COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cline v. Fédération de Gymnastique du Québec,* 2025 BCCA 132

Date: 20250423
Docket: CA50414

Between:

Amelia Cline

Appellant
(Plaintiff)

And

Fédération de Gymnastique du Québec

Respondent
(Defendant)

Before: The Honourable Mr. Justice Harris
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 30, 2025 (*Cline v. Gymnastics Canada*, 2025 BCSC 146, Vancouver Docket S223818).

Counsel for the Appellant:	R. Mogerman, K.C. J.D. Winstanley
Counsel for the Respondent:	N.L. Trevethan N.M. Cooke
Place and Date of Hearing:	Vancouver, British Columbia April 9, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 23, 2025

Summary:

Application to determine whether leave to appeal is required from a pre-certification hearing considering whether common issues alone are sufficient to create a real and substantial connection and ground territorial jurisdiction over an ex juris defendant in respect of ex juris potential class member whose claims arise outside BC. Held: the order in issue is not appealable under the Court of Appeal Act. The appeal is quashed. If it were a limited appeal order, the application for leave is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] This is an application by the plaintiff seeking a direction that leave to appeal is not required, or alternatively for leave to appeal, in respect of an order of Justice Forth.

[2] The issue arises in the context of a proposed class action, not yet certified, in which the defendants are Gymnastics Canada and its provincial member organizations in each province and territory except Nunavut. The proposed class consists of all gymnasts resident in Canada who claim they were physically, sexually, or psychologically abused while participating in programs, activities, and events run by the defendants or their member clubs. The plaintiff pleads that her individual experiences of abuse are representative of the experiences of many gymnasts in Canada, and that the defendants were complicit in creating the circumstances that allowed this abuse to occur and continue.

[3] The resolution of the application requires me, as a threshold matter, to decide whether the order in issue is an “order” for the purpose of conferring jurisdiction on this court.

[4] It is necessary to provide some background to bring this issue into focus. It is, however, useful to set out the order itself before turning to that background. The order provides in its material parts:

> 1. The Fédération’s application under Rule 21-8 regarding jurisdiction over the claims of the Fédération’s member gymnasts who have not undertaken gymnastics in British Columbia (the “*Ex Juris* Fédération Gymnasts”) against the Fédération can be heard prior to certification.

> 2. The Fédération's application under Rule 21-8 for a declaration that the Court does not have territorial competence over the claims of the *Ex Juris* Fédération Gymnasts against the Fédération and dismissal of those claims (the "Application") is adjourned in part to the plaintiff's application for certification…
> 3. The plaintiff and the Fédération are only permitted to make submissions at the partial continuation of the Application with respect to the following issues:
>
> a) the substance of the meetings the Fédération attended in British Columbia and any impact those meetings had on the Fédération's policies; and
>
> b) whether there is a real and substantial connection on the basis of a joint tort committed in British Columbia through common design.

[5] The genesis of the order starts with an application by the Fédération de Gymnastique du Québec (the "Fédération") for an order under Rule 21-8 that the claims of gymnasts who had been Fédération members but who have not undertaken gymnastics in British Columbia (the "*Ex Juris* Fédération Gymnasts") be dismissed on the basis that the Supreme Court does not have territorial competence over the Fédération for those claims.

[6] Initially, the plaintiff agreed that the application could be heard pre-certification. It appears that that agreement was based on an understanding that the application would decide the issue of territorial competence over the Fédération for all purposes. That position changed somewhat. After learning that the target of the application was jurisdiction over a subset of non-resident proposed class member claims, the plaintiff, in the words of the judge, agreed that the application could be heard prior to the certification application so as to avoid any further delays, but advised that she would object to the appropriateness of it being heard at that time.

[7] One live issue, therefore, on the application was whether the judge should hear it prior to certification. The judge was also provided with an agreement between the parties which she set out at para. 4:

> [4] For the purposes of this application, the plaintiff and the Fédération agreed to the following:

- The plaintiff and the Fédération are in agreement that the Fédération had ***some*** gymnasts that attended British Columbia for national gymnastics competitions.
- The plaintiff is not arguing that jurisdiction over the claims of the *Ex Juris* Fédération Gymnasts against the Fédération is established:
    - via a tort committed in British Columbia; or
    - [because the] common design creates a real and substantial connection between the claims of [a] non-resident plaintiff and this pleading.

  Plaintiff's Written Submissions at para. 8
- Rather, the plaintiff argues that this Court has territorial competence over those claims based on the common issues among all of the plaintiffs, which the plaintiff argues establishes the real and substantial connection necessary for jurisdiction.

  Plaintiff's Written Submissions at para. 7
- For the purposes of this application only, the Fédération submits that the Court can assume that:
    - this Court has jurisdiction over the Fédération for the claim of Amelia Cline against the Fédération; and
    - on a certification application, there would be common issues on issues of duty of care and standard of care.

  This is not a general concession for other purposes.

[8] The legal question before the judge devolved to whether common issues standing alone were sufficient to ground a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based. The answer to this question did not depend on identifying any of the presumptive connecting factors enumerated in s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]. Rather, it turned on the opening words of s. 10:

> Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, …

[9] The order sought by the Fédération, so far as the issue became, was a "declaration" that the Court did not have territorial competence over the claims of the *Ex Juris* Fédération Gymnasts who were not abused by British Columbia

residents on the grounds that their claims lack a real and substantial connection to British Columbia.

[10] The judge in her reasons concluded that she could hear the application prior to certification. This conclusion is reflected in the first paragraph of the order. In her reasons, she expressed the opinion that common issues standing alone do not constitute a real and substantial connection to British Columbia.

[11] For current purposes, the correctness of that opinion is not in issue, although the plaintiff argues it is clearly wrong; a view disputed by the Fédération. Rather, the issue is: what is the order the applicant seeks to appeal? The judge provides some commentary that illuminates that question.

[12] The judge said:

> [8] With respect only to the arguments made on June 19 and 20, 2024, I agree with the Fédération. However, I decline to rule definitively on the issue of territorial competence. I anticipate that, depending on my ultimate jurisdiction ruling in this application, other defendants will make similar applications alleging lack of territorial competence. To ensure consistency, I have decided to adjourn the Fédération's application, in part, to the certification hearing only in respect of the following outstanding issues:
>
> a) the substance of the meetings the Fédération attended in British Columbia and any impact those meetings had on the Fédération's policies; and
>
> b) whether there is a real and substantial connection on the basis of a joint tort committed in British Columbia through common design.
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> …
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> [177] Among other things, the plaintiff advances a systemic negligence claim. She alleges that, as a result of the Fédération's implementation of Gymnastics Canada policies, standards, and procedures for the sport of gymnastics in Québec, it failed to create and maintain an environment free from physical, sexual, and psychological abuse. The plaintiff further argues that all of the relevant and necessary evidence is not before the Court. It is this aspect of the plaintiff's submissions that concern me.
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> [178] At this stage of the proceeding, I agree that there is only a limited record before me. There is evidence that the Fédération attended meetings in British Columbia, but I have no evidence as to the substance of those meetings. Specifically, whether the issue of the abuse of gymnasts was discussed, whether any type of policy was formed to address it, and whether the Fédération implemented any such policies.

> [179] This proposed class action involves a non-resident defendant, who does not carry on business in British Columbia, and non-resident plaintiffs who allegedly suffered abuse in another province. In these circumstances, I am not persuaded that a British Columbia court should take territorial jurisdiction. However, there remains the outstanding issue of evidence as to the subject-matter of the Gymnastics Canada meetings held in British Columbia and what potential impact any decisions at those meetings had on the *Ex Juris* Fédération Gymnasts.
>
> [180] On this basis, I decline to definitively rule on the issue of territorial competence. These reasons are a final decision with respect to the jurisdiction arguments advanced at the hearing on June 19 and 20, 2024. However, I grant the plaintiff and the Fédération limited leave to make submissions regarding territorial competence only in respect of the following issues:
>
> a) the substance of the meetings the Fédération attended in British Columbia and any impact those meetings had on the Fédération's policies; and
>
> b) whether there is a real and substantial connection on the basis of a joint tort committed in British Columbia through common design.
>
> (the "Outstanding Issues").
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> …
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> [182] On this basis, the Fédération's application respecting the *Ex Juris* Fédération Gymnasts is adjourned to the certification hearing with respect to the Outstanding Issues.
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> [Emphasis added.]

[13] These comments explain the terms of the order as entered, which although it articulates what can and cannot be argued when the application is completed, does not contain an express declaration of rights and, it seems clear to me, does not adjudicate on the ultimate issue of whether there is territorial competence over the Fédération in respect of the claims of the *Ex Juris* Fédération Gymnasts. It follows, in my view, that this application must be viewed as resulting from a bifurcated hearing, as the judge described it. Part of what needs to be decided to determine territorial competence has been decided, but not everything, and there is no order declaring whether there is territorial competence or not, or dismissing the action in respect of at least certain claims. The order does not, by its terms, determine substantive rights.

[14] As is well known, there is a line of cases in this Court that has determined that at least certain kinds of mid-hearing orders, decisions, or directions are not orders conferring jurisdiction to appeal or seek leave to appeal an "order" of the Supreme Court. This is so because this is a statutory court and rights of appeal are granted by the *Court of Appeal Act*, S.B.C. 2021, c. 6.

[15] It is not necessary to review all of the cases. The cases involve, for example, mid-trial rulings on evidence, applications for a judge to recuse themselves, the dismissal of no-evidence motions, and determinations in the course of one trial that a party is estopped by findings in a previous case from raising issues or relying on certain defences. It is not uncommon to see in those cases a reference to the fact that such rulings or "orders" are not final until the case is concluded and may be revisited before judgment. Nonetheless, as I understand our jurisprudence, the essential point was captured by Justice Groberman in *First Majestic Silver Corp. v. Davila Santos*, 2015 BCCA 452:

> [33] … This Court derives its jurisdiction from statute. It can only entertain the appeal in this matter if it is, under s. 6 of the *Court of Appeal Act*, an appeal from an "an order of the Supreme Court or an order of a judge of that court". The *Act* defines "order" as including "a judgment" and "a decree".
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> [34] It is clear that not every pronouncement of a judge of the Supreme Court constitutes an "order". …
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> …
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> [39] While the word "order" in s. 6(1)(a) should not be narrowly construed, I am of the view that it cannot extend beyond decisions by the Supreme Court that determine rights (procedural or substantive) or that make declarations of law. A letter of request that does no more than transmit an existing order to a foreign court is not an "order" within the meaning of s. 6 of the *Act*.

[16] In the case at bar, there is not yet a determination of substantive rights, namely, a determination of territorial competence. It may be that the remaining grounds to be argued might result in the dismissal of the Fédération's application. That order would be appealable. Similarly, the order will be appealable if the judge grants the order sought by the Fédération. The problem with appeals before a final determination of an application, proceeding, appeal, or trial is reflected also in cases

cited by this Court in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287:

> [61] Of particular significance is *Merryfield & Dick v. The Male Minimum Wage Board* (1931), 44 B.C.R. 380 (C.A.), a decision in which all of the then five judges of this Court participated. In that case, two employers filed a petition seeking review of an order of the Minimum Wage Board. That review came on before a judge of the Supreme Court of British Columbia. That judge dismissed the application to rescind the Board's order, ordered that the Board was entitled to appear by counsel in support of its order, and fixed a date for the hearing of the petition. An order to that effect was entered which the employers sought to appeal to this Court under s. 9(3) of the *Male Minimum Wage Act*, S.B.C. 1929, c. 43, which provided:
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> > On the hearing of the application, the Judge applied to shall hear and determine the matter of the minimum wage in question, and may review, confirm, vary, or rescind the order of the Board, and his decision shall be final and conclusive, except that on a point of law an appeal shall lie to the Court of Appeal, provided notice of appeal shall be given to the Board within thirty days from such decision.
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> [62] This Court sustained the respondent's preliminary jurisdictional objection and quashed the appeal. In so doing, Chief Justice Macdonald stated (at 382):
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> > The matter was one matter, an appeal from the order, and the question of the merits and question of law should have been disposed of before any appeal had been taken at all. In fact, I do not think a formal order ought to have been taken out, on this, any more than in a trial where there is a ruling on admission of evidence; but it was taken out. At all events, this is perfectly clear, that it did not dispose of the whole appeal which was brought by that petition. Part of it was deferred, and the decision of this Court in *Douglas Lake Cattle Co. v. Reinseth* (1922), [30 B.C.R. 552], and other cases, shews that for a long time it has been laid down that an appeal shall not be taken in the middle of a trial or legal proceeding. The whole matter must be disposed of and then the appeal may be taken after the final order. That was not done in this case. The failure to do that would lead to very great inconvenience in the matter of appeals. Half a dozen appeals might be taken on interlocutory findings of the learned judge and final hearing of the case delayed for months, pending these expensive appeals.
> >
> > [Emphasis in original.]
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> [63] To hold that an evidentiary ruling made during a trial juridically constitutes an appealable order would be inconsistent with the long-accepted principle that it is always open to a trial judge to revisit such rulings: see *R. v. Adams*, [1995] 4 S.C.R. 707 at paras. 29–30; *R. v. Cole*, 2012 SCC 53 at para. 100, [2012] 3 S.C.R. 34. If such rulings gave rise to orders and those orders were formally entered, then the doctrine of *functus officio* would preclude reconsideration even in the face of a material change in circumstances. Accordingly, I agree with the following from the judgment of

> Madam Justice MacFarland in *Laudon v. Roberts*, 2009 ONCA 383, 308 D.L.R. (4th) 422, leave to appeal ref'd [2009] 3 S.C.R. viii:
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> > [25] There can be no question that a trial judge has full authority, during the course of a trial, to revisit rulings made earlier in the proceedings and there may be any number of reasons for so doing. In view of that jurisdiction, it is my view that rulings made intra-trial do not become final for the purposes of appeal until judgment has been entered. Such an approach is a sensible one which would preclude litigants having to adjourn trial proceedings mid-stream, as it were, to appeal particular rulings. The time-honoured practice of reserving to the conclusion of trial the appeal of various rulings made during the proceedings is sound in that it preserves court time and costs.

[17] I accept that the judge has expressed a definitive opinion in respect of a legal argument, but equally she is clear that she has not ruled definitively on the issue of territorial competence. Appeals are not from reasons, they are from orders. And in this sense, the substance of the order is that it is a mid-hearing order adjourning to the certification hearing certain remaining issues relevant to an ultimate determination of territorial competence.

[18] It appears to me that the closest case on point is *North Vancouver (City) v. British Columbia (Utilities Commission)*, 2024 BCCA 221. The issue in that case arose during what was described as Stage 1 of an Inquiry into the Regulation of Municipal Energy Utilities by the British Columbia Utilities Commission. The Commission made a finding in its Stage 1 Final Report as follows:

> … [T]he Panel finds that [Local Government Corporations], wholly owned and operated by a Local Government and providing energy utility services exclusively within the boundaries of that Local Government, are Public Utilities and are not excluded from regulation under the [*Utilities Commission Act*].

[19] The issue was whether this definitive interpretation of the statute was a decision or order grounding jurisdiction to seek leave to appeal (leave having been granted without jurisdiction having been considered). Although dealing with different legislation, the issue of whether this finding was a decision or order was analysed in part by the general law under the *Court of Appeal Act*. Justice Groberman for the Court wrote:

> [14] Because Part 7 of the *Utilities Commission Act* and particularly s. 101 deal with appeals, it is, in my view, helpful to consider the general role of appeal courts, and the scope of appeals. This Court has considered the question of what kinds of court orders and rulings are appealable on a number of occasions. Several of the cases were recently referred to by Butler J.A. in *Badela v. Donald*, 2024 BCCA 215. They include *Skyllar v. The University of British Columbia*, 2022 BCCA 138; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287; *Grewal v. Grewal*, 2017 BCCA 261; and *First Majestic Silver Corp. v. Davila Santos*, 2015 BCCA 452. The cases establish that one feature of appealable orders is that they must be determinations of procedural or substantive rights.
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> …
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> [16] … The report does not make any orders or determinations with respect to the appellants' operations. Rather, it comes to an interpretation of the statute. While it can be expected that the Commission will apply its interpretation in the future, it is not, strictly speaking, bound to do so. …
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> …
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> [18] The Utilities Commission itself has only provided an opinion on the meaning of the statute. It is not appropriate to have that opinion appealed in its current form, which is purely advisory. Only once concrete steps have been taken to transform the opinion into a decision or order will an appeal be appropriate.
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> …
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> [20] Once a formal and binding decision is given by the Utilities Commission, a party aggrieved by the decision will have the right to challenge it through appropriate proceedings before the courts. …
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> [Emphasis added.]

[20] It is not lost on me that the judge in her reasons described her conclusion on the issue she analysed to be final, and the order limits the rights of the parties to reargue the point. If it were evident that what remained to be considered was incapable of leading to an order finding territorial competence over the party and claims in question, it might be possible to conclude that in substance, if not in form, this order determined substantive rights and was appealable. That is not, however, a conclusion open to me on the record. I have to conclude that a finding of territorial competence remains a realistic possibility. Certainly, that was the view of the judge, who explained the substantive concern leading her to adjourn part of the application to the certification hearing and leading her to decline to pronounce definitively on the issue of territorial competence.

[21] In summary, I conclude that the order in issue is not an appealable order within the meaning of the *Court of Appeal Act*.

[22] This is not necessarily the end of the matter. It is arguable that the order is the kind of sequencing or case management order for which, it is common ground, leave is required.

[23] There is in my view some attraction to this characterization of the order. By its express terms, it adjourns part of the application to the certification application, identifies the scope of permissible argument at the continuation of the application and adjourns certain issues to be heard together with the certification hearing. Moreover, the order expressly determines that the Rule 21-8 application can be heard prior to certification.

[24] I am prepared to proceed on the assumption, in analysing this aspect of the application, that the jurisdictional basis of these orders means that they are limited appeal orders for which leave is required. The test for leave is well-known and need not be repeated.

[25] The fundamental problem with the leave application is whether an appeal will have any utility. Although the plaintiff is concerned about the impact of the order on the certification hearing (significance to the action, delay of proceedings) and to the development of national class actions generally, these concerns stem from the implications of the substantive ruling itself: that is, the judge’s opinion that common issues standing alone in these circumstances are not sufficient to ground territorial competence.

[26] If leave were to be granted, it would have to be because the judge erred in hearing the territorial competence application first, expressing an opinion on some material elements bearing on the substantive issue, but then adjourning other aspects of the substantive question to be completed later at the certification hearing, or some other procedural or case management aspect of the order. It does not appear to me that those issues can ground granting leave to attack the alleged

substantive errors made by the judge. Leave is not fit for the plaintiff's purpose, which is to have this Court confirm that common issues alone can ground territorial competence in a proposed national class action.

[27] In any event, I am not persuaded that the judge made any error in principle in exercising her case management or sequencing powers. Originally, there was agreement that territorial competence could be decided prior to certification, although the plaintiff changed her view on the suitability of doing so when it became clear that the application was, in effect, bifurcated. The judge was of the view that she was following the directions of this Court in *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219, and that to proceed as she did would narrow the issues for the certification hearing. Whether that turns out to be the result may be another matter, but I cannot see an error in principle in that exercise of discretion. This is true not only of the decision to proceed to hear the application, but also the decision to adjourn part of it when the judge identified a concern about whether territorial competence might exist on another basis.

[28] Both parties attempted to persuade me that their view of the ramifications of judgment should be preferred. The plaintiff contended that the effect of the judgment is to undermine the possibility of proceeding efficiently with national class actions in general, will create unstructured chaos in the certification hearing, and would inordinately delay putting this class action on a sound national basis for the benefit of class members who are waiting to have their rights vindicated. The defendant says, by contrast, that the judgment imposes clarity and order on the certification process by narrowing issues.

[29] I am in no position to assess the relative merits of these competing predictions. It is not apparent to me whether the judgment will prove to undermine judicial efficiency or conserve it. To repeat, the plaintiff's problems stem from the substantive conclusions reached by the judge, not from the procedural rulings. And I fail to see how those substantive concerns can be addressed if leave is granted on

the issue of whether the exercise of case management powers rested on reviewable error.

[30] Even if I view the order as a limited appeal case management order, I cannot conclude that it is in the interests of justice to grant leave. Doing so will not address the mischief in the judgment perceived by the plaintiff. Although, it may prove to be regrettable that the process will unfold as it now seems destined, I am satisfied that when a substantive order on territorial competence is pronounced, one way or the other, the substantive issue engaged by this proposed appeal will necessarily be in play. I see no material risk that the issue of whether common issues standing alone can create territorial competence for the purpose of a national class action, now that it has been crystallized, will not come before the Court as an aspect of an appeal determining substantive rights. The issue is not if, it is when.

[31] In the result, I conclude that this Court does not have the jurisdiction to entertain this appeal and I quash the appeal. If, however, I am wrong in that conclusion, and the proposed appeal is properly characterized as arising from a limited appeal order, I dismiss the application for leave.

[32] I am grateful to counsel for their submissions.

"The Honourable Mr. Justice Harris"