CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

C.A. Nº: 500-09-030658-230
S.C.M. Nº: 500-06-001225-230

COURT OF APPEAL

S.N.

APPLICANT – Applicant

v.

ROBERT GERALD MILLER

and

FUTURE ELECTRONICS INC.

RESPONDENTS – Defendants

APPLICATION *DE BENE ESSE* FOR LEAVE TO APPEAL FROM A JUDGMENT RENDERED IN THE COURSE OF A PROCEEDING
(Articles 30, 31, 32 and 357 *C.C.P.*)
Applicant
Dated August 2, 2023

TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL, THE APPLICANT RESPECTFULLY SUBMITS:

1. On February 22, 2023, the Applicant filed this class action alleging the sexual exploitation of underage adolescent girls, of which she was one. On June 12, 2023, the Applicant presented two motions: (a) an Application by the *Applicant for a Pseudonym Order* ("Motion for Anonymity") and (b) an *Amended Application by the Applicant for a Case-Management Hearing & for the Issuance of a Safeguard Measure* ("Motion to Cease Unsupervised Communications"). No other applications were scheduled to be heard that day. The hearing lasted approximately 4 hours.[1]

2. On June 28, 2021, the Honourable Justice Donald Bisson, J.S.C. (the "Judge") rendered a single judgment on the Applicant's two motions namely: (a) granting, though with extra conclusions on issues that were not before him, the Motion for Anonymity and (b) dismissing the Motion to Cease Unsupervised Communications (the "Judgment"). The present appeal does NOT involve the conclusions found at paras. 98-100 of the Judgment.

3. Attached are: the *Avis de jugement* dated July 6, 2023 and Judgment (**Sch. 1**), the *Procès-verbal* of the June 12, 2023 hearing (**Sch. 2**), the Applicant's Motion for Anonymity (**Sch. 3**), the Applicant's Motion to Cease Unsupervised Communications (**Sch. 4**), the Affidavits of Madame 13 and Madame 14 in support of Sch. 4 (**Sch. 5**), the Applicant's Application for Authorization ["AforA"] (**Sch. 6**), email correspondence between the attorneys for the Applicant and Defendant Miller between April 26, 2023 and May 25, 2023 (**Sch. 7**), Defendant Miller's Application to Dismiss (**Sch. 8**), the Applicant's Application *de bene esse* to Suspend the Execution of a Conclusion in a Judgment Pending the Initiation of an Appeal (**Sch. 9**), and the Applicant's Motion to Adduce New Evidence (**Sch. 10**).

Permission to Appeal

4. For the Motion for Anonymity, it is submitted that it is appealable as of right under s. 30 C.C.P. because it terminates the proceeding. If a plaintiff, a minor victim of sexual exploitation, must reveal her full name to her alleged aggressor while being terrified of him (because he is extremely wealthy, well-connected, and powerful, having the ability and motivation to harm her, either physically or by revealing her trauma to her family, work, or to the public), the plaintiff has no choice other than to discontinue or to give up her identity and face consequences – a "Hobson's choice", where there is no real choice at all. The Judge made a factual determination that the Applicant would never agree to give her name to the Defendants[2], thereby knowingly rendering a Judgment that categorically puts an end to the proceedings. Knowing this, Defendant Miller has already filed a Motion to Dismiss (Sch.

[1] Specifically, the hearing was between 9h34-12h44 and 13h48-14:15.
[2] « [16] Dans sa plaidoirie orale et dans son plan d'argumentation, la demanderesse ajoute qu'elle ne veut jamais donner son nom aux défendeurs et que le Tribunal ne peut lui ordonner de le faire… » see also para. 44.

8) based on the Applicant's failure to furnish her name within the 15-day delay provided for at para. 101 of the Judgment; the motion is scheduled for September 7, 2023.[3] Alternately, it is argued that this decision is appealable with permission under s. 31 C.C.P. because it "causes irremediable prejudice" to the Applicant. Finally, and as a subsidiary argument, it is appealable with permission under s. 32 C.C.P. as a case-management measure "unreasonable in light of the guiding principles of procedure".

5. The issue of when and whether a plaintiff in a sexual abuse class action (when dozens of victims were adolescents) must disclose her real name to the defendants (i.e. before or after authorization, before trial, or never) "involves a question of principle, a new issue or an issue of law that has given rise to conflicting judicial decisions" (s. 31 C.C.P.). There is very little caselaw on point[4]; the Judge cites 2 cases (para. 47 of the Judgment), one was decided by himself and is not directly on point *Centre d'amitié autochtone de Val-d'Or* c. *Procureur général du Québec*, 2022 QCCS 2089[5] and *J.D.* c. *Institut Voluntas Dei*, 2021 QCCS 5164, which, with respect, wrongly decided the point on disclosure (including timing) of a plaintiff's name (paras. 14-18). A defendant's right to make a full answer and defence does not exist before authorization except insofar as they have a limited right to contest the criteria of s. 575 C.C.P., recall that the criteria of s. 575 4) are not very demanding.

6. The Judge ordered the Applicant to disclose her real identity to the Defendants without this issue having been properly brought or pleaded and the Applicant was dispossessed of her right to produce evidence of her reasonable apprehension of harm and to produce affidavits from the 30+ Class Members that were also scared of what Defendant Miller could do if he were to know their identities. *Allstate*[6], holds that a violation of the fundamental principle of *audi alteram partem* goes to the jurisdiction of the court justifying permission to appeal.

7. The Motion to Cease Unsupervised Communications is appealable as of right (s. 30 C.C.P.) because it will terminate the proceeding for Class Members successfully duped into releasing their

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[3] In response and although provisional execution was not ordered by the Judge, the Applicant was obliged to file an Application *de bene esse* to Suspend the Execution of a Conclusion in a Judgment Pending the Initiation of an Appeal (Sch. 9), which is also scheduled to be heard on September 7, 2023.

[4] Likely because under normal circumstances, the alleged sexual aggressor is aware of who his accuser is. Here, the difficulty is that there are so many victims, to which Defendant Miller never knew their full names, he is unsure which one finally came forward as S.N.

[5] Under appeal in *Procureur général du Québec* c. *Centre d'amitié autochtone de Val-d'Or*, 2022 QCCA 1203.

[6] *Allstate du Canada, compagnie d'assurance*s c. *Agostino*, 2011 QCCA 1817 : « [11] … le premier juge, en modifiant sans préavis les règles qu'il avait lui-même énoncées, a porté atteinte à la règle fondamentale de justice naturelle en ne permettant pas aux parties de plaider sur les éléments de preuve sur lesquels elles s'étaient entendues. Partant, la règle *audi alteram partem* a été ignorée et la Cour doit intervenir… [17] Cela étant, je suis d'avis que les questions soulevées à la requête pour permission d'appeler sont sérieuses et se rattachent directement à la compétence du tribunal d'instance et s'inscrivent dans les exceptions par définition rarissimes qui peuvent justifier la permission de se pourvoir. »

claim, excluding them from the class action; the communications were for the sole purpose of settlement. Alternately, it is argued that this decision is appealable with permission under s. 31 C.C.P. because: (a) it "allows an objection to evidence" when the Judge maintained Defendant Miller's objection to the submission of the affidavits of Madames 13 and 14, dismissing this essential evidence *in toto* (paras. 82 and 84) and (b) because it "causes irremediable injury" to any Class Member that settles their personal claim with Defendant Miller under false pretenses and at a fraction of its value. Finally, and again, subsidiarily, it is appealable with permission under s. 32 C.C.P. as a case-management measure "unreasonable in light of the guiding principles of procedure".

8. The issue of when a defendant can communicate directly with class members (outside the presence of or even knowledge of class counsel) "involves a question of principle, a new issue or an issue of law that has given rise to conflicting judicial decisions" (s. 31 C.C.P.); there is only one Court of Appeal authority on point[7], *Bernard* c. *Collège Charles-Lemoyne de Longueuil inc.*, 2023 QCCA 854, which was quoted by the Judge (paras. 69, 71, 83, and 86 of the Judgment); however, it did not address 3 distinct issues in the present case: (i) there is a "risk of potential harm" where the parties are not on a level playing field and it is clear that the defendant can take advantage and an "actual risk of harm" (ii) where the communications are oral (not written), which the caselaw holds has a far greater risk of abuse, and (iii) defence counsel is communicating directly with Class Members.

Grounds of Appeal – Motion for Anonymity

9. The conclusions that the Applicant wishes to appeal from the Judgment relating to the Motion for Anonymity are paragraphs 101 to 104, which order Class Counsel to send the name of the Applicant to the Defendants and provides conditions relating thereto. It is respectfully submitted that on this first issue, the Judgment made the following errors of law:

a) The Judgment contravenes the principle of *non ultra petita*;

b) The Judgment contravenes the principle of *audi alteram partem*;

c) Before deciding the issue of whether the Defendants were entitled to the Applicant's real name, the Judge should have pointed out a deficiency in the proof and authorized the Applicant to remedy it in accordance with s. 268 C.C.P.;

d) The Judge refused to consider evidence in the record that would have established that the Applicant's (and Class Members') fear of Defendant Miller was reasonable;

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[7] *Trottier c. Canadian Malartic Mine*, 2018 QCCA 1075 and *Filion c. Québec (Procureure générale)*, 2015 QCCA 352, while being are relevant authorities, only peripherally deal with the main issue of when, what, where, why, and how defendants can communicate directly with class members.

e) The Judgment is wrong in law because the basis of this decision was to allow the Defendants to make a « défense pleine et entière », which is a merits principle and does not apply at the authorization stage, other than in the application of s. 575 C.C.P.

10. The Applicant filed her Motion for Anonymity on February 22, 2023 (Sch. 3), the same day that she filed her AforA (Sch. 6). This practice has legal precedent where the applicant is a victim of sexual assault and is coming forward to pursue her aggressor.[8] The only conclusion of the Applicant's Motion for Anonymity is:

"AUTHORIZE the Applicant to be identified using only her initials in the present proceeding and to not provide her name, address, phone number, or any other personally identifiable information;"

11. No application was ever filed, by anyone, to either have Court permission to not disclose her name to the Defendants or to compel her to – this issue was not on the agenda for the hearing. It could have been on the agenda had Defendant Miller decided to file his "motion for sanctions" that he had announced; but in the end, he decided to reserve his right to present his motion at another time.

12. On May 20, 2023, Me Renno emailed Class Counsel to demand the Applicant's identity [Sch. 7].[9] That day, Me Orenstein replied that it would not be doing so, but that it was willing to "find a solution that satisfies what you need it for". Me Renno then replied "we will be adding the matter to our motion for sanctions." – Defendant Miller decided not to file his motion for sanctions. On May 29, 2023, Me Renno wrote to the Judge: « Par soucis d'efficacité, nous notifierons et présenterons notre demande pour sanction en même temps que nos autres moyens préliminaires (le cas échéant). *Ainsi, nous ne notifierons pas de demande présentable le 12 juin aujourd'hui.* »

13. Consequently, when the Judge rendered the conclusions at paragraphs 101-104 of the Judgment, it was not pursuant to any pending motion before the Court – he rendered beyond the request in the Applicant's Motion for Anonymity, which made his conclusions *ultra petita*.

14. Because this issue was never to be decided at the hearing, the Judge was correct to state that the Applicant "*n'a d'ailleurs cité aucune autorité à l'appui de sa prétention, outre des causes générales qui parlent de la protection de l'identité des membres en action collective*" (para. 46); this

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[8] *Centre d'amitié autochtone de Val-d'Or* c. *Procureur général du Québec*, 2022 QCCS 2089 : « [37] Le Tribunal interprète ces propos comme permettant à un représentant ou une personne désignée dans une demande d'autorisation d'exercer une action collective d'utiliser un pseudonyme ou des initiales dès le dépôt initial de la procédure, le but étant de préserver l'anonymat en matière de victimes d'agression sexuelle. [38] Le Tribunal constate que cette pratique existe déjà dans plusieurs dossiers d'action collective ouverts depuis 2019. » Permission to appeal granted in *Procureur général du Québec* c. *Centre d'amitié autochtone de Val-d'Or*, 2022 QCCA 1203.

[9] This feigned urgency to obtain the identity of the Applicant is interesting given that Defendant Miller never knew her full name in the first place. Interestingly, the Applicant never knew Defendant Miller's name either, since he had been operating under the alias of Bob Adams (see paras. 30, 36, 44 and Exhibits R-3 and R-7 of Sch. 6 AforA).

was so, since the only motion before him was for a pseudonym order. This highlights the dangers of rendering a decision on which a party did not file materials and did not have a chance to be heard.

15. It is unsurprising that the Applicant also did not file the evidence that she would have relied on had she known that this issue would be decided. Specifically, had the Applicant known that the Judge would be rendering on the issue of whether she is required to divulge her name to the Defendants, she would have filed an affidavit explaining the reasons why she should not be so compelled (i.e. that she is scared). The Applicant would have explained how Defendant Miller is extremely wealthy, well-connected, and powerful, how she fears for her safety and that of her family, and how she also is scared that Defendant Miller has ways of secretly "leaking" her real name either to her family, to her work, or to the public, thereby causing her extreme embarrassment and injury. This evidence was not in the record. She also would have obtained many more affidavits from Class Members who too are scared of giving their names to Defendant Miller for reasons similar to those of the Applicant.

16. During the hearing, the Judge verbally agreed that this issue was not on the agenda and yet, inexplicably, he ordered the disclosure anyhow.

> "Me Orenstein: I'll move to a different issue, *the real name of my client – this is a different issue that is not before this Honourable Court today* and we already looked at what the conclusion of our motion is, you saw it, it is just to use her initials and to not give her address, which we'll give the address of our office … *Me Renno did not file any application that he wants to have our client's real name. That motion may come one day, but that day is not today.*
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> *And if he makes such a motion, we will have two defences, because I just want to sort of set the stage, Mr. Justice. We will file affidavit evidence from our client and likely will be forced to produce affidavits from almost all of the thirty women that we have so far in this case that they are scared of Mr. Miller.*
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> Me Renno: Monsieur le juge, *mon confrère peut pas faire de la preuve.* Ça marche pas lorsqu'il est entraine de faire. *Là il est entraine de témoigné. Il y a pas de demande devant vous là. On en parle pas de toute ça.*
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> Judge Bisson: *Il y'on a pas, et il ne parle pas lui-même, alors vous n'a pas besoin d'en parler.*
> …
> Me Orenstein: …I will withdraw that comment *and we will get to that when we get to that. There is something from the Enquête story with regard to his wife, which is in evidence by the way, for the record. Can I discuss that one, or is that also not necessary either, Mr. Justice?*
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> Judge Bisson: But I don't know why – *are you anticipating an upcoming motion or, because he is not requesting anything today.*

> Me Orenstein: *I am not so sure because he put into the argument plan about how we have to give the name of S.N. to his client, but I agree that there is no motion before you, that is correct and that is my main point.*"[10]

17. The Judgment should not have decided whether the Applicant must furnish the Defendants with her identity – that was to be the discussion of another day, where the Applicant would have filed evidence and would have argued how such evidence supports her position (i.e. *audi alteram partem*). Thus, the Applicant's Motion to Adduce New Evidence being necessary at this stage, to which should never have been "new" in appeal had the Applicant's right to be heard not been violated (Sch. 10).

18. With such a clear lack of evidence, the Judge had the obligation to point out this *lacune* in the proof pursuant to s. 268 C.C.P. and allow the Applicant a reasonable delay to remedy it. As stated in *Garage Poirier & Poirier inc.* c. *FCA Canada inc.*, C.S.M. 500-06-000837-175, 18 octobre 2017, j. Paquette: « [8] Il on résulte une lacune dans la preuve, qu'il est ici du devoir du Tribunal de signaler avant de rendre jugement sur la demande de suspension des procédures en autorisation au Québec; »

19. The Applicant referred to *The Fifth Estate* (CBC) broadcast, which was in evidence with the AforA (Ex. R-2), to state that even Defendant Miller's own ex-wife feared that her ex-husband would physically harm her. The Judge refused to consider this evidence or to watch the video, writing:

« [97] Le Tribunal indique en terminant sur les deux questions qu'il n'a pas suivi la suggestion de l'avocat de la demanderesse d'écouter au complet les reportages télévisuels du 2 février 2023 des émissions *Enquête* (SRC) et *The Fifth Estate* (CBC) sur M. Miller afin de trouver des allégations venant confirmer certains des arguments de la demanderesse... »

The Fifth Estate (CBC) video that the Judge never watched contained the following evidence at minutes 2:30–3:10:

> Ms. Noel: It's 2006 in Vermont. Two private detectives from Montreal are meeting with a woman who lives in the city, but insists they meet south of the border.
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> Westlake: Our meeting place was in Vermont, which surprised me. I said, "Why not Montreal?" She says, "Well, I'm scared to go to Montreal because my ex-husband, terrified of him."

20. There are serious grounds to argue that the Defendants should not be entitled to the Applicant's real name, at least, not before authorization. The Judge based his decision on this matter as follows:

> « [46]… *En effet, le droit à une défense pleine et entière nécessite que les défendeurs aient accès au nom de la demanderesse*, comme l'a décidé la jurisprudence. La demanderesse n'a

[10] The argument plan being referred to was sent at 22h20 the night before the hearing, which left the Applicant with no time whatsoever to prepare for this argument.

> d'ailleurs cité aucune autorité à l'appui de sa prétention, outre des causes générales qui parlent de la protection de l'identité des membres en action collective. »

21. With respect, this is not the state of the law during the authorization stage of a class action – where the applicant's facts are taken for true and where, conversely, the defendant is not permitted to file a defence under any circumstances; where the defendant may not submit any evidence or examine the applicant without prior court authorization (and even where leave is granted, only with respect to the four criteria of s. 575 C.C.P.). Thus, the authorization stage is a procedural stage governed by specific rules and a defendant is not entitled to a « *défense pleine et entière* », that is a legal concept that will only come into play ***after*** authorization, on the merits. This Honourable Court of Appeal has consistently held that the authorization stage is meant to facilitate access to justice not to hinder it and that Courts must be careful to not misapply the legislative provisions in this regard.[11]

22. There are good reasons for this distinction of before and after authorization, especially in a sex abuse case. There are many things that change depending on the stage of the class action. It is possible that, after authorization, and after notice has been published, even more women will come forward and some of them will have no objection to revealing their identities (s. 589 C.C.P.). Alternatively, authorization could be rejected based on a plethora of reasons unrelated to her identity and then there would have been no need to subject her to this risk of harm.

23. The Applicant's main argument on this point is that this issue was decided prematurely and, on a record devoid of evidence; it is worth mentioning that it is not a *fait accompli* that the Defendants will be successful in obtaining the Applicant's name after authorization. The right to the Applicant's personal security, privacy, dignity, and equality are charter-protected rights under ss. 1, 4, 5 and 10 of the Quebec *Charter of Human Rights and Freedoms*, just as the Defendants' right to a full and complete defence is provided for at s. 35. One charter right does not supersede the another; they are all equal and a balance must be struck. As numerous Supreme Court of Canada decisions have stated:

> *R.* c. *O'Connor*, [1995] 4 RCS 411: « [130]…toute entrave au droit d'un individu à la protection de sa vie privée provient de l'affirmation par une autre personne que cette entrave est nécessaire à la présentation d'une défense pleine et entière. Aussi important que puisse être le droit de présenter une défense pleine et entière, il doit coexister avec d'autres droits constitutionnels plutôt que de les éclipser. La protection de la vie privée et l'égalité ne doivent pas être sacrifiées sans autre forme de procès sur l'autel de l'équité du procès. … [154] un équilibre doit être trouvé qui place les droits des plaignantes garantis par la Charte sur le même pied que ceux des accusés. »
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> *R.* c. *Mills*, [1999] 3 RCS 668: « [17] Pour trancher le présent pourvoi, il faut savoir comment définir des droits opposés, en évitant la conception hiérarchique rejetée par notre Cour dans l'arrêt *Dagenais* c. *Société Radio-Canada*, [1994] 3 R.C.S. 835, à la p. 877. Il y a, d'une part, le droit de

[11] For example, see *Charles* c. *Boiron Canada inc*., 2016 QCCA 1716, paras. 69- 74.

> l'accusé à une défense pleine et entière et, d'autre part, le droit du plaignant et du témoin à la protection de leur vie privée. Aucun de ces droits ne saurait être défini de manière à annuler l'autre, et les deux reposent sur le droit à l'égalité qui est en jeu dans le présent contexte. … [21] Comme l'arrêt *Dagenais*, de notre Cour l'indique clairement, les droits garantis par la Charte doivent être examinés selon une méthode contextuelle afin de résoudre les conflits qui existent entre eux. Par conséquent, à la différence de l'évaluation fondée sur l'article premier, où on permet parfois aux intérêts de la société de l'emporter sur les droits garantis par la Charte, l'art. 7 exige que les droits soient définis de manière à ne pas entrer en conflit les uns avec les autres. Le droit à une défense pleine et entière et le droit à la vie privée doivent être définis l'un par rapport à l'autre, et les deux doivent être définis en fonction des dispositions en matière d'égalité contenues à l'art. 15. »

Grounds of Appeal – Motion to Cease Unsupervised Communications

24. The conclusions that the Applicant wishes to appeal from the Judgment relating to the Motion to Cease Unsupervised Communications are paras. 109 and 110.

25. It is submitted that on this issue, the Judge made the following errors of law:

a) The Judgment fails to recognize the existence of the concept of "potential risk of harm, only acknowledging actual risk of potential harm – two separate concepts;

b) The Judgment makes no distinction between communications between the parties themselves as compared to between a lawyer and class members directly (deontological obligations), especially when that person is objectively vulnerable such as a sexual misconduct victim (uneven playing field);

c) The Judge misapplied the test in *Bernard* c. *Collège Charles-Lemoyne de Longueuil inc.*, 2023 QCCA 854 to the facts of the situation;

d) The Judge improperly ignored admissible anonymous affidavit evidence;

e) The Judge improperly exercised his discretion under s. 340 C.C.P. to award costs against the Applicant, an alleged sexual misconduct victim, selflessly acting as a proposed class representative for other victims against their aggressor;

26. The case of *Bernard* rendered recently by this Honourable Court of Appeal, only addressed the concept of "actual risk of harm", as those were the particular facts of that particular case (whether harm had materialized enough to cancel opt outs). The fact that potential risk of harm was not addressed does not signify that this concept does not merit court intervention to protect class members. Courts in the U.S. and in Ontario recognize that there are situations where the relationship between the parties is such that the parties are on an uneven footing, which leads to a "potential risk of harm". The classic examples from the caselaw include class actions between employee-employer, franchisee-franchisor, and borrower-lender. While admittedly, the present case might be a first, there is good reason to add to this list of an inherently-imbalanced relationship, that of a lawyer for an alleged sexual aggressor negotiating directly with unrepresented underage sexual assault victims,

who because of their psychological injuries are objectively vulnerable. This is exacerbated when Me Renno's communications with Class Members were all (purposely) verbal and secretive.

> *Abdallah* v. *Coca-Cola Co.*, 186 F.R.D. 672 (N.D. Ga. 1999): "Coca-Cola has not given the Court any reason to suspect that it will attempt to mislead its employees and coerce them into non-participation in this case. But simple reality suggests that the danger of coercion is real and justifies the imposition of limitations on Coca-Cola's communications with potential class members."
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> *Lewis* v. *Shell Canada Ltd.*, 2000 CanLII 22379 (ON SC): "[15] While the court has no reason to suspect that Shell or Crawford have attempted to mislead or coerce claimants into settling, simple reality suggests that the danger of misleading and coercion is real in such a process and justifies placing limitations upon the nature of Shell's communications with claimants."
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> *Kleiner* v. *First National Bank of Atlanta*, 751 F.2d 1193 (1985): "... it is unnecessary for a trial court to issue particularized findings of abusive conduct when a given form of speech is inherently conducive to overreaching and duress. The Supreme Court has acknowledged that unsupervised oral solicitations, by their very nature, are wont to produce distorted statements on the one hand and the coercion of susceptible individuals on the other: [I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education… Under such circumstances, "the absence of explicit proof or findings of harm or injury is immaterial," and the trial court is empowered to enter prophylactic orders designed to prevent harm before it happens."

27. The mere fact that the negotiations were between Defendant Miller's attorney and Class Members should have, in itself, justified reasonable safeguards under a potential risk of harm – the danger is self-evident. Worse yet, these "settlement" talks took place in secret (a suspicious indicia), which should also have deontological consequences. More specifically, ss. 119-120 *Code de déontologie des avocats*, RLRQ c B-1, r 3.1 should apply to the situation, with the necessary adaptations for the class action context. The *Code de déontologie* was drafted for the classic one attorney-one client context, but that doesn't mean that the rules are simply ignored for class actions.[12]

28. Under s. 119 of the *Code de déontologie*, class members are not "parties", but the caselaw holds that they are "*quasi*-parties". This distinction should not be interpreted as allowing an officer of the court to mislead a party under any qualification. Under s. 120 of the *Code de déontologie*, class members and class counsel are not in a client-solicitor relationship, but the caselaw holds that there is a *sui generis* relationship between them. Would it be permissible then for an officer of the

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[12] *Fantl* v. *Transamerica Life Canada*, 2008 CanLII 17304 (ON SC): "[7]…That difficult questions may arise from an attempt to integrate a new class action procedure with existing canons of legal ethics cannot be denied. However, we are of the view that these difficulties arise not from inherent flaws in the class action remedy, but rather from the fact that the present rules of legal ethics were formulated to govern litigation between individuals and, therefore, were not designed to apply to problems peculiar to litigation arising from mass wrongs and brought on behalf of large numbers of persons."

court to speak to them without their *sui generis* lawyer's knowledge or presence? It is respectfully submitted that it is not. This position finds indirect support in the cases of *Association des amis du Patro Lokal de Saint-Hyacinthe* c. *Frères Maristes*,[13] *Association d'aide aux victimes des prothèses de la hanche* c. *Centerpulse Orthopedics Inc.*,[14] and in an article by professor Pierre-Claude Lafond.[15]

29. Even if the only evidence, accepted or not, was "actual risk of harm" and we ignore the obvious inequity of the negotiations taking place between a sophisticated lawyer and unrepresented sexual misconduct victims, the affidavits of Madames 13 and 14 were sufficient to justify court intervention. The affidavit of Madame 14 establishes "*potential* risk of harm"; the affidavit of Madame 13 establishes "*actual* risk of harm", as it shows Defendant Miller's « *démarche ou message assimilable a de la désinformation, a des menaces, a une quelconque forme de coercition ou qui compromet d'une autre manière l'intégrité du processus* » (to use the words of the Court of Appeal in *Bernard* at para. 51). Me Renno has never denied the contents of either of Madame 13 or 14's affidavits.

30. The uncontested evidence at paras. 9-12 of the Affidavit of Madame 13 proves each element under *Bernard* to justify court-intervention: (i) "misinformation" – Defendant Miller's assets are tied up and that he will likely die soon; (ii) "threat, intimidation, and coercion" – that once Defendant Miller dies, it will be impossible to collect any money; (iii) "for the improper purpose aimed at undermining the process" – settle for a small sum, sign a release, and exclude from the class action.

31. The Judge erred in ignoring the affidavits of Madames 13 and 14 (since they were signed under a pseudonym and because the Defendants could not question them, paras. 80-81). First, the Applicant offered to have the affiants examined in writing.[16] Second, had the Judge required evidence to establish that Madames 13 and 14 feared Defendant Miller, he was required to give them an opportunity to do so.[17]

32. Therefore, the Applicant will ask this Honourable Court of Appeal to:

a) **ALLOW** the appeal;

b) **SET ASIDE** the judgment in first instance, in part;

c) **CONDEMN** the Respondents to pay the Applicant the legal costs both in first instance and on appeal.

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[13] 2021 QCCS 3353 at paras. 11-20; permission to appeal rejected in 2021 QCCA 1660.
[14] 2005 CanLII 18075 (QC CS) at paras. 89-90.
[15] *Libres propos sur la pratique de l'action collective – Sur le statut des membres et les obligations des avocats*, Montréal, Les Éditions Yvon Blais, 2020.
[16] Sch. 7 – email dated May 24, 2023: "As this is a sexual misconduct case involving minors at the time, where we intend to keep the victims' identity confidential, *we will offer you the ability to examine in writing*."
[17] It is insincere for Me Renno to require Madame 13's name, which he knows, having met with her in his office.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT this Application *de Bene Esse* for Leave to Appeal;

AUTHORIZE the Applicant to institute an appeal from the judgment rendered on June 28, 2023, by the Honourable Donald Bisson of the Superior Court, District of Montreal, in file number 500-06-001225-230;

DECLARE the conclusions at paragraphs 101 to 104 of the Judgment, inclusively, suspended until such time as judgment has been rendered on the present Application *de Bene Esse* for Leave to Appeal;

DECLARE the conclusions at paragraphs 101 to 104 of the Judgment, inclusively, suspended until such time as judgment has been rendered on the present appeal;

DECLARE that the conclusion at paragraph 101 of the Judgment will not become executory until 15 days after this Application *de Bene Esse* for Leave to Appeal is dismissed or until judgment on the appeal becomes final;

THE WHOLE, with legal costs to follow the outcome of the appeal.

Montreal, August 2, 2023

(S) Andrea Grass

_____

CONSUMER LAW GROUP INC.
Per: Me Andrea Grass
Attorneys for the Applicant

CONSUMER LAW GROUP INC.
1030 rue Berri, Suite 102
Montréal, Québec, H2L 4C3
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CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

C.A. Nº: 500-09-
S.C.M. Nº: 500-06-001225-230

COURT OF APPEAL

S.N.

APPLICANT – Applicant

v.

ROBERT GERALD MILLER

and

FUTURE ELECTRONICS INC.

RESPONDENTS – Defendants

AFFIDAVIT
Applicant
Dated August 2, 2023

I, Andrea Grass, the undersigned attorney, practicing my profession at 1030 rue Berri, suite 102, Montreal, Quebec, H2L 4C3 declare the following:

1. I am one of the attorneys for the Applicant in this matter;

2. All of the alleged facts in the *Application de Bene Esse for Leave to Appeal from a Judgment Rendered in the Course of a Proceeding* are true.

And I have signed.

(S) Andrea Grass

Andrea Grass

Solemnly affirmed before me in
Montreal, on August 2, 2023

(S) Andrew Garonce, # 241130

Commissioner of Oaths
for the province of Quebec

CANADA

PROVINCE OF QUEBEC
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C.A. Nº: 500-09-
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COURT OF APPEAL

S.N.

APPLICANT – Applicant

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ROBERT GERALD MILLER

and

FUTURE ELECTRONICS INC.

RESPONDENTS – Defendants

NOTICE OF PRESENTATION

To:

Me Karim Renno **RENNO VATHILAKIS INC.** krenno@renvath.com 145 rue St-Pierre, Suite 201 Montreal, Quebec, H2Y 2L6 Tel: (514) 937-1221 Fax: (514) 221-4714 Attorneys for Respondent – Defendant ROBERT GERALD MILLER	Me Jean-Pierre Sheppard **ROBINSON SHEPPARD SHAPIRO S.E.N.C.R.L./LLP** jpsheppard@rsslex.com 800 rue du Square-Victoria, Bureau 4600 Montreal, Quebec, H4Z 1H6 Tel: (514) 393-4013 Fax: (514) 878-1865 Attorneys for Respondent – Defendant FUTURE ELECTRONICS INC.

NOTICE IS HEREBY GIVEN that the *Application de Bene Esse for Leave to Appeal from a Judgment Rendered in the Course of a Proceeding* will be presented before a judge of the Court of Appeal sitting at Édifice Ernest-Cormier, located at 100 Notre-Dame Street East, in Montreal, on **August 17, 2023**, at **9:30 a.m**. in **Courtroom RC-18**.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Montreal, August 2, 2023
(S) Andrea Grass

CONSUMER LAW GROUP INC.
Per: Me Andrea Grass
Attorneys for the Applicant

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LIST OF SCHEDULES IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL
Applicant

Schedule 1: *Avis de Jugement* dated July 6, 2023 and Judgment rendered by the Honourable Justice Donald Bisson of the Superior Court rendered June 28, 2023;

Schedule 2: *Procès-verbal d'audience* of the June 12, 2023 hearing;

Schedule 3: Applicant's Motion for Anonymity dated February 22, 2023;

Schedule 4: Applicant's Motion to Cease Unsupervised Communications dated April 26, 2023;

Schedule 5: Affidavits of Madame 13 and Madame 14 in support of the Motion to Cease Unsupervised Communications dated April 25 and 26, 2023;

Schedule 6: Applicant's Application for Authorization dated February 22, 2023;

Schedule 7: Various email correspondence between the attorneys for the Applicant and Defendant Miller between the dates of May 20–25, 2023;

Schedule 8: Defendant Miller's Application to Dismiss dated July 14, 2023;

Schedule 9: Applicant's Application *de bene esse* to Suspend the Execution of a Conclusion in a Judgment Pending the Initiation of an Appeal dated July 17, 2023;

Schedule 10: Applicant's Motion to Adduce New Evidence dated August 2, 2023.

Montreal, August 2, 2023

(S) Andrea Grass

CONSUMER LAW GROUP INC.
Per: Me Andrea Grass
Attorneys for the Applicant

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