COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029975-224
(500-17-106683-199)

DATE: April 20, 2022

BEFORE THE HONOURABLE MARTIN VAUCLAIR, J.A.

ATTORNEY GENERAL OF CANADA
APPLICANT – Defendant
v.

ALISON JEAN STEEL
MARILYN RAPPAPORT
RESPONDENTS – Plaintiffs
and
ROYAL VICTORIA HOSPITAL
MCGILL UNIVERSITY HEALTH CENTRE
IMPLEADED PARTIES – Defendants

JUDGMENT

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[1] The applicant seeks leave to appeal from a judgment rendered in the course of a proceeding by the Superior Court of Quebec, District of Montreal (the Honourable Mr. Justice André Prévost), on February 23, 2022. The judgment dismissed the applicant's application for the partial dismissal of the respondents' modified originating application.

[2] To briefly summarize the case, while sacrificing some precision, both respondents are the children of former patients alleged to have received, between 1948 and 1965, experimental psychiatric care at the Allan Memorial Institute, a psychiatric department of the Royal Victoria Hospital that was part of McGill University. This research had been

funded by the Canadian government. The impugned treatments are said to have caused the respondents to suffer injuries. The respondents were mandated by family members of other former patients.

[3] One of the applicant's arguments before the Superior Court – on which the proposed appeal rests – was that the respondents could not act on behalf of approximately 95 individuals from whom they had received mandates pursuant to art. 91 *C.C.P.*, given the absence of a sufficient common interest.

[4] The judge decided otherwise, explaining at paragraphs 8 and 60 of the judgment the common interest:

> [8] Les demanderesses soutiennent que les défenderesses ont commis des fautes, soit en permettant ou en autorisant les Traitements expérimentaux allant à l'encontre du respect et de l'intégrité des patients, soit en les encourageant par l'octroi de subventions. Elles affirment que ces traitements leur ont porté préjudice en ce qu'elles ont été privées du soutien et des soins auxquels elles auraient pu raisonnablement s'attendre des membres de leur famille respective s'ils n'avaient pas été traités par le Dr Cameron.
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> [...]
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> [60] En l'instance, à la lumière des allégations de la Demande complétées par les pièces au dossier, l'intérêt commun que partagent les demanderesses et les Mandants dans le litige est la sanction du comportement apparemment fautif des défendeurs en rapport avec les Traitements expérimentaux administrés à un de leur parent et qui a eu pour conséquence de leur causer un préjudice. Il existe vraisemblablement certaines variations du préjudice d'un cas à l'autre mais, de l'avis du Tribunal, cela ne remet pas en cause leur intérêt commun dans le litige.

[5] The applicant claims that the judgment causes irremediable injury because it allows the continuation of an action which is inadmissible in law due to an absence of a sufficient common interest. The appeal, therefore, satisfies the criteria of art. 31 para. 2 *C.C.P.* The applicant further submits that the appeal is in the bests interests of justice and complies with the rule of proportionality.

[6] The applicant argues that "if the Court's judgment is allowed to stand, the parties will be required to prepare for trial on each of the mandators' claims, all of which have put forward different allegations, particularly on the issue of damages. Even if a trial judge seized of the merits could theoretically find – following a complex pre-trial phase or even a trial – that the mandators and plaintiffs did not share a common interest in a dispute,

such a finding would not remedy the prejudice incurred from having to proceed on approximately 95 different claims which turn out to be inadmissible in law".

[7] The applicant refers to *Commission de la santé et de la sécurité du travail c. Transforce inc.*, 2011 QCCA 205, where a judge of the Court, after having characterized the case as "exceptional", granted leave from a judgment rejecting a motion to dismiss. In the motion to dismiss, it had been argued that the action was instituted after the expiry of the prescription period. In that case, the judge held that the inescapable conclusion that the right of action does not exist is akin to an issue of jurisdiction that must be decided from the outset.

[8] The applicant also relies on the Court's decision in *Procureure générale du Québec c. Maheux*, 2019 QCCA 399, para. 22. In that case, the Court granted leave on the basis that the *forum conveniens* issue had to be decided before the beginning of the trial.

[9] Finally, the applicant affirms that "it is in the interests of justice to grant leave because the judgment raises novel and important questions of law that warrant the Court's consideration having regard to the guiding principles of procedure".

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[10] Pursuant to art. 31 *C.C.P.*, a judgment may be appealed with leave if it causes irremediable injury to a party. The jurisprudence is unequivocal in finding that a judgment dismissing an application to dismiss and thus forcing a trial does not constitute an "irremediable injury": *St-Gelais c. Barrière*, 2016 QCCA 604; *Pharma Biotech inc. c. Biogentis inc.*, 2005 QCCA 578 (Bich, J.A.); *Société des casinos du Québec inc. c. Chamberland-Pépin*, 2021 QCCA 674 (Moore, J.A.).

[11] The determination of a common interest under art. 91 *C.C.P.* is certainly subject to error from time to time, but contrary to the argument put forward by the applicant, a challenge of a positive determination—i.e. that a common interest does exist—cannot, by itself, trigger a right to appeal. Such a determination has nothing in common with the issue of jurisdiction or, in the instance case, with an inescapable conclusion that there is no common interest. The trial judge is not bound by this judgment and, in any event, the action will proceed, at least with the two respondents. Evidence at trial may inform the specific situation of some or all of the mandators and lead to a different conclusion. Respectfully, there is no evidence of irremediable injury.

[12] Furthermore, I note that Justice Prévost is mindful of proportionality and leaves open the possibility of addressing future concerns to keep the procedure in line with this important guiding principle.

[13] As regards the interests of justice as a criterion for granting leave, the Court has ruled that, beyond the legislative criteria for granting leave, leave may be granted if the appeal is in the interests of justice while respecting the principle of proportionality. Such cases, however, will be rare: *Canada (Procureur général) c. Imperial Tobacco Limited*, 2012 QCCA 2034, para. 80; *Gillet c. Arthur*, 2004 CanLII 47873, para. 18; *Procureure générale du Québec c. Groupe Hexagone*, 2018 QCCA 2129, para. 22 (Hogue, J.A.) and para. 81 (Gagné, J.A.). I am of the view that, while the action itself may be characterized as a matter of public interest, the question raised by the proposed appeal does not amount to an issue of public interest.

[14] Although the applicant's submissions were very ably presented, the applicant has not convinced me that the proposed appeal should be authorized.

FOR THE FOREGOING REASONS, THE UNDERSIGNED:

[15] **DISMISSES** the application for leave to appeal, with legal costs.

MARTIN VAUCLAIR, J.A.

Mtre Sarom Bahk
Mtre François Joyal
Mtre Andréane Joanette-Laflamme
DEPARTMENT OF JUSTICE CANADA
For the Applicant

Mtre Alan M. Stein
ALAN M. STEIN
For the Respondents

Mtre Véronique Roy
LANGLOIS AVOCATS
For the Impleaded parties

Date of hearing: April 12, 2022