

SEXUAL ABUSE AND PRESCRIPTION: THE SUPREME COURT INTERVENES IN AN ACTION GOVERNED BY QUEBEC LAW

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On October 29, 2010, the Supreme Court rendered a very brief judgment in the case of *Christensen v. Roman Catholic Archbishop of Québec*¹ and ordered the file be remanded to the Superior Court to assess the evidence in order to determine whether the civil liability action brought in the context of a sexual assault that took place more than 25 years earlier, should be dismissed on the grounds that it was prescribed.

The Supreme Court referred to and relied on the dissenting reasons of Justice Chamberland in the Court of Appeal.²

Facts of case

The plaintiff was the victim of sexual touching by a priest between 1979 and 1981 when she was aged 6 to 8. Her parents were informed of the incidents and contacted the Archbishop's representative to denounce the situation.

There was also evidence that the plaintiff underwent counselling for behavioural problems between 1981 and 1982, during her teens in 1987 and 1988, and also in 2003 just prior to her marriage.

According to the plaintiff, a specific situation triggered the regression in her behaviour. While having a discussion in the bathroom with her spouse's daughter (from a previous relationship), the plaintiff realized that:

[Translation] I was her age, with a small body like that, when it happened to me!

She then recalled the abuse she had suffered more vividly and decided to bring a complaint against the aggressor, who pled guilty to the offence charged in October 2008.

In the meantime, in February 2007, the plaintiff took measures to institute a civil liability suit. As part of this process, she consulted a psychologist and a psychiatrist to obtain an independent assessment. The psychiatrist submitted his report to her on July 23, 2007.

The action was filed on June 28, 2007. On February 1, 2008, the Archbishop and the priest filed motions to dismiss on grounds of prescription, which were granted by the Superior Court on May 21, 2008.

The decision was appealed to the Quebec Court of Appeal and a judgment was rendered on July 8, 2009.

Two judges found that there was no suspension of prescription due to an impossibility to act between 1981 and 2006, and affirmed the judgment of the Superior Court granting the defendants' motions to dismiss.

However, Justice Chamberland, in dissent, stated that the first instance judge could not rule on certain facts at this stage of the proceedings.

Majority Judgment of the Court of Appeal

The majority considered the issue from the perspective both of the ability of the child herself, as well as the ability of her parents to act, and to institute legal proceedings since, as a minor, the child was incapable of acting by herself at the time of the events.

To the extent that the plaintiff could show that it was absolutely impossible for her to act, it follows that this would suspend the tolling of the prescription period applicable to the filing of the legal proceedings.

The majority acknowledged that the issue of the absolute impossibility to act is a mixed question of fact and law and found that the motion to institute proceedings contained no allegation that it was impossible for the plaintiff's parents to act. However, the lack of such an allegation was not fatal because it could not be concluded from a generous reading of the psychiatric assessment report, that it was impossible for the plaintiff's parents to make the connection between the alleged wrongdoing and the harm suffered by their daughter.

Justice Morin cited lengthy excerpts from this psychiatric assessment report and from family therapy sessions that took place since 1981 and concluded that, since the plaintiff's parents had been advised of the situation, they were aware of the causal connection between the aggression and the harm. He also added that the intervention by Mgr. Nicol, who had invited the plaintiff's parents not to act, did not mislead them and that they had chosen not to institute a legal action for personal reasons and not because they were incapable of doing so.

Justice Morin concluded that the parents' failure to act was sufficient to lead to the prescription of the right of action, and Justice Vézina agreed with his reasons.

Dissent of Justice Chamberland

Justice Chamberland agreed with the reasons of Justice Morin with respect to the facts and the chronology of the proceedings, as well as the summary of the judgment in the Superior Court.

However, his opinion differed primarily in regard to what the proper role is of the judge ruling on the motion to dismiss. He cited the case of *Creighton v. Immeubles Trans-Québec*³ which describes the proper role of a judge where he is required to assess facts in deciding whether an action is inadmissible on grounds of prescription:

[Translation] When considering a motion to dismiss, the judge rules on a point of law, in this case the prescription of the action. It goes without saying that he will be conferring a jurisdiction on himself that he does not have, at this stage of the proceeding, if he decides an issue involving facts. With all due respect, I believe that the judge strayed from this rule (art. 165.4 C.P.).

In truth, the judge should have considered the allegations but not have assessed the facts within the narrow framework of the dismissal of the action. All the allegations must be assumed to be true [...]

Justice Chamberland therefore recalled that a judgment on a motion to dismiss is not the appropriate time to resolve issues of fact and that the judge seized of a preliminary motion to dismiss must guard himself against the risks of bringing a trial to a premature end without a consideration of the merits of the case. Justice Chamberland added that particular caution must be exercised when the issue is to determine the date on which prescription starts to run and whether prescription has been suspended due to the impossibility to act because these two issues are often, if not always, based on an assessment of the specific facts of each case.

Justice Chamberland described certain criteria for assessing the weight to be given to the exhibits filed in support of the motion to dismiss and noted that not all the exhibits must necessarily be dealt with in the same way.

The judge may consider exhibits that are not subject to debate without further explanation such as an invoice or a ticket stub to a show. However, he added:

[Translation] [131] (...) However, some exhibits need to be put into a context or require an explanation, and the judge must exercise caution before relying on them and concluding, on their strength, that an action should be dismissed at the stage of a preliminary motion to dismiss.

[132] A medical expert report, such as that of the psychiatrist Gérard Leblanc in this case, is one such exhibit of this kind. The physician expresses an opinion in the report based on documents consulted by him and interviews he has conducted. I am not saying that this is the case here, but some might argue that he has incorrectly interpreted those documents or has not correctly understood what he was told by the persons he interviewed. The precautionary principle applies, in my view, when a judge is considering summarily dismissing an action based on such an exhibit.

Considering the motion to institute proceedings in light of these criteria, Justice Chamberland agreed that Justice Morin, for the majority, may have been right in believing that the plaintiff confused the date on which prescription started to run (date of knowledge of the facts giving rise to liability, particularly the first manifestation of harm, and the causal link between this harm and a wrongful act) and the notion of the suspension of prescription (from the date of the existence of an absolute impossibility to act and for the duration thereof).

Justice Chamberland nevertheless noted in this case that the plaintiff alleged a very specific triggering event that occurred in June 2006, and this assertion was not truly contradicted. With respect to the analysis of the parents' role and the fact that they could have established a causal connection between the actions with which the aggressor was charged and the behaviour of their daughter, Justice Chamberland criticized the majority for basing its decision on its analysis of the psychiatric assessment report. He concluded that, by doing so, the majority had decided a question of fact, thereby falling into the trap referred to in *Creighton v. Immeubles Trans-Québec (supra)* by conferring a jurisdiction on themselves which the judge seized of a preliminary motion to dismiss does not have, i.e. assessing the alleged facts rather than assuming them to be true.

Conclusion

In accordance with the judgment of the Supreme Court of Canada, the motions to dismiss were therefore dismissed and the file was remanded to the Superior Court to allow for more complete evidence to be adduced on the allegations of the impossibility to act both on the part of the plaintiff and of her parents. The Superior Court must also decide whether the date on which prescription started to run was in fact delayed or whether this is rather a case of the suspension of prescription.

Although brief, this judgment was unanimous and the judges of the Supreme Court adopted the dissenting reasons of Justice Chamberland in the Court of Appeal.

Justice Chamberland based his reasoning on a decision rendered by the Supreme Court in 1992 in an incest case,⁴ noting that:

[...] the plaintiff [must] have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes.

The debate is not explicitly closed with respect to the rules of Quebec law applicable to prescription where the alleged harm arises from an assault or events that give rise to a psychological state in the plaintiff which explain why there was a failure to respect the prescription period.

On the one hand, Justice Chamberland essentially relied on notions for defining the starting point of the prescription period in such circumstances, as well as the lack of power to assess the facts when this issue is raised with the court at the stage of a motion to dismiss.

On the other hand, the Supreme Court determined that the Superior Court will have to rule on the potential dismissal of the action on the grounds of prescription by examining two possible options: 1) based on the additional evidence presented, the right of action was extinguished by prescription which began to run on a given date that is to be determined, or; 2) the non-suspension of the prescription period as a result of an absolute impossibility to act.

What we can learn from the decision of the Supreme Court and the reasons of Justice Chamberland is that this case, and probably many other similar cases, essentially involves a mixed question of fact and law and that a complete hearing of the evidence on the facts is necessary for a ruling to be made on prescription.

1 - 2010 SCC 44.

2 - 2009 QCCA 1349, par. [123] to [146].

3 - [1988] R.J.Q. 27 (C.A.), p. 28.

4 - M.(K.) c. M.(H.), [1992] 3 S.C.R. 6.

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