COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-030658-231
(500-06-001225-230)

DATE: 6 September 2023

BEFORE THE HONOURABLE PATRICK HEALY, J.A.

S.N.
PETITIONER – Plaintiff

v.

ROBERT GERALD MILLER
FUTURE ELECTRONICS INC.
RESPONDENTS – Defendants

JUDGMENT

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[1] The petitioner seeks leave *de bene esse* to appeal against specified conclusions in a judgment of the Superior Court[1] that addressed two motions in the course of preliminary proceedings concerning a proposed action on behalf of a class of more than thirty that alleges sexual misconduct with minors, including the petitioner who is proposed as representative of the class. The petitioner styles the first as the "Motion for Anonymity" and the second as the "Motion to Cease Unsupervised Communications."

[2] In the first motion the petitioner sought an order to prevent the disclosure of her identity to others, including the opposing parties, as protection due to her fear of the defendants. The motions judge in the Superior Court (the "single judge") granted the motion in part, and allowed the petitioner to be identified by initials, but imposed an exception that required the petitioner to disclose her identity to the defendants and

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1 *S.N.* v. *Miller*, 2023 QCCS 2333.

prescribed directives for doing so. The petitioner now seeks leave to appeal against the exception, which was expressed by the Superior Court in the following conclusions:

> [101] **ORDONNE** à l'avocat de la demanderesse de transmettre le nom de la demanderesse aux avocats des défendeurs, dans les 15 jours du présent jugement;
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> [102] **PERMET** aux avocats du défendeur Robert Gerald Miller de donner le nom de la demanderesse seulement au défendeur Robert Gerald Miller;
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> [103] **PERMET** aux avocats de la défenderesse Future Electronics inc. de donner le nom de la demanderesse seulement à un seul représentant de la défenderesse Future Electronics, représentant dont l'identité sera indiquée à la demanderesse et au défendeur Robert Gerald Miller sur détermination, et uniquement après que celui ou celle-ci ait signé un engagement s'engageant de respecter les paragraphes 104 et 105 du présent jugement;
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> [104] **ORDONNE** que soit interdite toute publication ou toute divulgation de quelque information permettant d'identifier la demanderesse, sauf entre les parties et leurs avocats, en respectant les conclusions précédentes, et ce, aux seules fins du présent litige.[2]

[3] To date the petitioner has not complied with the directives of the Superior Court concerning disclosure of her identity to the defendants.

[4] The second motion sought to bar counsel for the defendants from further direct communications with members of the proposed plaintiff class except if authorised on conditions established in advance by the court. The present petition raises no issue on this matter.

[5] The petitioner submits that an appeal against the conclusions in paragraphs [101] – [104] of the judgment of Superior Court may be brought as of right or, if need be, with leave.

[6] Paragraph [2] of the decision of the Superior Court states this: "La Demande d'autorisation n'a pas encore fait l'objet d'une audience." The judgment against which the petitioner seeks leave to appeal is thus concerned entirely with rulings before a hearing on the application for authorisation of a class action under Article 575 C.C.P.

[7] This court's jurisprudence has evolved with respect to the possibility to obtain leave to appeal against rulings made before a decision on the question of authorisation.

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2 Paragraph [105] of the judgment :

> [105] Et, pour plus de sûreté, **INTERDIT** au défendeur Robert Gerald Miller et au représentant de la défenderesse Future Electronics inc. et à leurs avocats de révéler à quiconque l'identité de la demanderesse, à l'exception des discussions et contacts entre les parties et leurs avocats.

[8] Until 2016 there was no appeal against a decision to authorise a class action. Today the avenues to appeal with leave against such a decision are narrow; and the avenue for leave to appeal before that decision is narrower. For some time before 2016 there were decisions affirming that leave to appeal could not be granted with respect to rulings before a decision whether to authorise a class action. The premise was that in the absence of such a decision no action was instituted and there was accordingly no standing to seek leave and no jurisdiction in the Court to grant it.[3] That position was modified in *Ridley Inc.* v. *Bernèche*,[4] where a single judge noted that the possibility of leave to appeal against a decision to refuse authorisation should be construed narrowly as an exceptional procedure and that leave to appeal against a decision before the hearing on authorisation should be restricted to questions affecting jurisdiction (including litispendence) or constitutional questions. After 1 January 2016, in *Centrale des syndicats du Québec* v. *Allen*,[5] this restrictive approach was maintained but modified when the Court held that leave to appeal *after* a decision concerning the authorisation of a class action is not governed by Article 30, Article 31 or Article 32 C.C.P. but by a strict interpretation *sui generis* of Article 578 C.C.P. A restrictive approach to leave is correspondingly even firmer under Article 31 C.C.P., or possibly Article 32 C.C.P., in relation to decisions *before* a judgment that authorises or refuses the institution of a class action.

[9] With respect to the Motion for Anonymity, the petitioner claims that the conclusions of the Superior Court terminate the proceedings and thus allow an appeal as of right under Article 30 C.C.P. The basis for this claim is that the consequences of those conclusions will force the petitioner to surrender the action due to her fear of the defendants. This basis does not mean that the decision of the Superior Court ends the proceedings in law even if it might dissuade the petitioner from pursuing the action. Moreover, the conclusions in question relate to proceedings before the authorisation of a class action and in this respect they remain preliminary in nature and do not terminate the proceedings because the action has not been formally instituted.

[10] There is no clear foundation on which to characterise the decision of the Superior Court in this matter as case management. It is not among the types of decisions enumerated in Article 158 C.C.P. in matters of case management. A decision such as that at issue in the present motion is not concerned with measures to ensure the orderly progress of proceedings that have been instituted but with the institution of proceedings that have not been formally commenced in accordance with Article 575 C.C.P. If leave to appeal may be granted in respect of a decision before the formal determination of authorisation or refusal, that possibility would suggest that the hearing of an application

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3 See, *e.g.*, *Hamel* v. *Ste-Anne-de-Beaupré (Ville de)*, 2003 CanLII 2154 (Que. C.A., judge alone), para. 10; *Pharmascience Inc.* v. *Option Consommateurs*, 2005 QCCA 437; *Valeant Pharmaceuticals International Inc.* v. *Catucci*, 2016 QCCA 1349, paras. 24-26 (judge alone); *Trottier* v. *Canadian Malartic Mine*, 2018 QCCA 1075.

4 2006 QCCA 984.

5 2016 QCCA 1878.

for authorisation is a "proceeding" that formally begins before the substantive examination of the four criteria in Article 575 C.C.P. is undertaken. This view would also suggest, notwithstanding the first paragraph of Article 574 C.C.P., that a decision before the authorisation or refusal could be characterised as a matter of case management for purposes of Article 32 C.C.P.

[11] Some divergence of view emerged after 2016 when a single judge suggested that leave to appeal might be sought under Article 31 C.C.P. against a decision before the authorisation or refusal of a class action because such a decision could be characterised as having been made "in the course of a proceeding."[6] This suggestion was made with reference to Article 578 C.C.P. in a manner that views a "judgment authorizing a class action" expansively but qualified by insistence that leave in such instances would be restricted to rare and exceptional cases. A panel of the Court in *FCA Canada Inc.* adopted this suggestion and the proposed restriction in these terms:

> [21] Il n'en demeure pas moins que, dans les faits, peu de jugements rendus préalablement à l'autorisation sont susceptibles de respecter les critères des articles 31 ou 32 *C.p.c.* À l'égard du premier, il est en effet peu probable qu'un tel jugement « décide en partie du litige / determines part of the dispute » ou « cause un préjudice irrémédiable à une partie / causes irremediable injury to a party » au sens de l'article 31 *C.p.c.* On peut même penser que la permission d'appeler sera susceptible d'être accordée uniquement à l'égard des jugements portant sur les exceptions qui avaient été identifiées sous l'ancien *Code de procédure civile* : litispendance, question de compétence, question constitutionnelle ou *lorsque l'appel soulève un enjeu qui affecte de façon déterminante l'équité de l'instance ou porte sur un principe fondamental de droit devant être décidé immédiatement*. Toutefois, l'approche retenue n'exclut pas la possibilité que soit autorisé l'appel de jugements précédant l'autorisation qui, sans tomber sous les exceptions identifiées sous l'ancien *Code de procédure civile*, respecteraient néanmoins les critères des articles 31 ou 32 *C.p.c.*, rigoureusement appliqués.[7]
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> (Italics added.)

In addition to the restrictions noted by the Court in this passage, any motion for leave to appeal before authorisation must also respect the other criteria of Article 31 C.C.P., notably the identification of irremediable injury and the interest of justice.[8] As a result, the

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6 *Groupe Jean Coutu (PJC) Inc.* v. *Sopropharm*, 2017 QCCA 1883 (judge alone).

7 *FCA Canada Inc. v. Garage Poirier Inc.*, 2019 QCCA 2213, para. 21 (references omitted, emphasis added). See also *Levy* v. *Nissan Canada Inc.*, 2021 QCCA 682; *Association des intervenants en dépendance du Québec* v. *Villeneuve*, 2021 QCCA 575 (judge alone); *Madden* v. *Nordia Inc.*, 2023 QCCA 682 (judge alone).

8 See *Francoeur* v. *Francoeur*, 2020 QCCA 1748, para. 8 (judge alone); *Devimco Immobilier Inc.* v. *Garage Pit Stop*, 2017 QCCA 1 (judge alone).

possibility of leave to appeal under Article 31(2) C.C.P. against a decision before authorisation has been established and confirmed by the Court[9] but its ambit, though restrictive, is not yet developed in the Court's jurisprudence with respect to the italicised words in the passage from *FCA* that is quoted above.

[12] A restrictive policy with regard to leave appeal before a decision on authorisation serves to protect the design and purpose of such proceedings as an expeditious mechanism for the institution of class actions in conformity with Article 575 C.C.P. But, as suggested in the Court's recent jurisprudence, the possibility of appeal before the decision on authorisation is nevertheless justifiable to address an immediate imperative that concerns the viability or integrity of those proceedings.

[13] It is arguable, and perhaps apparent in the disposition of the petitioner's motion by the Superior Court, that even if a claim for anonymity is warranted in part to protect the claimant in a broader public it should not be extended except in the rarest of circumstances to suppress disclosure of a party's identity to the opposing party in the same action. Such an extension is presumptively inimical to the foundations of due process in adversarial procedure, including the imperative for opposing parties to know or prepare the case to meet and to secure the protection guaranteed by effective confrontation. This is clearly apposite where a cause of action alleges criminal conduct.

[14] In sum, the jurisprudence of the Court allows the present motion for leave to be heard but the burden is high to obtain leave to appeal against the conclusions of the Superior Court that order disclosure of the petitioner's identity to the respondents.

[15] The principle of openness and public access is entrenched among fundamental tenets in the administration of justice. So too is the qualification that any deviation from that principle is exceptional and must be expressly authorised. Exceptions are condoned only by reference to a criterion of necessity in which openness cedes to a specified public or private value that compels respect and protection. Exceptions in this sense vary in scope and severity and can be found in various contexts. Common examples include national security, proceedings in family matters and the protection of witnesses. Wherever they are found, all remain exceptions to the general principle of openness and they all operate by reference to a requirement of specific authorisation.

[16] These observations are grounded in a steady jurisprudence. In *Sherman Estate* v. *Donovan* the Supreme Court reviewed the elements of permissible exceptions of a discretionary nature:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order. Upon examination, however, this test rests upon three core

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prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

> (1) court openness poses a serious risk to an important public interest;
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> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments.[10]

[17] The Court emphasised that permissible exceptions to the principle of openness are defined by formal categories but by a justification of necessity:

> [76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.
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> [77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions, stigmatized

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10 2021 SCC 25 (references omitted). See also *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35.

> work, sexual orientation, and subjection to sexual assault or harassment. I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.
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> [References omitted[11]]

[18] The criteria explained in the *Sherman Estate* were applied by this Court in *Dis Son Nom* v. *Marquis*:

> [63] [...] À la lumière du test des arrêts *Dagenais/Mentuck* et *Sierra Club* tel que reformulé par le juge Kasirer dans *Sherman*, une victime d'une agression sexuelle pourrait vraisemblablement obtenir une ordonnance d'anonymat lorsqu'elle est poursuivie ou qu'elle poursuit son agresseur. Pour réussir cependant, elle devra faire la démonstration que le dévoilement de son identité, en raison des informations sensibles en lien avec les allégations des procédures qui concernent le récit d'agressions sexuelles, pose un risque sérieux d'atteinte à sa vie privée et à sa dignité et ne touche pas seulement son intérêt privé, mais constitue également un risque sérieux pour un intérêt public à la confidentialité important. Au surplus, elle devra établir que le risque ne peut être écarté par des mesures raisonnables et que les avantages de l'ordonnance d'anonymat l'emportent sur ses effets négatifs.[12]

[19] The order of the Superior Court in the present case demonstrates concern and respect for the necessity to protect the petitioner's privacy. The limitation of disclosure to the defendants also shows a conscientious concern to limit disclosure in a manner that is proportionate to the imperative of due process in the constitution and progress of the proceedings.

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11 In paragraph [77] the Court refers to *Fedeli* v. *Brown*, 2020 ONSC 994, para. 9:

> [9] The privacy interests of a person who makes an allegation of sexual assault or sexual harassment in a civil proceeding [are] high, particularly when she has not initiated the civil proceeding. A complainant may be subject to unnecessary trauma and embarrassment, both for herself and her family, if she is identified. Without protection of her privacy interests, a person who has been sexually assaulted or sexually harassed may be unwilling to come forward. Further, the failure to afford such protection to a person alleging sexual assault or sexual harassment may deter other persons from coming forward to report sexual misconduct. Such interests are recognized and protected in a criminal proceeding as s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that an order banning publication of any information that could identify a victim of sexual assault is mandatory if sought by the Crown or victim. In my view, the policy reflected by s. 486.4 of the *Criminal Code* is equally applicable in these civil proceedings.

12 2022 QCCA 841. See also *S.* v. *Lamontagne*, 2020 QCCA 663.

[20] In the absence of compelling indications to the contrary, the concealment of the petitioner's identity from the respondents imperils the fundamental fairness of the proceedings. The petitioner has not established that the same principle justifies the application for leave to appeal against the order of disclosure. That order is reinforced by protective measures designed to protect the petitioner's interests, and those protective measures are in turn guaranteed by coercive and punitive sanctions that may be invoked in case of non-compliance by anyone who is bound by them or any agents on their behalf. There is no indication that these measures are inadequate. Further, there is nothing in the order of the Superior Court that would prevent the parties from revisiting any continuing or unresolved issues relating to such protective measures at the hearing concerning authorisation. For example, the order of the Superior Court does not specify that for all purposes relating to these proceedings the petitioner may elect domicile at the premises of her counsel. Similarly, the attention of the Superior Court might be sought in relation to the modalities for any subsequent procedures, if appropriate, such as discovery. But, again, the nature and scope of any protective measures must remain consistent with the degree of restraint dictated by the test of proportionality and the degree of effectiveness that can assured by coercive sanctions for non-compliance.

[21] Sensitive cases imply the distribution of burdens to the parties but this allocation must be managed in a manner that maximises both procedural fairness and necessary protections while minimising adverse risks. The order of the Superior Court aims specifically to achieve this objective. The petitioner has not demonstrated either irremediable injury or any error that warrants an appeal in the interest of justice. The guiding principles of procedure militate against the petitioner's request for anonymity. Further, as stated clearly by the Superior Court, there is no evidentiary foundation for such a request.[13]

[22] **FOR THESE REASONS THE UNDERSIGNED**:

[23] **DISMISSES**, with legal costs, the application de *bene esse* for leave to appeal.

PATRICK HEALY, J.A.

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13 2023 QCCS 2333, para. 84.

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Date of hearing: 17 August 2023