Court of Appeal rules on the waiver of professional secrecy at the Authorization Stage

May 20, 2021

Introduction

On May 12, 2021, the Court of Appeal renders its first decision on the implicit waiver of professional secrecy at the *Authorization Stage of a class action in E.L. c. Procureur général du Québec*, 2021 QCCA 782.

On October 2, 2019, E.L (the Petitioner) filed an Application for the Authorization to Institute a class action and to be designated as the Representative Plaintiff on behalf of children who were allegedly detained, isolated and mistreated, during their residency in certain youth reception centres in Québec. The proposed class action targets the Attorney General of Québec and eighteen healthcare institutions. With respect to her personal cause of action, the Petitioner alleges that she was repeatedly placed in solitary confinement for trivial reasons, that she was forcibly medicated and witnessed acts of sexual abuse committed against other children. She claimed both compensatory and punitive damages.

The Judgment in First Instance

The defendant healthcare institutions filed a motion requesting the disclosure of the Petitioner's health records relating to the allegations in the Application for Authorization relating to her state of health. The defendants intended to then seek leave to submit those records as "relevant evidence" pursuant to Article 574 C.C.P.

Justice Chantal Tremblay, J.C.S., allowed the healthcare institutions' motion and ordered the disclosure of certain health records deemed relevant and necessary at the authorization hearing. As such, she allowed for the filing of these documents as relevant evidence into Court record, before they were disclosed by the Petitioner and without her having first taken cognizance of them.

Analysis

Justices Schrager, Hamilton and Baudouin ruled on the only two issues raised by this appeal, namely : (1) Whether the Petitioner had waived the professional secrecy

protecting certain of her health records and (2) Whether the motions judge was entitled to allow an early disclosure of the health records for the authorization hearing.

Ruling for the first time on this novel issue, the Court of Appeal held as follows:

- **Implicit waiver of professional secrecy at the authorization stage:** A petitioner may implicitly waive professional secrecy pertaining to certain of his or her (otherwise confidential) medical and pharmaceutical records, where the petitioner makes his or her health a central issue in the dispute. The procedural stage of authorization does not impede the application of that principle. Accordingly, the judgment in the first instance ordering the disclosure of some of the Petitioner's health records was upheld.
- **Relevant evidence may not be adduced preemptively:** That being said, the Court of Appeal disagreed with the first instance judgment, which it held had been too quick to authorize the filing of the Petitioner's health records that were to be disclosed as relevant evidence. Instead, the disclosed health records will have to be the subject of a second application under article 574 C.C.P. if the defendants wish to produce them in whole or in part as relevant evidence.

Commentary

This is the first judgment rendered by the Court of Appeal confirming that the authorization of class actions, as a procedural step, does not override established principles governing the waiver of professional secrecy. This finding is consistent with the principle that petitioners applying to institute class actions and seeking representative status must demonstrate an arguable personal cause of action and confirms that the defendants have some, albeit limited, means to respond to an application for authorization.

Although the Court of Appeal acknowledged that petitioners might be obligated to disclose some of their health records at the authorization stage, doing so must not result in a "fishing expedition" by defendants. A two-step process is required, in which the case management judge can be called upon to intervene if the motion for documents is contested. Those two steps are:

- **An order for disclosure of documents**: The defendant has the burden of showing the apparent relevance of specific health records to the application for authorization. The Petitioner may make representations if he or she objects to producing those documents;
- **An application for leave to adduce relevant evidence**: If the defendant wishes to produce certain health records thus obtained as relevant evidence, the defendant must make an application under Article 574 C.C.P. and demonstrate that the records are essential and indispensable for the purpose of analyzing the criteria of Article 575 .C.C.P.

By

Mélanie Champagne, Jean Saint-Onge, Valérie Lafond

Expertise

Class Action Defence, Health Law

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.