "that are high up — right on top" (p. 90) had defamed two senior detectives. Since what distinguished the plaintiffs was their high rank, it might be more difficult for police officers without any special responsibilities or status to prove personal injury in similar circumstances. Indeed, in the same case, the Court of Appeal ruled against the other nine plaintiffs, who were lower-ranking employees of the narcotics squad.

[70] A person who is a well-known member of a group is more likely to suffer damage to his or her reputation as a result of comments made about the group. In *Fawcett Publications*, a football player brought an action in defamation based on allegations that the members of the team, which had 60 to 70 players, had used amphetamines. He was successful on the ground, *inter alia*, that he was "well-known and identified in connexion with the group" (at p. 51). Likewise, in *Trahan*, the

Superior Court took note of the fact that the plaintiffs were known as fur traders in the area in reaching the conclusion that they had been defamed by allegations of abuse in the fur trade.

(iv) *Real Target of the Defamation*

[71] The judge must also consider the words, gestures or images used to convey the message in order to determine the real target of the attacks. The precision or generality of the allegations will influence the analysis of the personal nature of the injury. The more general, evasive and vague the allegations, the more difficult it will be to go behind the screen of the group. For example, attacks on a doctrine, policy, opinion or religion must be distinguished from attacks on the persons supporting it, since proving personal injury will be complicated in the former situation. In *Zhang*, the Quebec Court of Appeal explained the necessary distinction as follows:

[TRANSLATION] [W]hile it was the prerogative of the author of the articles to level criticism, even vehement criticism, at Li Hongzhi's doctrine and the way it was practised by Falun Gong followers, the authors were guilty of defamation when they accused certain persons of criminal offences and perverse acts without any proof. [para. 13]

Similarly, in France, the Court of Cassation held that a document challenging right-wing extremism in general and associating it with criminal and racist purposes was not defamatory, because it [TRANSLATION] “contained no imputation or allegation of a specific fact about a specific natural or legal person” (Cass. crim., May 26, 1987, *Bull. crim.*, No. 217, at p. 597). It also held that criticism of a type of

agricultural production affected only the profession as a whole and left its members' reputations intact (Cass. Crim., September 16, 2003, *Bull. crim.*, No. 161).

[72] Moreover, where allegations apply to only one segment of a group, it will be more difficult for them to reflect personally on all members of the group. This occurs where the comments include an expression such as "some", "a few", "several", "most" or "all but one". Nonetheless, an action in defamation can sometimes be brought by one, some or all members of the group in such situations, since what is required is not certainty that the allegation relates to each member, but a suspicion that takes root in the mind of the ordinary person. In *Farrington v. Leigh* (December 4, 1987, reported in the Times Law Report of December 10, 1987), which involved statements made about two of the seven police officers on a team, the English Court of Appeal found that the statements could tarnish each team member's reputation, because each of them might be *suspected* of having committed unlawful acts. In the United States, the courts have dismissed actions in defamation where the impugned comments concerned one of about twenty police officers (*Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163 (1st Cir. 1977)) or less than the majority of police officers (*Algarin v. Town of Wallkill*, 421 F.3d 137 (2nd Cir. 2005)), but they have allowed actions where the allegations concerned "most" of 25 salesmen (*Neiman-Marcus*) and "all save one" of 12 New York radio critics (*Gross v. Cantor*, 270 N.Y. 93 (1936)).

(v) *Seriousness or Extravagance of the Allegations*

[73] As the Nova Scotia Court of Appeal stated in *Butler v. Southam*, “the more serious or inflammatory the allegation, the wider may be its sting” (at para. 68). In *Farrell v. Triangle Publications, Inc.*, 159 A.2d 734 (1960), the Pennsylvania Supreme Court held that an article accusing 13 municipal commissioners and other persons of criminal behaviour was not defamatory. Reversing that decision of the trial court, the Court of Appeal of the same state allowed the action in defamation on the following basis:

readers . . . who, prior to the defamatory article, had not known the identity of all of the township’s commissioners, were impelled by the scandalous nature of the charges to make inquiry and find out who the commissioners were — a process which would almost inevitably lead to connecting the plaintiff’s name with the alleged corruption in office. [pp. 738-39]

[74] In some circumstances, the seriousness of the allegations will have the opposite effect: an ordinary person will see exaggeration, excessive generalization or extravagance in the allegations and will give them less credence as a result. Thus, where there is no rational connection between an allegation and the members of a group, the statements made will not be accepted by an ordinary person because, as Lord Atkin explained in *Knupffer*, “the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds [and] the words are occasionally intended to be a facetious exaggeration” (at p. 122). For example, as Willes J. noted in *Eastwood v. Holmes* (1858), 1 F. & F. 347, 175 E.R. 758, at p. 759, an extravagant statement

such as “all lawyers are thieves” would not generally entitle a lawyer to bring an action in defamation unless it could be inferred from other circumstances that the statement was directed at the lawyer in question and that he or she was identifiable.

[75] However, the fact that comments made by a rabble-rouser are outrageous would not protect him or her fully from actions in damages for defamation. As in any other case where comments are impugned, it is necessary to ensure that all the elements needed to establish entitlement to compensation have been proven. Indignation is not a substitute for the requirements of civil proof or, more generally, the law of civil liability.

(vi) *Plausibility of the Comments and Tendency to be Accepted*

[76] Generally speaking, a plausible or convincing allegation will capture the ordinary person’s attention more and thus make it easier for that person to connect the allegation with each or some of the group’s members personally. Conversely, the ordinary person will quickly brush aside implausible allegations without connecting them with the group’s members personally.

[77] The context of an allegation also has an impact on its plausibility and on the likelihood of its being accepted. The fact that a group is big, that it is heterogeneous, or that the comments are general or exaggerated are all factors that will reduce the probability that the ordinary person would believe the assertion.

(vii) *Extrinsic Factors*

[78] Several other factors, related to the maker or target of the comments, the medium used and the general context, can cause comments that appear to be general to be attached to certain persons in particular and defame them personally. For example, in *Association des policiers de Sherbrooke v. Delorme*, [1997] R.J.Q. 2826 (Sup. Ct), the Superior Court held, in light of the intended audience, the medium used and a past incident involving the defendant and a member of the plaintiff association, that the comments in issue, which appeared to be about police officers in general, actually targeted police officers in the city of Sherbrooke in particular. Moreover, the reliability of the medium used or the credibility of the person making the comments are additional factors that can lend plausibility to an allegation that may at first seem implausible.

[79] Ultimately, the court must not conduct a compartmentalized analysis or seek to find all the relevant criteria. What must be determined is whether an ordinary person would believe that the remarks, when viewed as a whole, brought discredit on the reputation of the victim. The general context remains the best approach for identifying personal attacks camouflaged behind the generality of an attack on a group.

C. Application to the Facts of the Case at Bar

[80] Injury is the only one of the three elements of civil liability that is in issue in this case. The wrongful nature of Mr. Arthur's conduct is not in dispute. The respondents concede that, as the Court of Appeal found, [TRANSLATION] "the impugned comments, which we are not trying to excuse by invoking some journalistic standard of conduct, were made without regard for their potential impact on other people even though the person making them should have known that they were false, rude or exaggerated" (para. 27 of the reasons). The appellant is challenging the conclusion of the majority of the Court of Appeal that the members of the group did not sustain compensable injury. In light of the legal principles explained above, it is my opinion that the Court of Appeal's conclusion must be upheld.

[81] Mr. Arthur's comments were directed at the group made up of taxi drivers working in Montréal whose mother tongue is Arabic or Creole. Therefore, what needs to be asked is whether an ordinary person would have believed that the comments damaged the reputation of each member of that group, with the result that each of them sustained personal injury. At trial, to decide whether each member had been personally defamed, Guibault J. asked whether the drivers had all listened to the impugned comments. That approach does not apply in determining injury where the comments are made about a group, since it uses the defamed person as a measure of defamation and ascertains whether subjective injury has been proved by each member

of the group individually. On the contrary, the defamatory nature of comments must be assessed objectively and, in a class action context, personal injury can be proved through presumptions of fact on the basis of elements common to all members. This was the test rightly applied by the majority of the Court of Appeal (at para. 69).

[82] Mr. Arthur made accusations of uncleanness, arrogance, incompetence, corruption and ignorance of official languages. By referring to Creole as speaking [TRANSLATION] “nigger”, he disparaged and expressed contempt for the language primarily used by Haitians to communicate with one another. As well, when he called drivers of Arab origin [TRANSLATION] “fakirs”, he made fun of and even ridiculed them. His comments were scornful and racist, as has been found by all the courts that have had to consider them. It is thus easy to understand why the taxi drivers who were called to testify at the hearing said they were hurt by those comments, but this is a subjective perception, not the perception of the ordinary person. There is no doubt that such statements constituted civil fault. However, in this case, I am persuaded by an analysis of the trial judgment and a review of the entire record that an ordinary person might have been annoyed by Mr. Arthur’s comments but could not have applied the insults, abuse and offensive accusations to each taxi driver personally.

[83] Admittedly, certain contextual elements work in favour of recognizing personal injury. The members of the group have the same job and are identifiable as taxi drivers when they are driving their vehicles. In interacting with the public or

their coworkers, their accent may sometimes also make it possible to recognize their mother tongue. Moreover, they belong to visible minorities.

[84] Some of the words used by Mr. Arthur suggested that his attacks were directed more at Montréal taxi drivers whose mother tongue is Arabic or Creole than at the taxi industry in general. When Mr. Arthur used words such as [TRANSLATION] “Arabs”, “Haitians”, “immigrants” or “drivers”, he seemed to be attacking more the drivers themselves, which favours the appellant’s position. However, at other times, the words used by Mr. Arthur gave the impression that he was criticizing the taxi industry in Montréal generally, a topic that, according to the trial judge, is [TRANSLATION] “of great interest to the population as a whole and to the tourist industry in particular” (para. 84). This was the case, *inter alia*, where allegations were made using the words [TRANSLATION] “taxis”, “taxis in Montréal” and “taxi issue”. As shown by *Sarrazin v. Duquette* (1935), 41 R. de J. 365 (Sup. Ct), members of an industry will rarely be entitled to compensation on the basis of a general opinion about the industry, even if it is expressed in virulent terms. Nonetheless, even assuming that the words used by Mr. Arthur referred more generally to the drivers than to the taxi industry as a whole, and even though the members of the group may be identifiable, I must conclude based on the other contextual elements that the drivers’ personal reputations remained intact in the eyes of the ordinary person.

[85] First of all, the relevant group is of considerable size. The trial judge estimated that the group made up of Montréal taxi drivers whose mother tongue is

Arabic or Creole has about 1,100 members. That is a large number. While I am not prepared to rule out the possibility that comments made about such a large group may in certain very specific circumstances reflect on each of its members personally, there are several reasons why that cannot be the case here.

[86] It is well known that the group in question is heterogeneous. Taxi drivers in general are not part of a structured or formalized association. Nor is there any indication that the group of drivers in question was organized in any special way that made it easier to recognize each of its members. Of course, the taxi drivers in question share a language and a job and belong to two visible minorities, but no one could reasonably believe that their common attributes extend to their personal knowledge of English and French, their knowledge of driving routes in the city of Montréal, their thoughtfulness with customers, their personal hygiene and the cleanliness of their vehicles. These are highly individual characteristics that do not readily lend themselves to generalization. Moreover, in Canada and in Montréal in particular, the taxi industry is open and, as in several other countries, fortunately or unfortunately, it is a fallback position for a large number of people whose vocational training in their country of origin is not recognized or who for some other reason do not find other employment. In such a heterogeneous group, it is implausible that all members would have the specific failings imputed to them by Mr. Arthur. Certain characteristics could be attributed to such a heterogeneous group only by extrapolation. Furthermore, given Quebec's French language requirements and the origin of the drivers in question (drivers from Lebanon and Haiti testified at the trial),

Mr. Arthur's general allegation concerning language was unlikely to reflect on each driver.

[87] Mr. Arthur's statements conveyed the message that taxi drivers whose mother tongue is Arabic or Creole should be blamed for all the problems he said existed in the taxi industry in Montréal. There is simply nothing rational about this suggestion, as the trial judge pointed out (at para. 87).

[88] Moreover, the impugned comments were subjective in tone and were an extreme generalization. Apart from a single unsatisfactory personal experience that Mr. Arthur recounted, without identifying any driver, the assertions were general and vague. The comments often took the form of questions and set out no specific facts. Instead, they alluded briefly to uncleanliness, corruption, incompetence, etc. Mr. Arthur's comments could only stem from an intolerance of immigrants in general.

[89] In addition, Mr. Arthur was a known polemicist in the area where his show was broadcast. He had become known for his distasteful and provocative language. The radio show during which the impugned comments were broadcast had a satirical style and tried to sensationalize things. This is not intended as a value judgment on shock jock radio, but the context of such shows does have an impact on the real effect of comments made on them. People cannot of course use their general tendency to speak in bad taste as an excuse to defame others on air, but it must be

acknowledged that comments made by Mr. Arthur in such a context have very little plausibility from the point of view of the ordinary person.

[90] In light of these factors, I am of the opinion that an ordinary person would have understood the extravagant nature of the comments made. Mr. Arthur's allegations were undoubtedly serious and infuriating, but an ordinary person would nonetheless have recognized that they were an excessive generalization on the part of the host, based on an unpleasant personal experience. An ordinary person would not have believed the offensive allegations and would not have thought that Mr. Arthur was vouching for the validity of his racist and contemptuous insults. An ordinary person certainly would not have associated the allegations of ignorance, incompetence, uncleanness, arrogance and corruption with each taxi driver whose mother tongue is Arabic or Creole personally.

[91] In *Gauthier v. Toronto Star Newspapers Ltd.* (2003), 228 D.L.R. (4th) 748, a defamation case involving an allegation of reprehensible behaviour by members of a group — the Toronto police — the Ontario Superior Court stated the following:

In some cases both the size of the class and the extravagance of the allegedly defamatory statements will indicate that they cannot have been intended — and should not be understood — to apply to each and every member of the class. Statements such as “all lawyers are thieves” and “all police officers are racists” would fall within this category which Lord Atkin describes as consisting of vulgar and unfounded generalizations. [para. 21]

In my opinion, allegations that all taxi drivers whose mother tongue is Arabic or Creole are incompetent, unclean, arrogant and corrupt also fall within that category.

[92] In short, having regard to all of the circumstances, I find that the group is of considerable size and is heterogeneous, that the characteristics attributed to the members of the group are individual and do not lend themselves well to extrapolation, and that the remarks are an extreme, irrational and sensationalist generalization. Accordingly, an ordinary person, while sensitive to such excessive remarks, would not in my view have formed a less favourable opinion of each Arab or Haitian taxi driver, considered individually. I therefore conclude that Mr. Arthur's comments, while wrongful, did not damage the reputation of each Montréal taxi driver whose mother tongue is Arabic or Creole. The plaintiff did not prove that a personal injury was sustained by the members of the group.

[93] Moreover, I cannot endorse the conclusion of Guibault J., who in an attempt to make up for the absence of personal injury, awarded a collective remedy. It was no doubt because he considered himself bound by what Rayle J.A. had stated in her decision to authorize the bringing of the class action that he ordered the payment of damages despite the absence of proof of personal injury. However, the Court of Appeal's decision to authorize the class action did not limit his discretion as the judge responsible for deciding the merits of the action, especially since the legal test applicable at the stage of the application for authorization differs from the test applicable to the merits. Thus, given the absence of proof of personal injury, the

respondents could not be found civilly liable and the judge ought to have dismissed the class action in defamation.

VI. Conclusion

[94] I have no doubt that racist speech can have a pernicious effect on the opinions of members of its audience. However, it should be noted that an action in defamation will not always be the appropriate recourse in cases concerning racism or discrimination. In the instant case, I am of the opinion that it is not the appropriate recourse. I would therefore dismiss the appeal. For the reasons given by the Court of Appeal on this question, no costs are awarded in this Court.

The following are the reasons delivered by

ABELLA J. —

[95] Democracies cherish the right of their citizens to engage in public debate, and to express the widest possible range of views on the widest possible range of subjects. These views may be hugely unpopular. They may also be hugely influential. And they may be hugely hurtful. The right to express those views is not, however, tied to their popularity, influence, or insensitivity. It is tied to that most

complicated of barometers: the nature and extent of their harmful impact. That is why we do not protect libellous statements. Or those promoting violence. Or hate.

[96] The challenge lies in how to strike the balance between the need to provide the widest possible scope for freedom of expression, with the need for a narrow interventionist role in those rare circumstances when the words are so deeply harmful that they are no longer entitled to the benefit of the freedom's protective scope. Context and content matter: there is a difference between yelling "fire" in a crowded theatre and yelling "theatre" in a crowded fire station.

[97] Canada's strength as a multiracial, multicultural and multireligious country flows from its ongoing ability to develop core and transcendent values that help unify the differences. Sometimes that means tolerating slings and arrows of misunderstanding that will be hurtful. And sometimes it means drawing a line because tolerating the "misunderstanding" undermines the core of our core values.

[98] I see the comments made by radio talk show host André Arthur as undermining that core. He stated, in part:

[TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that's French and English? . . . I'm not very good at speaking "nigger" . . . [T]axis have really become the Third World of public transportation in Montreal. . . . [M]y suspicion is that the exams, well, they can be bought. You can't have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams. . . . Taxi drivers in Montreal are really arrogant, especially the Arabs. They're

often rude, you can't be sure at all that they're competent and their cars don't look well maintained.

[99] As Deschamps J. pointed out, the right to freedom of expression in Canadian and Quebec law and in various human rights instruments is not articulated as an absolute right. Limitations on the right to freedom of expression, like those designed to protect reputation or to prevent harmful speech, have long been accepted in this country and internationally. Canada is a party to the *International Covenant on Civil and Political Rights*, Can. T.S 1976 No. 47, for example, which states in Article 19 that the right to freedom of expression may be limited if necessary to protect the rights and reputation of others.

[100] The law of defamation is one such limitation, as McLachlin C.J. pointed out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640:

. . . freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation. [para. 2]

(See also *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 43; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 2, *per* Binnie J.; *R. v. Keegstra*, [1990] 3 S.C.R. 697, *per* Dickson C.J.)

[101] It is my respectful view, unlike that of Deschamps J., that the individuals in the group at issue were defamed.

[102] In *Prud'homme*, L'Heureux-Dubé and LeBel JJ. noted that in order to prove defamation under the *Civil Code of Québec*, R.S.Q., c. C-1991, it was necessary for a plaintiff to prove that the defendant had committed a fault and that the plaintiff had suffered an injury as a result. Defamation was defined as follows:

Generally speaking, . . . defamation [TRANSLATION] “consists in the communication of spoken or written remarks that cause someone to lose in estimation or consideration, or that prompt unfavourable or unpleasant feelings toward him or her” [para. 33]

[103] In order to show fault, a plaintiff must show that the conduct of the defendant was either malicious or negligent (*Prud'homme*, at para. 35). Mr. Arthur did not contest fault before the Court of Appeal or this Court, and causality is not in issue. The sole issue before us, therefore, and the one that, with great respect, separates me from the conclusion reached by Deschamps J., is whether there is injury.

[104] LeBel J. set out the test for injury in *Gilles E. Néron Communication Marketing Inc. v. Chambres des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, where he said:

. . . in order to prove injury the plaintiff must convince the judge that the impugned remarks were defamatory. As noted in *Prud'homme*, *supra*, at para. 34, this involves asking “whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit on the reputation of another person”. [para. 57]

The question is whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit to someone's reputation. Once this objective standard is met, injury is established.

[105] At the outset, I resist, with respect, the degree of sophisticated knowledge Bich J.A., writing for the majority in the Court of Appeal, attributed to the "ordinary person", whom she described as being

[TRANSLATION] concerned about protecting and preserving the freedoms of thought, belief, opinion and expression as well as the right to safeguard one's reputation. Finally, the ordinary citizen is also concerned about personal dignity and is accordingly aware both of convictions, prejudices or discriminatory practices of certain of his or her fellow citizens and of the need not to encourage such attitudes. And the ordinary citizen also knows that, beyond the openly discriminatory opinions or practices of certain people, there is a systemic discrimination that, although less overt and not necessarily intentional, is no less real.

(2008 QCCA 1938, [2008] R.J.Q. 2356, at para. 71)

This, it seems to me, inappropriately elevates the attributed characteristics of an ordinary person to those of an ordinary third-year law student.

[106] In my view, an ordinary person would conclude that the remarks made by Mr. Arthur were defamatory of these plaintiffs and therefore injurious. Mr. Arthur's comments were not about the taxi industry in general. He targeted only Arab and Haitian taxi drivers and accused them of creating "Third World" public transportation in Montréal, of corruption in obtaining their permits, of incompetence, and of keeping

unsanitary cars. He also said that neither Arab nor Haitian drivers knew their way around the city and that they could not communicate in either English or French. He denigrated Arab taxi drivers as “fakirs” and the Creole language as [TRANSLATION] “nigger”.

[107] These were highly stigmatizing remarks attacking members of vulnerable communities. There is a difference between provocation or controversy, including offensive statements, and statements that deliberately vilify vulnerable people. The trial judge concluded that the comments in this case were racist. When we are dealing with hortatory language seriously uttered that is blatantly racist, we are inherently dealing with words that diminish dignity and are an invitation to contempt. As Dickson C.J. stated in *Keegstra*, “[t]he threat to the self-dignity of target group members is . . . matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society” (p. 748). Deschamps J. makes a similar point in her reasons when she notes that the fact that a group has been historically stigmatized may mean that offensive comments about that “group will stick more easily to its members” (para. 68).

[108] This brings us to the crucial fact that we are dealing with a group, and with whether the members can show that the defamatory words were such as to impugn not only the *group*, but also the plaintiffs as individuals in that group. This case was brought as a class action. Mr. Bou Malhab, the representative plaintiff, is a

taxi driver and was, at the relevant time, the President of the Montréal Taxi League. He and ten other drivers testified at trial. In the case of a class action “the court can draw from the evidence a presumption of fact that the members of the group have suffered a similar injury” (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 108). The requirement that each individual in the class demonstrate an injury caused by the statements is satisfied by having the representative plaintiff adduce evidence that the remarks made were, objectively, defamatory, and therefore injurious, of the members of the group. As in claims of discrimination, it is unnecessary that every member of the group testify that he or she has been affected. As LeBel J. noted in his concurring reasons in *WIC Radio*, “actual harm to reputation is not required to establish defamation” (para. 78). If the evidence adduced at trial demonstrates that the impugned statements are defamatory of the group members, it is unnecessary for each of the other individual group members to testify in order to show that they too were defamed.

[109] I accept that the factors articulated by Deschamps J. in her reasons are helpful. I see the following as being of particular relevance in this case: the size and nature of the group; the “seriousness or extravagance of the allegations”; and the plausibility of the comments. As she notes, none of the factors is determinative and their synergetic impact will vary with each case. I disagree, however, that consideration of those factors leads to the conclusion that the individual group members in this case were not defamed.

[110] Under both the common law and civil law regimes, the fact that comments are aimed at a group is not, in itself, reason to deny a claim. If multiple individuals can show that they were defamed by the comments, each has a right of action. As the reasons of Deschamps J. make clear, the determination of whether the statements relate to each member of the group involves a contextual analysis of both the group and the comments. In both *Prud'homme* (at para. 38) and *Néron* (at para. 54), this Court spoke of the need to find the appropriate balance between the right to freedom of expression and the right to respect for one's reputation. That need for balance does not change when it is alleged that individual members of a *group* were defamed by remarks directed at the group.

[111] Tort law is not normally concerned with the number of plaintiffs who claim injury. Neither the procedural vehicle used nor the ultimate difficulty in assessing damages in respect of multiple plaintiffs is reason in itself to deny a claim for defamation which is otherwise well founded. In this regard, I agree completely with the statement of Cromwell J.A. in *Butler v. Southam Inc.*, 2001 NSCA 121, 197 N.S.R. (2d) 97:

There are no special legal rules concerning individual claims of defamation based on statements made about a group: see, for example, Raymond E. Brown, *The Law of Defamation in Canada* (2nd 1999), at pp. 324-325. In this sort of case, as in others, the fundamental question remains whether the statements could reasonably be found to be defamatory of the named plaintiffs. Some authorities in some jurisdictions have attempted to define the limit of liability by reference to the size of the group: see, for example, Joseph Tanenhaus, "Group Libel" (1950), 35 Cornell Law Quarterly 261, at 263 and Jeffrey S. Broome, "Group Defamation: Five Guiding Factors" (1985), 64 Texas Law review

591, at 595 ff). However, *Knupffer*, the leading case in the Anglo-Canadian jurisprudence, holds that although the size of the group is relevant, it is not a controlling factor. Lord Atkin in that case stressed that the group aspect of the defamatory statements should not distract the court from the real issue, namely whether the published words refer to the plaintiff. [para. 53]

[112] As Justice Cromwell noted in *Butler*, the key common law case dealing with group defamation, is the decision of the House of Lords in *Knupffer v. London Express Newspaper Ltd*, [1944] A.C. 116. The Law Lords made it clear that it was possible for a plaintiff to succeed in a claim for defamation even when the defamatory comments referred to a group. They were unanimously of the view that such an action could succeed provided a plaintiff could show that the words referred to the plaintiff.

This principle was clearly expressed by Lord Atkin:

There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statements: for the habit of making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or, at any rate, of himself. [p. 122]

[113] The position in Quebec is similar, as *Ortenberg v. Plamondon* (1915), 24 B.R. 69, 385, demonstrates. In 1910, Jacques-Édouard Plamondon had given a lecture in Quebec City during which he made statements attacking Jews. At the time of the lecture, there were about 75 Jewish households in Quebec City out of a

population of about 80,000. Towards the end of his lecture, Mr. Plamondon invited the conference attendees to boycott Jewish businesses. A Jewish merchant, Benjamin Ortenberg, brought an action in defamation against Mr. Plamondon alleging that as a result of the lecture, he had been insulted and attacked and had lost part of his business clientele. In his defence, Mr. Plamondon argued that his statements were made about *all* Jews and that he had not singled out any individual.

[114] While the claim was initially dismissed, Mr. Ortenberg was successful on appeal and awarded modest damages. Carroll J. concluded that [TRANSLATION] “[i]n ascribing all the crimes of the Jewish race to this small community, the speaker was targeting them to a sufficient extent” (p. 74). According to Carroll J., [TRANSLATION] “[t]his is not a case of an insult to a community that is large enough that the insult is lost in the crowd” (p. 75).

[115] As *Ortenberg* shows, it is not only the size of the group which is relevant, it is also the extent to which the group is sufficiently defined or easily identifiable such that each person in the group can be said to be affected. Or, as Cromwell J.A. said in *Butler*, the question is whether the group is so large as to be “indeterminate” (para. 72) (see also *A.U.P.E. v. Edmonton Sun* (1986), 49 *Alta L. R.* (2nd) 141 (Q.B.)).

[116] While the group targeted by the statements in this case was large, it was not so diffuse as to be indeterminate. Mr. Arthur’s criticisms were directed at Arab

and Haitian taxi drivers in Montréal. This is a precisely defined and easily identified group.

[117] Secondly, these were serious accusations. Mr. Arthur's allegations of corruption were particularly dramatic, including:

[TRANSLATION] My suspicion is that the exams, well, they can be bought. You can't have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams. When I see something like this, I can only think of corruption.

[118] As Guibault J. found, the suggestion that Arab and Haitian taxi drivers had obtained their taxi permits illegally along with Mr. Arthur's numerous other allusions to corruption in getting those permits [TRANSLATION] "was particularly insulting and hurtful" (para. 80).

[119] Mr. Arthur's comments were aimed at a determinate group of individuals who were of particular racial backgrounds in a particular industry and in a particular city, leading the trial judge to conclude:

[TRANSLATION] The general impression conveyed by the program is that problems with respect to taxis in Montréal are the fault of Arabs and Haitians, that they alone are responsible for those problems and that they must bear all the opprobrium for them. [para. 89]

The group was defined with sufficient precision and the statements specific enough to be harmful to the reputations of each of its members. If Mr. Arthur had named an individual taxi driver and accused him or her of similar corruption and incompetence, there seems to me to be little doubt that an ordinary person would find those comments to be defamatory and therefore injurious.

[120] Moreover, I do not accept that his listeners would have inevitably treated Mr. Arthur's statements as less plausible because of his reputation. I appreciate that Mr. Arthur was not averse to comments of a provocative nature, and that his listeners knew that he was given occasionally to making offensive statements. But I do not accept that Mr. Arthur's comments would necessarily be seen to be hyperbolic by the ordinary person. They were made "seriously", not satirically or ironically.

[121] The members of the group Mr. Arthur vilified interact with the public on a daily basis and their livelihoods depend upon their ability to attract customers. Mr. Arthur's defamatory comments were, it seems to me, analogous to those made in *Ortenberg*: they were made seriously and raised, objectively, the clear possibility not only of harm to reputation, but also of harmful economic consequences from customers who may have decided to avoid taxis driven by members of the group, members who were easily identified and who stood accused not only of incompetence, but of having used corruption to become taxi drivers. In my view, those comments would palpably have been seen by an ordinary person as being defamatory, and therefore injurious, of the plaintiffs.

[122] I would therefore allow the appeal and restore the award of damages made by Guibault J.

Appeal dismissed, ABELLA J. dissenting.

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