

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL SEAT

No.: 500-09-031682-255
(500-06-001343-249)

MINUTES OF HEARING

DATE: October 14, 2025

THE HONOURABLE STEPHEN W. HAMILTON, J.A.

APPLICANTS	COUNSEL
HANNA GUILA TOLEDANO 9466-4315 QUÉBEC INC.	Mtre Joey Zukran LPC AVOCAT Absent
RESPONDENT	COUNSEL
THE BANK OF NOVA SCOTIA	Mtre Emmanuelle Rolland Mtre Marc-André Grou AUDREN ROLLAND Absent

DESCRIPTION: **Application for leave to appeal from a judgment rendered in the course of a proceeding on September 8, 2025 by the honourable Sylvain Lussier of the Superior Court, district of Montreal (Art. 30 al. 3, 31, 32 and 357 C.C.P.).**

Clerk at the hearing: Mélanie Camiré	Courtroom: RC-18
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HEARING

Continuation of the hearing held on October 10, 2025. The parties were excused from appearing in Court.

BY THE JUDGE: Judgment – see page 3.

Mélanie Camiré, Clerk at the hearing

JUDGMENT

[1] The Petitioners seek leave to appeal from a judgment of the Superior Court, District of Montreal (the Honourable Sylvain Lussier) rendered on September 8, 2025, which, prior to the authorization of a class action, (1) allowed the Respondent to file the sworn declaration of one of its directors, as well as five exhibits filed in support of the sworn declaration, and (2) allowed the Petitioners' cross-examination of the declarant but limited it to a written cross-examination on specific issues.

[2] The Petitioners are seeking authorization to initiate a class action against the Respondent in the aftermath of a major service outage which prevented customers from accessing many banking services. They allege that on November 12, 2024, it was impossible for them to access their accounts and perform everyday basic banking operations.

[3] At the pre-authorization stage, the Respondent filed an application to adduce evidence pursuant to Article 574 al. 3 C.C.P. in order to produce the sworn declaration of one of its directors. The declarant seeks to put into evidence the bank statements of the Petitioners for the period including November 12, 2024, which show several transactions in the accounts on that day. She adds that the Respondent has no record of either Petitioner having called its customer support centres to report any issues from November 10 to November 30, 2024. Finally, she produces the relevant contractual documents. The judge granted that application and there is no appeal on that part of his judgment.

[4] At the same time, the Petitioners sought the right to cross-examine the declarant orally on the allegations in paragraphs 1 to 8 of her sworn declaration (everything except the production of the contractual documents). They argued that Article 105 al 3 C.C.P. provides for a strict right to cross-examine on the sworn declaration. The judge found that he had the discretion to set limits on the cross-examination, and he limited it as follows:

[26] **PERMET** la tenue d'un interrogatoire écrit de madame Cloutier, dans les 15 jours du présent jugement, relativement :

- Aux paragraphes 3 à 7 de la déclaration sous serment de madame Cloutier, quant aux dates et heure d'inscription des transactions bancaires dans les relevés bancaires électroniques et les délais possibles quant à ces inscriptions.

- Au paragraphe 8, quant à la possibilité de contacter les centres de services de la Banque pendant la journée du 12 novembre 2024;

[5] As a final matter of context, the hearing on the application for authorization is scheduled for November 26, 2025.

[6] The Petitioners argue that the judge erred in finding that there is no absolute right to cross-examine on a sworn declaration in the context of an application to authorize a class action. Further, they argue that the judgment causes them irreparable harm in that it deprives them of their right to an oral cross-examination by limiting them to written questions and answers. This limitation would take away from the spirit and spontaneity of cross-examination, wherein witnesses are not assisted by their attorneys in their responses, and prevents an effective challenging of the witnesses in question.

[7] They also argue that there are contradictory judgments on this question, whereby some judges recognize a strict and automatic right to cross-examination while others do not. This has fueled, according to the Petitioners, a practice whereby respondents in class actions file sworn declarations and refuse to undergo cross-examination, thereby forcing a debate and a hearing on the issue with uncertain results. They suggest that the guidance of the Court of Appeal is required on this issue to ensure stability and predictability.

[8] The judgment having been rendered in the course of the proceeding, leave to appeal is required and is subject to article 31 C.C.P., where the test is that the judgment “determines part of the dispute or causes irremediable injury to a party / décide en partie du litige ou cause un préjudice irrémédiable à une partie”. In the alternative, if the judgment is considered to be a case management measure, it requires leave under Article 32 C.C.P., where the test is stricter: that the measure “appears unreasonable in light of the guiding principles of procedure / paraît déraisonnable au regard des principes directeurs de la procédure”. Whichever provision applies, the Petitioners do not convince me that it is appropriate to grant leave to appeal.

[9] In my view, the Petitioners fail to establish any irremediable injury under Article 31 C.C.P. The judge did not deny them the right to cross-examine the declarant but rather provided for a cross-examination that was appropriate given the nature of the statements made in the sworn declaration. In paragraphs 3 to 7, the declarant produced the Petitioners’ bank statements for the period that included the relevant date. She alleges that the Petitioners conducted multiple transactions on November 12 and provides the details. The judge allowed a written cross-examination “quant aux dates et heure d’inscription des transactions bancaires dans les relevés bancaires électroniques et les délais possibles quant à ces inscriptions”. It is difficult to imagine what other questions might usefully be put to this witness in relation to these bank statements and the

Petitioners do not suggest any. Moreover, the written examination seems appropriate in that these are the type of questions where a witness typically gives the undertaking to check in the records to find whatever further details are requested. There is no issue of the declarant's credibility. Further if there are other transactions that did not go through on November 12, the Petitioners are in a better position to make that proof.

[10] In paragraph 8, the declarant alleges that the Respondent has no record of either Petitioner having called its customer support lines to report any issues relating to their banking operations or access to their bank accounts during the period from November 10 to November 30, 2024. The judge allows a written cross-examination as to the possibility of contacting the service centres on November 12, 2024. Again, it is difficult to imagine what other information the Respondent might have on this question. The Petitioners know what steps they took on November 12 to reach the Respondent and they can make that proof.

[11] For the same reasons, I am of the view that the Petitioners do not establish that the limited cross-examination is unreasonable in light of the guiding principles of procedure. To the contrary, the judge set reasonable boundaries on the cross-examination.

[12] To the extent that there are inconsistencies in Superior Court judgments regarding these cross-examinations, the Court may eventually be required to weigh in and clarify the issue, but I am not convinced that this is the appropriate case in which to do so. Here, the cross-examination allowed by the judge was appropriate in the circumstances. The authorization application scheduled for November 24 should not be postponed in order to allow the Court to consider the issue, particularly since it is likely to come up again in a case where there is real prejudice to a party.

FOR THESE REASONS, THE UNDERSIGNED:

[13] **DISMISSES** the Application for Leave to Appeal, with judicial costs.

STEPHEN W. HAMILTON, J.A.