# COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029018-207
(500-06-000942-181)

DATE: January 10, 2022

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**CORAM: THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.**
**GENEVIÈVE COTNAM, J.A.**
**STEPHANE SANSFAÇON, J.A.**

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**MICHAEL CARRIER**
APPELLANT/INCIDENTAL RESPONDENT – Applicant

v.

**ATTORNEY GENERAL OF QUÉBEC**
RESPONDENT/INCIDENTAL APPELLANT – Respondent

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JUDGMENT

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[1] The appellant/incidental respondent ("appellant") appeals against a judgment rendered on June 29, 2020 by Mr. Justice Gary D.D. Morrison of the Superior Court, District of Montreal, which granted, in part, his application for authorization to institute a class action against the respondent/incidental appellant.[1]

[2] He states that the Ministère de la Justice, the Ministère de la Sécurité publique and the Director of Criminal and Penal Prosecutions, for whom the respondent is acting, are, together, responsible for the systematic violation of the rights of citizens arrested in Nunavik, as they failed to take the necessary measures to ensure that these citizens could have a bail hearing within the time limit stipulated in section 516 *Cr.C.*

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1 *Carrier v. Procureure générale du Québec*, 2020 QCCS 1980 [judgment under appeal].

[3] Under the *Criminal Code*, once an accused is arrested, the interim release process[2] provides that a judge will, unless a plea of guilty is accepted, grant a release order in respect of the offence, except if the prosecutor shows cause why the detention of the accused in custody is justified or why the release should be granted under conditions. Section 516 *Cr.C.* provides that if the proceedings for interim release are adjourned, the accused is remanded in custody. Furthermore, this adjournment must not exceed three clear days unless the accused consents thereto.

[4] According to the appellant, this interim release process cannot be respected when an accused is arrested in Nunavik. He alleges that an accused is first brought before a justice of the peace for a hearing which is generally held by phone. However, If the prosecutor objects to his release, the proceedings are automatically adjourned and an order to remand the accused to custody is issued. Because there are no detention facilities available in Nunavik, an accused will then be taken to the Amos Courthouse for his bail hearing. This requires him to travel through the detention system for days prior to appearing before a judge. In the process, he will be transferred between detention centres, will undergo numerous strip-searches and will be unable to communicate with his lawyer, which may force him to request an additional delay in order to prepare for his bail hearing. Furthermore, the appellant alleges that in many cases an accused will ultimately be heard by videoconference and the parties will then be granted only 45 minutes to present their evidence and make their arguments.

[5] According to the application for authorization, although the respondent is well aware of the problem, which has been raised on numerous occasions over the past ten years by the Viens report, the local bar and judges, he has failed to take any measure to correct it.

[6] Based on these facts, the appellant considers that this situation leads to a violation of the class members' rights guaranteed under sections 7, 9, 11, 12 and 15 of the *Canadian Charter of Rights and Freedoms*[3] and sections 1, 10, 24, 25, 31 and 33 of the Quebec *Charter of Human Rights and Freedoms.*[4]

[7] He therefore seeks the authorization to institute a class action and to represent the following class:

| | |
|---|---|
| Toute personne qui, ayant été inculpée sur le territoire du Nunavik d'une infraction criminelle après le 4 septembre, a été détenue sur une période excédant trois jours francs | All persons who, having been charged within the territory of Nunavik with a criminal offence after September 4, 2015, was detained for a period exceeding |

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2 Section 515 *Cr.C.*

3 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

4 *Charter of Human Rights and Freedoms*, CQLR, c. C-12.

| | |
|---|---|
| sans qu'une enquête pour mise en liberté provisoire soit tenue conformément à l'article 515 du *Code criminel*, sauf si cette personne a délibérément consenti à une telle détention | three clear days without an interim release hearing being held in accordance with section 515 of the Criminal Code. |

[8] The appellant is asking for compensation for those *Charter* violations in the form of pecuniary damages evaluated at $10,000 per day of "illegal" custody and punitive damages in the amount of $50,000.

[9] In first instance, the respondent raised multiple arguments in order to have the application for authorization to institute the class action dismissed. The authorization judge granted the appellant's application, but only for the purpose of claiming punitive damages. He considered that the essence of this portion of the claim did not concern the validity of the remand orders issued, but rather the general administration of the criminal judicial system in Nunavik.

[10] However, he denied the claim with regard to the pecuniary damages, being of the opinion that it constituted a collateral attack of the remand orders issued, which could not be allowed for the following reasons:

> [74] In any event, in the present matter, Applicant's claim for moral damages based on unlawful detention would indeed require the Court to conclude that the adjournment and remand order, which was never attacked directly through appeal or otherwise, gave rise to an unlawful result for which the class members should be compensated.
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> [75] That the Court will not do, and this by reason of the rule against collateral attacks. To do so would risk bringing the administration of justice into disrepute, even if the order was null *ab initio*. This Court, in the context of a class action proceeding, is not sitting in appeal or in review of such orders.
>
> [...]
>
> [78] One must also keep in mind that beyond the principle against collateral attacks *per se* there is a more general principle against attacking the integrity of judgments and the judges that render them. For this Court to conclude in a future class action that the detentions ordered by a judge were "unlawful" would be an affront to the integrity of both the judgement and the judge. This would also risk bringing the administration of justice into disrepute.

[11] Both the appellant and the respondent argue that the judge committed an error, because he should have reached the same conclusion for all the heads of damages. The appellant suggests that his application for authorization should have been fully granted while the respondent argues that it should have been entirely dismissed.

[12] The judge committed a reviewable error by dismissing the claim for pecuniary damages at this stage. This error seems to stem from a misunderstanding of the method suggested by the appellant for estimating these damages at $10,000 per day of "illegal detention". The judge considered that the reference to the illegality of the detention would require that the judge seized of the merits of the case reconsider the legality of the remand orders which led to the members of the class being held in custody. The judge was of the view that the appellant could not argue the illegality of the detention without having first sought to reverse the remand orders "by filing an appeal or otherwise".

[13] This conclusion does not reflect the true nature of the appellant's claim. While it is true that the appellant characterizes the additional detention period as "illegal" for the purpose of assessing damages, he is not attacking the validity of the remand orders or asking the Court to set them aside. Rather, and as mentioned previously (see *supra*, paragraph 4), he is arguing that the judicial system under the control of the respondent is flawed and deprives class members of their right to have a bail hearing within the legal timeframe specified in the *Criminal Code*.

[14] Furthermore, even if the appellant's claim were to be considered as a collateral attack of the remand orders, that issue should be determined on the merits of the case, with the benefit of a full hearing and the administration of all relevant evidence, not at the authorization stage

[15] Finally, the respondent claims that the appellant cannot seek compensatory damages for an infringement of his *Charter*-protected rights without having first raised this issue, and asked for an appropriate remedy, during his own criminal trial. Once again, this is a question best left to be decided on the merits. As previously noted, the appellant has chosen to seek compensatory damages as a result of the alleged breach. He did not contest the remand order or seek to have it set aside in the course of his criminal case. At this point in time, the provincial criminal courts are simply not the proper forum to debate the issue and they are not empowered to award compensatory damages.[5] The appellant should therefore be authorized to pursue his chosen remedy in the context of the proposed class action.[6]

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5 *Vancouver v. Ward*, 2010 SCC 27, para. 58; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, para. 17; *Mills v. The Queen*, [1986] 1 S.C.R. 863, para. 35.

6 *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.

[16] Considering the facts alleged in the procedure, the authorization judge committed a reviewable error by granting the application for authorization with respect to punitive damages only, while dismissing the claim for pecuniary damages at this stage. For these reasons, the application for authorization should be granted for all heads of damages claimed.

**FOR THESE REASONS, THE COURT:**

[17] **ALLOWS** the appeal;

[18] **MODIFIES** the judgment under appeal, such that its conclusions read as follows:

> **GRANTS** the application for authorization to institute a class action and to appoint the representative plaintiff;
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> [...]
>
> **APPOINTS** Michael Carrier as representative plaintiff for the purposes of instituting a class action on behalf of a class of persons described as follows:
>
> > All persons who, having been charged within the territory of Nunavik with a criminal offence after September 4, 2015, were detained for a period exceeding three clear days without an interim release hearing being held in accordance with section 515 of the Criminal code.
>
> **IDENTIFIES** as follows the main issues of fact and law to be dealt with collectively:
>
> > a) Has Defendant infringed or denied class members' rights or freedoms guaranteed by sections 7, 9, 11, 12 and 15 of the *Canadian Charter of Rights and Freedoms* by not enabling the holding of interim release hearings in accordance with sections 515 and 516(1) of the *Criminal Code*?
> >
> > b) If so, are class members entitled to pecuniary damages as a just and appropriate remedy in accordance with section 24 (1) of the *Canadian Charter of Rights and Freedoms*?
> >
> > c) Has Defendant infringed or denied class members' rights or freedoms guaranteed by sections 1, 10, 24, 25, 31 and 33 of the *Charter of Human Rights and Freedoms* by not enabling the holding of interim release hearings in accordance with sections 515 and 516(1) of the *Criminal Code*?
> >
> > d) If so, are class members entitled to pecuniary damages as a just and appropriate remedy in accordance with section 49 para. 1 of the *Charter of Human Rights and Freedoms*?

e) Has Defendant unlawfully and intentionally interfered with any of the class members' rights or freedoms protected by sections 1, 10, 24, 25, 31 and 33 of the *Charter of Human Rights and Freedoms* by not enabling the holding of interim release hearings in accordance with sections 515 and 516(1) of the *Criminal Code*?

f) If so, are class members entitled to punitive damages in accordance with section 49 para. 2 of the *Charter of Human Rights and Freedoms*?

**IDENTIFIES** as follows the principal conclusions sought in relation to the aforementioned issues:

**GRANT** Plaintiff's action on behalf of all class members;

**ORDER** Defendant to pay each class member an amount of $10,000 per day spent in illegal detention (i.e. per day after three clear days have elapsed from the time of the initial appearance) for the violation of their fundamental rights, the whole with interest at the legal rate and the additional indemnity provided by law since the filing of the *Demande pour autorisation d'exercer une action collective*;

**ORDER** Defendant to pay to each class member an amount of $50,000 in punitive damages;

**ORDER** the collective recovery of all the [...] damages to be paid to all class members;

**RECONVENE** the parties within 30 days of the final judgment with a view of establishing the method of distribution;

**THE WHOLE** with costs, including the costs of all experts, notices and administrator's expenses, if any.

**DECLARES** that class members who have not opted out are bound by all judgments to be rendered in the class action in the manner provided by law;

**FIXES** the time limit for opting out of the class action at sixty (60) days after the date of the notice to class members;

**ORDERS** the publication of a notice to class members pursuant to Article 579 C.C.P in accordance with the Court's future determination, including the issue of costs required for publication;

**DECLARES** that the class action is to be conducted in the judicial District of Montreal;

**THE WHOLE** with judicial costs.

[19] **MODIFIES** the judgment under appeal, such that it:

**AUTHORIZES** the institution of the class action in damages and punitive damages against the Attorney General of Québec.

[20] **THE WHOLE** with costs against the respondent.

GENEVIÈVE MARCOTTE, J.A.

GENEVIÈVE COTNAM, J.A.

STEPHANE SANSFAÇON, J.A.

Mtre Robert Kugler
Mtre Alexandre Brosseau-Wery
KUGLER, KANDESTIN
For the appellant / incidental respondent

Mtre Émilie Fay-Carlos
Mtre Gabriel Lavigne
BERNARD, ROY (JUSTICE-QUÉBEC)
For the respondent / incidental appellant

Date of hearing: October 20, 2021