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FATHER OF FAMOUS CHILDREN TELEVISION SERIES OBTAINS THE DISMISSAL OF A MOTION FOR DISMISSAL BROUGHT ON BY DEFENDANTS.

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PRECIS: The Superior Court of Quebec refuses to grant a motion to dismiss an action for being frivolous or clearly unfounded in law after the plaintiff's examination.

In *Lachance c. Productions Marie Eykel inc* (2008 QCCS 4698), the Superior Court of Quebec rejects a motion to dismiss an action brought against production companies by a plaintiff claiming to be a co-author of a famous children television series.

In 1968, the plaintiff was a part-time employee of the Quebec Ministry of Education. During his employment, the plaintiff, as a project manager, was asked to create an educational television program for children. The show was produced and is now known as *Passe-Partout*. It has become a cult series for an entire generation of Quebec children.

The plaintiff claims to be one of the co-authors of the series since he participated in the creation of the episodes, revised and approved them for telecast. He collaborated to the scripts, directed some episodes and alleges to be the creator of many characters of the series. He hired specialists, script-writers, directors, actors, musicians and designers. He also claims to have worked on the project mostly in his free time. In 1989, he was awarded a prize for his contribution to the progress of children programming. The plaintiff further alleges being considered by many to be the father of the series.

The defendants are two of the three principal actors of the series and their respective production company.

In November 2006 and in May 2007, having obtained a licence from the public television station that first aired the show, the defendants launched DVD box sets of

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episodes of the series. In both instances, the plaintiff alleges that the defendants did not ask for his authorisation for commercialising the box-set nor did they make him a financial offer. The name of the plaintiff does not appear on the box-set.

The defendants claim that plaintiff does not have copyright over the episodes and even if the Court found him to be first owner of the copyright, pursuant to Section 13(1) of the *Copyright Act*, which they deny, ownership belongs to his employer, pursuant to Section 13(3) of the *Copyright Act*, since he was employed by the Ministry of Education when he created the series. The defendants also claim that even if he retained copyright over the series, the fact that he did not claim royalties for more than 30 years after the first airing of the series proves that he abandoned his rights and is estopped.

The Court states that the dismissal of an action after an examination pursuant to Section 75.1 of the *Civil Code of Procedure* is an extraordinary measure that should only be used when all the facts of the case, as revealed during the examination, do not substantiate in any way the remedy sought by the plaintiff.

Section 55 of the *Civil Code of Procedure* is then examined to see if the plaintiff has sufficient interest to file the suit. In doing so, the Court states that it has to determine if he has ownership of the copyrights thus examining the merits of the case, a question that cannot be examined at this point of the proceedings.

The Court adds that the question of who owns the copyright needs to be assessed with a thorough exam of the employment contract and a possible assignment of rights, or lack thereof. During his examination, the plaintiff recognised the existence of a service contract between him and the Ministry of Education but also stated that the creation of the series was made outside of his work mandate. Thus, for a work to be deemed the product of an employment under Section 13(3) of the *Copyright Act*, three criteria must be met: 1) the work must have been created pursuant to a contract of service or apprenticeship; 2) the work must have been created while working; 3) unless otherwise stipulated in the contract. The answer in the present case is not clear-cut and warrants a thorough examination, something that once again goes outside the scope of the present proceedings according to the Court.

Similarly, the Court states that there is no clear evidence, *prima facie*, to prove that the plaintiff renounced tacitly to his rights by not claiming any royalties. The renunciation of rights must be clear, express and non-ambiguous and is not presumed. In order for it to be tacit, the facts must show an obvious intent to abandon the rights. From the facts of the case, the Court argues, that it is not clear, even more so since the suit concerns DVDs which did not exist 30 years before. How can one relinquish a right that did not exist and that one has no knowledge of, the Court asks.

Finally, in order to find the action to be *estopped*, the Court must determine if the plaintiff was at fault and profited from his delaying behaviour, something that calls also for an in-depth analysis, after a full trial.

Since all these questions are deemed to be important, complex and not frivolous or unfounded in law, the Superior Court rejects defendants' motion to dismiss the action.

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