**CANADA**

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTRÉAL**

**No.: 500-11-060613-227**

**SUPERIOR COURT**

**(Commercial Division)**

**IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:**

**RISING PHOENIX INTERNATIONAL INC.**

- and -

**10864285 CANADA INC.** doing business under the trade name **M COLLEGE OF CANADA**

- and -

**11753436 CANADA INC.**

- and -

**CDSQ IMMOBILIER INC.**

- and -

**COLLÈGE DE L'ESTRIE INC.**

- and -

**ÉCOLE D'ADMINISTRATION ET DE SECRÉTARIAT DE LA RIVE SUD INC.**

- and -

**9437-6845 QUÉBEC INC.**

- and -

**9437-6852 QUÉBEC INC.**

**Applicants**

- and -

**RICHTER INC.**

**Monitor**

# MEMORANDUM OF ARGUMENTS OF THE APPLICANTS

**APPLICATION FOR THE CONTINUANCE OF THE *DEMANDE DE BENE ESSE EN DÉCLARATION D'INAPPLICABILITÉ DE LA SUSPENSION DES PROCÉDURES ET, SUBSIDIAIREMENT, POUR LEVER LA SUSPENSION DES PROCÉDURES EN FAVEUR DES ADMINISTRATEURS ET DIRIGEANTS* OF LES CONSULTANTS 3 L M INC.**

**TO THE HONOURABLE DAVID R. COLLIER, JUSTICE OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTREAL, THE APPLICANTS RESPECTFULLY SUBMIT THE FOLLOWING:**

## I. ORDER SOUGHT

1. The Applicants oppose the *de bene esse* Application and hereby request that any debate on it be postponed to a later date, in order to:

    a. Allow the Directors and Officers of the Applicants to focus on and devote all their time and energy to the restructuring process of the Applicants, the whole to the greater benefit of all creditors;

    b. Avoid a race tor the assets of the Directors and Officers, whereby ISI is given an advantageous lead, while all other creditors remain stayed;

    c. Allow the Applicants and the Monitor to put in place a claims process which will address the claims of all the Applicants' creditors; and

    d. Allow the Applicants to submit to the creditors a global plan of arrangement, which is expected to include a significant financial contribution by the Directors and Officers in exchange for a release in their favor.

2. In the meantime, the Directors and Officers will undertake not to dispose of any of their assets.

## II. ISI'S CLAIM

3. ISI's claim against RPI was twofold:

    (a) A claim for what ISI alleged was owed by RPI to the students who had applied to attend ISI College, which it claimed it was entitled to collect on behalf of these students; and

    (b) Loss of profits and punitive damages against RPI;

4. The liability of the Directors and Officers of RPI was sought after it was alleged that the Directors and Officers had caused RPI to loan to other members of its group, the Applicants, funds paid by the students who had applied to attend ISI College;

5. Paragraph 11 of the Initial Order provides that:

> « 11. (…) no Proceeding may be commenced or continued against any former, present or future director or officer of the Applicants nor against any person deemed to be a director or an officer of the Applicants under subsection 11.03(3) CCAA (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Applicants where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation".

6. Although the conduct of the Directors and Officers was qualified of fraudulent by the Arbitrator, the liability of the Directors and Officers was found by reason of the fact that those Directors and Officers had caused RPI to loan to other members of its group, the other Applicants, funds paid to it by students;

7. The Applicants contest the finding of facts of the Arbitrator that RPI and the Directors and Officers have committed fraud;

## A. The Award and the findings of fact of the Arbitrator

8. ISI takes the view that the Court is bound by all the findings of the Arbitrator and that, as such, it is forced to conclude that the Stay, imposed by para. 11 of the Initial Order, does not apply to the Award and if it does, that it should be lifted because, essentially, of the findings of the Arbitrator;

9. Without entering into the merit of ISI's *de bene esse* Application, the Applicants consider it necessary to address a few elements advances by ISI as the incarnated truth.

### a. The Court is not bound by the conclusions of fact of the Arbitrator

10. Article 4 of the *Code of Civil Procedure* sets the principle that anything said, written or done during an arbitration process is confidential:

> **4.** Parties who opt for a private dispute prevention and resolution process and the third person assisting them undertake to preserve the confidentiality of anything said, written or done during the process, subject to any agreement between them on the matter or to any special provisions of the law.

11. As pointed out by Justice Marie-Anne Paquette, in *79441 USA Inc.* c. *Mondofix Inc*., this confidentiality rule applies not only to the process itself, but the Award as well[1].

12. Justice Paquette further noted that "only the conclusions of an award are to be enforced. Not the reasons."[2]

13. The Applicants argue that the reasons of the Arbitrator, which are confidential and which ought not to be homologated, should not be relied upon in the determination of whether a debt is dischargeable or not under the CCAA;

14. Even if it could be relied upon, it is now clear, since the Court of Appeal decision in *Association des propriétaires de boisés de la Beauce*[3], that finding of facts in a judicial or quasi-judicial decision benefits from a rebuttable presumption of exactitude, as noted by Justice Pierre Dallaire in *Protection de la jeunesse — 202580*[4]:

> [24] Dans l'affaire *Association des propriétaires de boisés de la Beauce*[11], la Cour d'appel précise la portée qu'il faut donner aux constatations de faits que l'on retrouve dans une décision judiciaire ou quasi judiciaire :
>
> > [27] Sur cette question de présomption découlant d'une décision judiciaire ou quasi judiciaire, l'affaire *Ali* précitée a provoqué un changement dans l'orientation des tribunaux québécois. Depuis, la jurisprudence considère que toute constatation de fait à la base d'une décision judiciaire ou quasi judiciaire bénéficie de la présomption simple d'exactitude. (soulignement ajouté)
>
> [25] La conséquence qui découle de cette présomption simple est qu'il déplace le fardeau de la preuve sur les épaules de celui qui conteste les faits découlant de cette présomption.

15. The findings of fraud by the Arbitrator constitute evidence which may be rebutted. There is therefore no "*chose jugée"* as to these findings;

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1 *79411 USA Inc.* c. *Mondofix Inc.*, 2020 QCCS 1104, at para. 6 to 8 [**TAB 1**]

2 *Op. cit.* note 1, para. 17 [**TAB 1**]

3 2009 QCCA 48 [**TAB 2**]

4 2020 QCCS 2007. [**TAB 3**] Also see : *P.A.* c. *Air Canada,* 2013 QCCS 5594 and *D'Astous c. 9292-4638 Québec inc.*, 2021 QCCS 5719.

16. The Supreme Court of Canada recently examined, in *Montréal (City)* v. *Deloitte Restructuring Inc.*[5] the question of the burden of proof required to establish that a claim cannot be discharged under the CCAA for fraud;

17. The Supreme Court expressed the view that the exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly.[6]

18. The Court held that the fraud had to be proven and that there is a well-established principle that the court had to make its own findings of fact:

> In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the BIA that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard.

19. The same is true in the present matter;

20. The Applicants will be submitting a plan of compromise and arrangement to their creditors and will be seeking a determination, by this court, as to whether the claims of ISI and of all other creditors may be discharged or not, based on proper evidence and applicable criteria for such a determination;

21. A plan of compromise and arrangement can provide for the release of third parties[7], including directors and officers for claims against them that are not of a asserted against them in such capacity[8];

22. Section 5.1(1) of the CCAA is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances[9].

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5 2021 SCC 53 [**TAB 4**]

6 Op. cit, note 5, para. 25. [**TAB 4**]

7 *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235 [**TAB 5**]

8 *Nortel Networks Corp Re*, 2009 CarswellOnt 4806 [**TAB 6**]

9 *Re Green Relief Inc.,* 2020 ONSC 6837, para. 25 [**TAB 9**]

**B. <u>The Directors and Officers of the Applicants must be allowed to concentrate and devote all their energies to the restructuring process of the Applicants</u>**

23. Since the commencement of these CCAA Proceedings, the Applicants, all directly or indirectly owned and/or controlled by the Mastantuonos, who are all current or former directors of one or another of the Applicants, have worked assiduously with the Monitor towards:

(a) stabilizing their operations;

(b) operating the Colleges, albeit with very limited human and financial resources;

(c) resuming classes of hundreds of students;

(d) crafting a sale and investment solicitation process and populating the required data room;

(e) dealing with thousands of student requests;

(f) assisting in the negotiation of a Junior DIP financing facility, an Asset Purchase Agreement and a Transition Services Agreement (the "**TSA**") with the Purchaser;

(g) providing countless number of documents, reports and answers to the Monitor and the Purchaser;

(h) cooperating with the Student Representative Counsel and providing all required information; and

(i) ensuring that the students are looked after and are able to resume their educational programs as quickly as possible.

24. In sum, the Applicants and their Directors and Officers have been working, in good faith, in ensuring that the Applicants, and more specifically the Colleges, can continue to operate such that they can be sold as going concerns for the benefit of all stakeholders, and in particular, the Students;

25. Following, and as a pre-closing condition of the Asset Purchase Agreement the Purchaser and the Applicants entered into a TSA with the Purchaser to facilitate a seamless transition of the Colleges to the Purchaser, a copy of which is filed under seal of confidentiality as **Exhibit R-1**.

26. The involvement of the Directors and Officers are an essential component in these transitional services arrangements for the periods both before and after the closing of the transaction, the whole to ensure a successful transition of the Colleges to the benefit of all stakeholders, but in particular, the Students.

27. Without the unfailing support and commitment of the Directors and Officers, the transaction is put into jeopardy.

28. While the Directors and Officers have and wish to continue to focus on this successful transition, they may not be able to do so if the stay of proceedings is lifted, as they might then be forced to focus on the consequences of no longer being protected by these CCAA proceedings.

## C. Avoid a race for the assets of the Directors and Officers, on the part of ISI

29. ISI is not the only creditor of the Directors and Officers of the Applicants.

30. In particular, the Directors and Officers have personally guaranteed the Firm Capital Facility, and Caroline Mastantuono has personally guaranteed the FCC Interim Facility.

31. The lifting of the stay against the Directors and Officers at this stage would fuel a race to their assets with ISI leading the pack.

32. ISI's *de bene esse* Application is geared at being first out of the gate, in a race for the assets of the Directors and Officers, which could then force other creditors to seek to enforce their rights against the Mastanuonos.

33. The assets of the Directors and Officers should not be subject to a free for all process to the sole benefit of the fastest creditor to seize.

34. Thus, the lifting of the stay should not be considered, at this stage, since doing so, may result in an unfair advantage for one creditor, to the detriment of others.

## D. Allow for a claims process to be implemented

35. The structure of the claims process to be put in place is complex, in particular due to the fact that the quantum of claims is likely to vary significantly over the coming months.

36. Indeed, the sale of the Colleges, as going concerns, made it possible to negotiate an agreement with the Purchaser giving the majority of the Students, who had potential claims of several million dollars on the day of the filing, the possibility of attending the soon to be purchased Colleges and to complete the program of their choice (which will benefit the mass of creditors by reducing the quantum of unsecured claims).

37. In doing so, a large proportion of potential claims against the Applicants will be paid in kind, through the provision of educational services to the Students, as per their educational contracts. Failing payment in kind, the Purchaser has undertaken to reimburse all Pipelines Students who were issued letters of acceptance should they choose not to pursue their education with the Purchaser.

38. In light of the foregoing, the status of these potential creditors and the amount of their claims will vary in time.

39. The status of ISI students and of the ISI claim also complicates the process, raising a new set of questions, which need to be assessed, including the following:

    a. How many ISI students have requested a refund?

    b. Have these students been reimbursed by ISI?

    c. Are they entitled to reimbursement from ISI or must they submit their claims as part of the plan to be filed by the Applicants?

    d. In this regard, are the findings made by the Arbitrator binding on this Court?

    e. What is the effect of the $1,635,000.00 hypothec granted by 11753436 Canada Inc., in favor of RPI (**Exhibit R-3**), to guarantee the obligations of RPI towards the ISI Students, if any?

    f. How do we avoid duplication of claims and the Applicants being called upon twice to pay for the claim of ISI and those of its students?

    g. Should the Students be afforded a special status? If so, should such a status extend to ISI? What is the position of the Student Representative Counsel on these issues?

40. These are questions that require reflection and debate, in particular to ensure that all creditors are treated fairly.

41. These issues, and many others, are being analyzed by the Applicants and the Monitor and will be the subject of an upcoming application to establish the creditors' claims process.

42. Allowing ISI to pursue the execution of the Arbitration Award at this stage would solely benefit ISI and would impede the restructuring process as a whole, to the detriment of all the other creditors, including the Students.

## E. Allow the Applicants to submit to the creditors a global plan of arrangement

43. As the proceeds of sale resulting from the APA will not result in sufficient liquidities to satisfy all of the Applicants' unsecured creditors, the Directors and Officers have indicated their intention to contribute financially to the eventual plan of arrangement and seek appropriate releases in their favor.

44. It is in the interest of all stakeholders and the Students in particular, that the Applicants be given the opportunity to make such a plan of arrangement.

45. The question of whether the Directors and Officers' liability towards ISI, or any other of its creditors could be discharged through a plan of arrangement duly approved by the Applicants' creditors is a question to be determined in due course.

46. The Court will also be called to determine whether it is bound by the finding of fact of the Arbitrator, whether there is *chose jugée* on the characterization of the conduct of the Directors and Officers and whether the claim of ISI can be compromised, as the case may be.

47. The granting of the ISI Application at this time would inevitably prevent the Directors and Officers from contributing to a plan, would put at jeopardy the sale transaction and, consequently, any plan of arrangement which the Applicants would have otherwise submitted to their creditors, the whole to the detriment of all creditors and other stakeholders.

### F. The Directors and Officers will undertake not to dispose of any of their assets

48. The Directors and Officers will undertake, on terms that this Court may impose, for as long as the stay is in effect or until such further order of the Court is rendered, not to dispose of any of their assets of value.

49. The postponement of the hearing on the merits of the ISI Application will not prejudice ISI since the assets of the Directors and Officers will be preserved until such time as the ISI Application may eventually be adjudicated and, in the interim, the *status quo* will be maintained for all stakeholders.

## III. FURTHER ARGUMENTS

50. ISI alleges that the Directors and Officers of the Applicants have acted in bad faith.

51. The good faith which is required here relates to the conduct of the parties in these proceedings10;

52. As pointed out by Justice Newbould, in Re 4519922 Canada Inc.[11] , the Court should not focus on the failure of an applicant to have dealt in good faith or with due diligence in the past:

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10 *Muscletech Research and Development Inc.*, 2006canlii3282, para. 4. [**TAB 7**]

11 Re 4519922 Canada Inc. [**TAB 8**]

> "[44] […] I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection".

53. The Supreme Court of Canada has held that when exercising judicial discretion under the CCAA, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors and, in certain cases, the broader public interest.

54. The exercise of that discretion was appropriate in the present case.

55. In the case at hand, the Court ordered a stay of proceedings to provide the Applicants and the Monitor with the time necessary to stabilize their operations, obtain interim financing, resume the classes for hundreds of students and conduct, to the extent possible, a going concern sale of the colleges.

56. It is imperative that the *status quo* be maintain to allow the Applicants and the Monitor to complete the sale of the Colleges, ensure proper transition to the purchaser, craft a claims process that will be fair, equitable and expeditious and allow the Applicants to file a plan of compromise and arrangement for the benefit of all creditors, in which the Directors and Officers with provide a further financial contribution.

57. The continuation of ISI's de bene Application won't cause prejudice to ISI, nor to any other creditor, on the contrary.

58. Should the stay against the Directors and Officers be lifted at this stage, all the progress realized to date by the Applicants, the Monitor and the various other stakeholders towards making a viable plan of arrangement will fail, to the detriment of all stakeholders.

59. As such, the ISI Application, regardless of whether it has merit or not, is premature and ought not be adjudicated upon until such time as the Applicants have had the opportunity to present a plan of arrangement and, if approved, is implemented.

60. The balance of inconvenience favors maintaining the *status quo* until such time as such a plan can be submitted to the creditors.

## IV. RELIEF SOUGHT

61. In light of the foregoing, the Applicants respectfully submit that the present Application should be granted in accordance with its conclusions.

**RESPECTFULLY SUBMITTED**

**MONTRÉAL, April 13th, 2022**

Kaufman Lawyers

**KAUFMAN LAWYERS LLP**
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**CANADA**

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTRÉAL**

**No.: 500-11-060613-227**

**SUPERIOR COURT**

**(Commercial Division)**

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**IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:**

**RISING PHOENIX INTERNATIONAL INC.**

- and -

**10864285 CANADA INC. (M College of Canada)**

- and -

**11753436 CANADA INC.**

- and -

**CDSQ IMMOBILIER INC.**

- and -

**COLLÈGE DE L'ESTRIE INC.**

- and -

**ÉCOLE D'ADMINISTRATION ET DE SECRÉTARIAT DE LA RIVE SUD INC.**

- and -

**9437-6845 QUÉBEC INC.**

- and -

**9437-6852 QUÉBEC INC.**

**Debtors**

- and -

**EY ADVISORY GROUP INC.**

**Monitor**

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# APPLICANTS LIST OF AUTHORITIES

**IN SUPPORT OF THE AMENDED APPLICATION FOR THE CONTINUANCE OF THE *DEMANDE DE BENE ESSE EN DÉCLARATION D'INAPPLICABILITÉ DE LA SUSPENSION DES PROCÉDURES ET, SUBSIDIAIREMENT, POUR LEVER LA SUSPENSION DES PROCÉDURES EN FAVEUR DES ADMINISTRATEURS ET DIRIGEANTS* OF LES CONSULTANTS 3 L M INC.**

| | TAB |
|---|---|
| *79411 USA Inc. c. Mondofix Inc., 2020qccs1104* | **1** |
| *Association des propriétaires de Boisés de la Beauce c. Monde Forestier* | **2** |
| *Protection de la jeunesse — 202580 2020qccs2007* | **3** |
| *Montréal (City) v. Deloitte Restructuring Inc., 2021 SCC 53* | **4** |
| *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à),* 2015 QCCS 3235 | **5** |
| *Nortel Networks Corp Re, 2009 CarswellOnt 4806* | **6** |
| *Muscletech Research and Development Inc., 2006canlii3282* | **7** |
| *4519922 Canada Inc.(Re), 2015 ONSC 124* | **8** |
| *Re Green Relief Inc.,* 2020 ONSC 6837 | **9** |

Montréal, April 13, 2022

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# SUPERIOR COURT

(Commercial Division)



CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-058006-202

DATE: March 24, 2020

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**BY THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.**

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**79411 USA INC.**
**dba FIX AUTO USA and FUSA INC.**
Petitioner
v.
**MONDOFIX INC.**
Respondent

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JUDGMENT
ON THE APPLICATION FOR THE HOMOLOGATION OF AN ARBITRATION AWARD

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## OVERVIEW

[1] Fix Auto USA and Fusa Inc. (**Fix Auto**) seek the homologation of a domestic arbitration award (**Award**)[1] which, in essence, declares that the Licence Agreement[2] between Fix Auto and Mondofix Inc. (**Mondofix**) is renewed until 2027.

[2] Both parties agree that the conditions of article 646 of the *Code of Civil Procedure* are met and that the Award should be homologated. However, Mondofix objects to the Award being public and asks that it be put under seal. Mondofix also

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1 Exhibit P-1.
2 Exhibit P-2.

requests that the other exhibits filed in support of the present Application for Homologation (License Agreement,[3] Request for Arbitration[4] and Response to the Request for Arbitration[5]) be withdrawn from the court record.

[3] For the reasons below, the Court holds that not only the process, but also the resulting arbitration award itself, are confidential, except for the conclusions of the Award. Fix Auto failed in showing that a broader disclosure and publicity of the Award, which is otherwise confidential, is reasonably necessary.

## ANALYSIS

[4] In the case at hand, confidentiality is protected under the rules and law which the parties chose. More particularly, as per the Licence Agreement,[6] the arbitration was conducted in accordance with the rules of the Canadian Commercial Arbitration Center (**CCAC**)[7] and governed by Quebec Law.

[5] The CCAC Rules do not include a specific rule dealing with the confidentiality of the process and of the award. However, the Preamble of the CCAC Rules include this statement, which refers to the confidentiality of the case arbitrated and is in line with the confidentiality principle applicable in Quebec Law.

> Since commercial arbitration is conducted by specialists, takes place out of court, behind closed doors, and is wound up rapidly, this [(arbitration)] makes it possible to respect the confidentiality of the case and to obtain an economic and final decision that is immediately enforceable.[8]
>
> [Emphasis added]

[6] Quebec Law, which applies to the arbitration in issue, unavoidably leads to article 4 of the *Code of Civil Procedure* in addressing the parties' current dispute on confidentiality. This article sets the principle that anything said, written or done during the arbitration process is confidential:

> 4. Parties who opt for a private dispute prevention and resolution process and the third person assisting them undertake to preserve the confidentiality of anything said, written or done during the process, subject to any agreement between them on the matter or to any special provisions of the law.
>
> [Emphasis added]

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3 Exhibit P-2.
4 Exhibit P-3.
5 Exhibit P-4.
6 Exhibit P-2, art. 10.
7 Canadian Commercial Arbitration Center, *General Commercial Arbitration Rules* (2008) (**GCA Rules**).
8 GCA Rules, Preamble, par. 4.

[7] Encouraging the parties to resort to Private Dispute Prevention and Resolution Processes (**PDPR**) (mediation or private arbitration)[9] is one of the goals which the 2014 remastering of the *Code of Civil Procedure* sought to achieve. The confidentiality of such processes is often a major incentive when a party weighs the benefits of PDPR, against those of the traditional judicial streamline. Such confidentiality is often key to the success of a mediation or of a private arbitration, as it favours an open approach.

[8] Fix Auto's suggestion that this confidentiality rule only applies to the process itself and not to the Award is untenable.

[9] In most if not all cases, arbitration awards thoroughly address what has been said, written and done during the arbitration. The confidentiality protection expressed in article 4 above would be eviscerated from any effect or meaning if the application for the homologation of an arbitration award systematically turned the award (and all the information it includes on the evidence and the process itself) into publicly available information.

[10] Still, there are exceptions to this confidentiality protection.

[11] More particularly, article 4 *in fine* of the *Code of Civil Procedure* opens the door to such exception if the parties agree or have agreed to waive confidentiality (totally or partially), or if the law provides that the information is public.

[12] Also, if justice cannot be done without the disclosure of the award, if such disclosure is necessary to avoid a denial of justice, if such disclosure is reasonably necessary for the establishment or protection of the legitimate interests of an arbitrating party, an exception to the above confidentiality principle will be made.[10] For example, such will be the case if disclosure is necessary to the enforcement of the award.[11]

[13] The solution then turns on the following question: Can justice "be done without the necessity of ordering the production of documents that are otherwise confidential".[12]

[14] In the case at hand, the burden to show that an exception to the confidentiality principle should be made rests on the party who seeks the benefit of such an exception. Fix Auto failed in making such a demonstration.

[15] For instance, the eventual need to enforce the Award in California does not justify such an exception. More particularly, there is no live controversy in this regard

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9 Title I (Mediation) and Title II (Arbitration) of Book VII (Private Dispute Prevention and Resolution Processes).

10 *Hassneh Insurance co of Israel v. Mew*, [1993] 2 Lloyd's Rep, pages 250, 252; *Tate & Lyle North American Sugars v. Somavrac inc.*, 2005 QCCA 458, par. 2; *SNC-Lavalin inc. v. ArcelorMittal Exploitation minière Canada*, 20185 QCCS 3024, par. 13, 34.

11 *Minister's Comments* on CCP, art. 4.

12 J. Brian CASEY, *Arbitration Law of Canada : Practice and Procedure*, 3rd ed., New York, JurisNet LLC 2017, s. 6.10.3

and no demonstration was made to the effect that the public disclosure of the Award in Quebec proceedings is necessary for the enforcement of the Award in California.

[16] Admittedly, when a party resorts to the Court to homologate an arbitration award, with the view of enforcing it, disclosure is unavoidable. However, as the *Code of Civil Procedure* reminds, the homologation of an arbitration award does not require the Court to address the merits of the dispute.[13] The Court only needs to address the criteria set forth in article 646, which do not require full disclosure of the award itself.

> **646.** The court cannot refuse to homologate an arbitration award or a provisional or safeguard measure unless it is proved that:
>
> (1) one of the parties did not have the capacity to enter into the arbitration agreement;
>
> (2) the arbitration agreement is invalid under the law chosen by the parties or, failing any indication in that regard, under Québec law;
>
> (3) the procedure for the appointment of an arbitrator or the applicable arbitration procedure was not observed;
>
> (4) the party against which the award or measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or it was for another reason impossible for that party to present its case; or
>
> (5) the award pertains to a dispute not referred to in or covered by the arbitration agreement, or contains a conclusion on matters beyond the scope of the agreement, in which case only the irregular provision is not homologated if it can be dissociated from the rest.
>
> The court cannot refuse to homologate the arbitration award on its own initiative unless it notes that the subject matter of the dispute is not one that may be settled by arbitration in Québec or that the award or measure is contrary to public order.

[17] Also, the purpose of an application to homologate an arbitration award is to ensure that the arbitration award can be enforced. We shall remind here that only the conclusions of an award are to be enforced. Not the reasons.

[18] In summary, Fix Auto did not show that the publicity of the Award, beyond the publicity of its orders, is necessary to avoid a denial of justice or is reasonably necessary to any other end. The application for the homologation shall not be used for the sole and distorted purpose of turning the Award and all the details it includes into publicly available information. The Court shall not bring its participation to such use of the homologation process.

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[13] CCP, art. 645(2).

[19] The above reasoning echoes the test set in *Sierra Club*, which Canadian courts[14] have used when a party seeks confidentiality orders regarding arbitration awards or proceedings:

> 53. Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[15]
>
> [Emphasis added]

[20] Although other Canadian courts[16] have come to opposite conclusions when faced with requests to seal arbitration awards or proceedings, the Court here agrees that applications for confidentiality of arbitration awards and proceedings must be decided on a case-by-case basis.[17] The answer may largely rest on the actual necessity of the disclosure sought.

[21] With all due respect for opposing views, the Court holds that confidentiality orders sought with respect to arbitration proceedings or awards should not be approached as any other request for confidentiality orders.

[22] In the case of arbitration, particularly under Quebec Law, cases and specific legal provisions already aim at protecting the confidentiality of the arbitration process. As highlighted in the above analysis, and as stipulated in Quebec Law, there is a legitimate public policy interest in encouraging private dispute resolution through arbitration by protecting the autonomy of arbitral process. The use of arbitration as a dispute resolution mechanism is encouraged and public interest favors confidentiality

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14 *Ontario Inc. v. Donato,* 2017 ONSC 4975, par. 9; *McHenry Software Inc. v. ARAS 360 Incorporated*, 2014 BCSC 1485, par. 27 and ssq; *Boeing Satellite Systems International Inc. v. Telesat Canada*, 2007 CanLII 7991 (ON SC), par. 11 and ssq.

15 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522.

16 *Ontario Inc. v. Donato,* 2017 ONSC 4975; *McHenry Software Inc. v. ARAS 360 Incorporated*, 2014 BCSC 1485; *Boeing Satellite Systems International Inc. v. Telesat Canada*, 2007 CanLII 7991 (ON SC).

17 *Ontario Inc. v. Donato,* 2017 ONSC 4975, par. 25.

orders to promote arbitrations and protect the expectations of privacy and confidentiality of the parties to the arbitration.[18]

[23] In itself, the general principle to the effect that procedures before the courts are public[19] does not automatically offset the confidentiality protection of PDPR processes. Admittedly, the widespread granting of sealing orders could diminish public confidence in the administration of justice. However, the open justice principle is already narrowed when arbitration proceedings are at stake.

[24] Hence, the burden rests on the party seeking the disclosure of otherwise confidential information to show that the salutary effects of disclosure outweigh the deleterious effects of infringing on the confidentiality expectations of parties to an arbitration. When no demonstration whatsoever is made of the utility or necessity of the disclosure of the arbitration award, the information should remain confidential.

[25] Finally, with the consent of all the parties involved, the other exhibits filed in support of the present Application for Homologation (License Agreement,[20] Request for Arbitration[21] and Response to the Request for Arbitration[22]) will be withdrawn from the court record. The parties admit that they are not necessary to the enforcement or recognition of the Award.

**WHEREFORE, THE COURT:**

[26] **HOMOLOGATES** the Arbitration award rendered in Montreal, Quebec, by the Honourable André Rochon, the Honourable François Roland, Ad. E. and the Honourable Joel Silcoff, ACIArb, on January 30, 2020, in the matters opposing the parties thereto, (**Award**) of which the conclusions read:

> **FOR THESE REASONS, THE TRIBUNAL:**
>
> **DECLARES** that the Second Amended and Restated License Agreement dated December 17, 2008 has not been terminated, remains in full force and effect and is considered renewed starting September 15, 2017;
>
> **DECLARES** that the Second Amended and Restated License Agreement dated December 17, 2008 is renewed until September 14, 2027;
>
> **THE WHOLE** with costs to be determined by the Tribunal according to the following schedule:

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18 See also: *Siedel v. TELUS Communications Inc.,* 2011 SCC 15, par. 89.
19 CCP, art. 11.
20 Exhibit P-2.
21 Exhibit P-3.
22 Exhibit P-4.

- Petitioners shall submit their written submissions (10 pages maximum) and supporting documents within 15 days of receipt of the present Award.

- Respondent shall do the same within 15 days of receipt of Petitioners' written submissions. Petitioners shall have the right to file a written rebuttal (2 pages maximum) to Respondent's submissions within 5 days of receipt thereof.

[27] **ORDERS** that the Award, except for the above-quoted conclusions, be filed under seal;

[28] **WITHDRAWS** Exhibits P-2 (License Agreement), P-3 (Request for Arbitration) and P-4 (Response to the Request for Arbitration) from the Court Record.



_____
MARIE-ANNE PAQUETTE, J.S.C.

Me Hubert Sibre
Me Rosemarie Sarrazin
**MILLER THOMSON**
Attorneys for the Petitioner

Me Jacques S. Darche
**BORDEN LADNER GERVAIS**
Attorney for the Respondent

Hearing date: February 24, 2020

# COUR D'APPEL



CANADA
PROVINCE DE QUÉBEC
GREFFE DE QUÉBEC

N° : 200-09-006471-087
(350-22-000086-085)

DATE : 16 janvier 2009

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**CORAM : LES HONORABLES FRANCE THIBAULT, J.C.A.**
**LOUIS ROCHETTE, J.C.A.**
**PAUL VÉZINA, J.C.A.**

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**ASSOCIATION DES PROPRIÉTAIRES DE BOISÉS DE LA BEAUCE**
APPELANTE - Demanderesse
c.

**LE MONDE FORESTIER,**
**ROBERT JOLY,**
**ANDRÉ ÉMERY,**
**ANDRÉA JACQUES,**
**CAMIL RANCOURT**
INTIMÉS - Défendeurs

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ARRÊT

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[1] **LA COUR**; - Statuant sur l'appel d'un jugement de la Cour du Québec, district de Beauce (honorable André J. Brochet), rendu le 12 septembre 2008, qui a accueilli la requête en radiation d'allégations présentée par les intimés à l'égard de la requête introductive d'instance.

[2] Après avoir étudié le dossier, entendu les parties et délibéré;

[3] Pour les motifs de la juge Thibault, auxquels souscrivent les juges Louis Rochette et Paul Vézina;

[4] **ACCUEILLE** l'appel en partie, avec dépens;

[5] **INFIRME** en partie le jugement de première instance;

[6] **SUBSTITUE** aux conclusions du jugement de première instance les conclusions suivantes :

> **ACCUEILLE** la requête en partie, avec dépens;
>
> **ORDONNE** la radiation des allégations mentionnées aux paragraphes 39, 40, 41, 42, 43, 44, 45, 46, 57, 60, 62, 65 et 72 de la requête introductive d'instance.



FRANCE THIBAULT, J.C.A.

LOUIS ROCHETTE, J.C.A.

PAUL VÉZINA, J.C.A.

Me Jean Fortier
Joli-Cœur, Lacasse
Pour l'appelante

Me Suzie Cloutier
Bélanger, Longtin
Pour l'intimé Le monde forestier

Me Frank D'Amours
Cain, Lamarre, Casgrain, Wells
Pour les intimés Joly, Émery, Jacques, Rancourt

Date d'audience : 19 décembre 2008

MOTIFS DE LA JUGE THIBAULT



[7] L'appelante se pourvoit contre un jugement de la Cour du Québec, district de Beauce (honorable André J. Brochet), rendu le 12 septembre 2008, qui a accueilli la requête en radiation d'allégations présentée par les intimés à l'égard de sa requête introductive d'instance.

* * *

[8] Dans sa requête introductive d'instance en diffamation, l'appelante demande que les intimés soient condamnés à lui payer 60 000 $, dont 50 000 $ à titre de dommages moraux pour atteinte à sa réputation et 10 000 $ à titre de dommages exemplaires.

[9] Elle invoque notamment qu'un article a été publié par l'intimé Le Monde forestier en juin 2007, que celui-ci contient des informations fausses et trompeuses, qu'il a été publié sans aucune vérification auprès de l'appelante et sans qu'aucune enquête n'ait été menée pour vérifier la justesse et la véracité des faits qui y sont énoncés. Elle soutient que l'article a été publié avec l'autorisation, l'encouragement, la tolérance, l'approbation des intimés Joly, Émery, Jacques et Rancourt et qu'aucune rétractation n'a été faite malgré une mise en demeure de sa part.

[10] L'appelante a déposé une plainte au Conseil de presse du Québec contre les intimés Joly, Émery et l'intimé Le Monde forestier à la suite de la parution de l'article dans le numéro de juin 2007.

[11] Dans sa requête introductive d'instance, elle fait état de cette plainte, de la réaction qu'elle suscite chez les intimés et de la décision du Conseil de presse :

> 30. Le 16 novembre 2007, une plainte a été déposée au Conseil de presse concernant les accusations non fondées publiées par les défendeurs;
>
> 31. Saisi de cette plainte, le Comité des plaintes et de l'éthique de l'information du Conseil de presse devait examiner, du point de vue de l'éthique journalistique, des griefs formulés par la demanderesse quant à la diffusion d'informations incomplètes et inexactes et pour manquement à l'impartialité, à l'équilibre et pour l'absence de rectification de l'information publiée;
>
> 32. Les défendeurs n'ont émis aucun commentaire au Comité des plaintes et de l'éthique de l'information qui était saisie de ladite plainte;
>
> 33. Ceux-ci ont indiqué dans leur lettre du 4 janvier 2008 qu'ils s'en remettaient à la compétence des tribunaux civils québécois, tel qu'il appert de la pièce R-7;

34. Le 28 mars 2008, le Conseil de presse rendait sa décision, tel qu'il appert de la pièce R-8 :

> « *Au terme de cet examen et en regard des manquements identifiés, le Conseil de presse retient partiellement la plainte contre le mensuel Le Monde forestier et ses collaborateurs MM. Robert Joly et André Émery aux motifs de mélange des genres journalistiques, de manque de mise en contexte, de défaut d'avoir révélé leur intérêt et également d'avoir permis un droit de réplique, et enfin, de manque de collaboration dans le cadre du processus de plainte du Conseil.* »

35. La décision contenait, notamment, les motifs suivants :

> […]

36. La décision publiée par le Conseil de presse met en évidence l'intention de nuire des défendeurs envers la demanderesse ainsi que leur attaque injustifiée à sa réputation;

37. Cette décision ne compense pas l'atteinte à la réputation qui subsiste, le Conseil de presse n'ayant pas le pouvoir de compenser la demanderesse en vertu des dispositions du Code civil du Québec quant à la responsabilité civile;

38. Le Monde forestier ne s'est pas acquitté de son obligation morale de publier la décision du Conseil de presse;

[12] Dans une autre partie de sa requête introductive d'instance, sous la rubrique « Le Droit », l'appelante invoque que la décision du Conseil de presse est pertinente à son recours :

42. Le Conseil de presse du Québec établit les principes journalistiques gouvernant le comportement d'une personne raisonnable;

43. Le Comité des plaintes et de l'éthique de l'information se fonde sur les principes mis de l'avant par le Conseil de presse pour rendre ses décisions quant à la qualification d'un comportement éthique;

44. Ces principes, ainsi que les conclusions du Comité des plaintes et de l'éthique de l'information, ont été repris par les tribunaux de droit commun afin de conclure au non-respect des standards journalistiques applicables. Ce principe a été appliqué, entre autres, à la décision *Le Devoir inc. c. Centre de psychologie préventive et de développement humain G.S.M. inc.*, REJB 1999-10604 (C.A.) :

> « *C'est en se basant sur les principes mis de l'avant par le Conseil de presse du Québec, à l'effet que les journalistes doivent livrer une information conforme et complète, qui ne doit pas laisser planer des*

*malentendus risquant de discréditer les personnes, que le juge conclut au non-respect des standards journalistiques. Je suis aussi de cet avis.* »

45. Ainsi, la décision publiée par le Conseil de presse est pertinente aux fins d'établir l'intention malveillante des défendeurs de nuire à la réputation de la demanderesse;

[13] Par ailleurs, la requête introductive d'instance contient de nombreux renvois à des articles de loi, à la jurisprudence et à la doctrine :

39. Le *Code civil du Québec* protège le droit à la réputation et indique la responsabilité qui s'applique à la diffamation :

« 3. Toute personne est titulaire de droits de la personnalité, tels le droit à la vie, à l'inviolabilité et à l'intégrité de sa personne, au respect de son nom, de sa réputation et de sa vie privée.

Ces droits sont incessibles. »

« 35. Toute personne a droit au respect de sa réputation et de sa vie privée.

Nulle atteinte ne peut être portée à la vie privée d'une personne sans que celle-ci y consente ou sans que la loi l'autorise. »

« 1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde. »

40. La Charte des droits et libertés de la personne, L.R.Q., c. C-12 énonce également la protection du droit à la réputation :

« 4. Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation. »

41. Les circonstances de la diffamation et la responsabilité dans les cas de diffamation ont été définies et interprétées dans la jurisprudence :

Radiomutuel Inc. c. Savard, 2002 CanLII 27151 (QC C.A.), no 200-09-003304-000, le 6 décembre 2002, j. Rousseau-Houle, j. Rochette, j. Morin

> « [35] *Il est bien établi en droit civil que la diffamation ne résulte pas seulement de la divulgation ou de la publication de nouvelles fausses ou erronées. Il y a diffamation lorsque les faits publiés sont exacts, mais que la publication n'a pour autre but que de nuire à la victime[6]. Les termes employés pour décrire le comportement d'une personne peuvent encore être diffamatoires et entraîner la responsabilité civile de leur auteur, si, bien qu'utilisés sans intention de nuire, ils sont publiés sans vérification sérieuse et portent atteinte à sa réputation. La responsabilité civile pour diffamation peut résulter alors de l'absence de rigueur dans la vérification des informations jumelées aux insinuations tendancieuses.* »
>
> *Latreille c. Choptain*, REJB 1997-01075 (C.S.) :
>
> *« [80] À cela s'ajoute la protection de la réputation :*
>
> *416 – Terminologie – En droit civil, il n'existe pas de différence entre la diffamation au sens strict du mot et le libelle que connaît le droit pénal. Toute atteinte à la réputation, qu'elle soit verbale (parole, chanson, mimique) ou écrite (lettre, pièce de procédure, caricature, portrait, etc.), publique (articles de journaux, de revues, livres, commentaires de radio, de télévision) ou privée (lettre, tract, rapport, mémoire), qu'elle soit seulement injurieuse ou aussi diffamatoire, qu'elle procède d'une affirmation ou d'une imputation ou d'un sous-entendu, peut constituer une faute qui, si elle entraîne un dommage, doit être sanctionnée par une compensation pécuniaire. On retrouve le terme diffamation employé la plupart du temps dans un sens large couvrant donc l'insulte, l'injure et pas seulement l'atteinte stricte à la réputation. »*

[…]

46. Des dommages moraux ont pour but de « *compenser l'atteinte à sa réputation et de chercher à réparer l'humiliation, le mépris, la haine ou le ridicule dont elle a fait l'objet* ». (Jean-Louis BAUDOUIN, *La responsabilité civile*, Les Éditions Yvon Blais, inc., 1998, p. 480).

[…]

57. L'honnêteté et l'intégrité de l'Association est alors mise en doute lorsque des informations fausses sont transmises au public. La décision *Lecompte c. Allard*, REJB 2001-24601 (C.S.) applique ces principes d'honnêteté et d'intégrité pour condamner une personne pour diffamation :

> « *[23] Il a été prouvé par prépondérance de preuve que les plaintes relatives au ratio étaient sans fondement (3 mai 1999, 2 septembre 1999, 24 novembre 1999 et 28 janvier 2000). Or, à chaque plainte, les intimés portent atteinte à la réputation de la requérante puisqu'ils mettent en doute l'honnêteté et l'intégrité de la requérante eu égard aux engagements qu'elle a pris avec Familigarde. Étant donné qu'il a été mis en preuve qu'elle*

*respecte effectivement ses engagements quant au ratio, de même que les normes et règlements qui lui sont applicables, il y a atteinte à la réputation.* »

[…]

62. L'auteure Claude Dallaire écrit à ce propos :

« La mise en œuvre des dommages exemplaires sous le régime des chartes, 2e édition, Wilson & Lafleur, 2003, pages 138 et suivantes :

« *La conduite de l'auteur de l'atteinte est au cœur de l'analyse effectuée par le tribunal.*

*La période préalable au geste fautif, les faits particuliers survenus au moment où le geste dommageable a été posé, les suites du geste, tel le refus d'excuses ou la récidive ou l'admission rapide des torts causés ainsi que l'attitude tout au long du processus judiciaire sont scrutés à la loupe par le tribunal pour évaluer l'ampleur et l'importance des gestes posés, afin de déterminer le quantum approprié de dommages exemplaires.* »

[…]

65. Les dommages-intérêts découlant d'une condamnation pour diffamation sont évalués, entre autres, selon l'intention ou le but derrière les atteintes, tel que le décrit la décision *Lecompte c. Allard*, REJB 2001-24601 (C.S.) :

« [*37] Dans les affaires de diffamation, il faut se demander quelle est l'intention ou le but derrière les atteintes afin de déterminer les dommages-intérêts de la victime. L'affaire Latreille c. Choptain parle des facteurs d'évaluation en ces termes :*

*Comme l'a bien démontré un auteur, l'analyse des facteurs influant sur l'évaluation du préjudice moral est complexe. On retient tout d'abord la gravité de l'acte. S'agit-il d'un simple commentaire discourtois ou impoli, ou au contraire d'une attaque en règle? L'intention de l'auteur de la diffamation, si elle n'a aucune importance au niveau de l'établissement de la faute, peut en avoir une au niveau de l'évaluation du préjudice. La jurisprudence est ainsi plus sévère lorsque l'auteur s'est servi de la diffamation pour tenter de ruiner le demandeur ou de bloquer ses aspirations politiques. La diffusion de la diffamation est évidemment importante. Une publicité large doit logiquement motiver un octroi plus généreux que si elle a été restreinte à un petit cercle. La condition des parties, la portée qu'a eue l'acte sur la victime et sur son entourage, la durée de l'atteinte, la permanence ou le caractère éphémère des effets sont aussi à considérer.* »

[…]

72. L'auteure Claude Dallaire précise :

> La mise en œuvre des dommages exemplaires sous le régime des chartes, 2e édition, Wilson & Lafleur, 2003, pages 153 et suivantes :
>
> « *C'est donc l'acharnement, la persistance et la récidive qui seront évalués, peu importe leur forme, pour déterminer la gravité de la conduite et faire en sorte qu'un quantum de dommages exemplaires plus important soit accordé parle tribunal*. »

* * *

[14] Le juge de première instance a accueilli la requête des intimés et ordonné la radiation des allégations précitées ainsi que le retrait des pièces auxquelles elles renvoient.

[15] En ce qui concerne la plainte du Conseil de presse, la décision rendue et tous les faits les entourant, le juge de première instance justifie la radiation des allégations et le retrait des pièces par un défaut de pertinence :

> [12] Si le Tribunal admettait la pertinence de la décision rendue, il lui donnerait alors un poids qu'elle n'a pas, et reconnaîtrait que l'opinion que peuvent avoir un groupe d'intervenants ou une corporation ou une association doit être prise en considération dans l'évaluation de la faute, ce qui est inacceptable. Sans compter que la recherche d'une qualification de la décision du Conseil de presse dénaturerait complètement le débat engagé par la requête introductive d'instance.
>
> [13] Dès qu'un tribunal judiciaire est saisi d'un recours, ce sont les règles qui s'appliquent à son égard qui doivent être retenues, à partir de l'institution du recours jusqu'à la décision de ce tribunal. Non seulement la décision d'une autorité déontologique de discipline, d'éthique ou autre rendue ou prononcée par quelqu'autorité que ce soit et concernant les mêmes parties est-elle non pertinente, mais pose le danger d'influer faussement sur la conclusion à laquelle le Tribunal doit en venir quant au litige qui est devant lui. Il pourrait en être autrement s'il s'agissait d'une décision rendue à la suite de la transgression d'une loi civile, pénale ou criminelle.
>
> [14] La recherche de la vérité et l'application de la règle de droit ne nécessitent pas de connaître la raison d'être du Conseil de presse, ni son fonctionnement, ni la qualification de ses membres, ni la façon dont ils sont nommés ou encore dont ils décident de la déontologie de leurs membres, ni le fondement de leurs règles de procédure. La volonté de donner la moindre force probante à la décision nécessiterait cette preuve.

> [15] Certes, les règles d'éthique journalistique et de déontologie qui n'ont pas été respectées peuvent faire l'objet d'une preuve pertinente. Mais, c'est au tribunal civil à décider si leur transgression constitue une faute génératrice de dommages. D'autant plus, le Tribunal le répète, que l'opinion du Conseil de presse a été exprimée sans que les défendeurs aient fait connaître leur point de vue ces derniers s'en remettant aux tribunaux civils, seuls compétents pour juger de la faute. Cette prise de position des défendeurs amplifie et d'une certaine façon redouble la non-pertinence de la décision R-8.

[16] Pour ce qui est des renvois aux dispositions législatives, à la doctrine et à la jurisprudence, le juge de première instance se fonde sur les articles 76 et 111 *C.p.c.* et conclut qu'ils doivent être radiés parce qu'il ne s'agit pas d'un énoncé des faits que l'appelante entend prouver.

* * *

[17] L'appel pose donc deux questions : la pertinence des allégations relatives au Conseil de presse et la légalité de celles qui comportent des propositions de droit.

**La pertinence**

[18] L'article 2857 C.c.Q. pose la règle que tout fait pertinent est recevable :

> 2857. La preuve de tout fait pertinent au litige est recevable et peut être faite par tous moyens.

[19] La pertinence d'un fait s'évalue au regard de l'objet du litige. Il s'agit de vérifier si la preuve du fait tend à établir l'existence ou non du droit réclamé. Elle s'apprécie en fonction de l'obligation qui incombe aux parties de faire la preuve des éléments sur lesquels repose la réclamation. Comme l'indique le professeur Jean-Claude Royer « un fait est notamment pertinent lorsqu'il s'agit d'un fait en litige, s'il contribue à prouver de façon rationnelle un fait en litige ou s'il a pour but d'aider le tribunal à apprécier la force probante d'un témoignage »[1].

[20] Le fondement de la règle de la pertinence vise à restreindre la preuve à ce qui est nécessaire au litige pour éviter la confusion et la prolongation inutile des débats associés à l'administration d'une preuve non pertinente.

[21] Lorsqu'il est saisi d'une requête en radiation d'allégations pour défaut de pertinence, le juge doit être prudent avant de retrancher des allégations d'un acte de procédure, car il est parfois difficile d'évaluer hors contexte la portée exacte de la preuve et son impact sur l'issue du recours. En cas de doute, la prudence commande

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[1] Jean-Claude Royer, *La preuve civile*, 3e éd., Cowansville, Éditions Yvon Blais, 2003, p. 745.

de laisser au juge saisi du fond du litige le soin d'évaluer la pertinence des faits invoqués[2].

[22] Ces principes étant posés, il y a lieu de vérifier si le juge de première instance a eu raison de conclure, au stade très préliminaire d'une requête en vertu de l'article 168 *in fine C.p.c.*, au rejet des allégations pour défaut de pertinence.

[23] S'agissant ici d'un recours en diffamation contre un professionnel de l'information, ce sont ces règles particulières de la responsabilité civile qui doivent être examinées. Elles ont été exposées à au moins deux reprises par le juge LeBel d'abord dans *Société Radio-Canada c. Radio Sept-Îles*[3] et ensuite, dans *Gilles E. Néron Communication Marketing inc*. c. *Chambre des notaires du Québec*[4]. Dans ces deux affaires, le juge LeBel écrit qu'il faut procéder à une analyse contextuelle pour déterminer si une faute a été commise. Et, le facteur directeur qui permet de décider de l'existence d'une faute réside dans la démonstration du non-respect des normes professionnelles :

> Somme toute, l'existence d'une faute constitue l'exigence de base du droit de la responsabilité civile pour diffamation et cette faute doit être appréciée en fonction des normes journalistiques professionnelles. Les journalistes ne sont pas tenus à un critère de perfection absolue; ils sont astreints à une obligation de moyens. D'une part, le fait qu'un journaliste diffuse des renseignements erronés n'est pas déterminant en matière de faute. D'autre part, un journaliste ne sera pas nécessairement exonéré de toute responsabilité simplement parce que l'information diffusée est véridique et d'intérêt public. Si, pour d'autres raisons, le journaliste n'a pas respecté la norme du journaliste raisonnable, les tribunaux pourront toujours conclure à l'existence d'une faute. Vue sous cet angle, la responsabilité civile pour diffamation continue de s'inscrire parfaitement dans le cadre général de l'art. 1457 C.c.Q.
>
> 62 La conduite du journaliste raisonnable devient donc une balise de la plus haute importance. En effet, elle est l'outil qui nous permet d'évaluer la nature d'une conduite raisonnable dans le contexte de l'art. 1457 C.c.Q. Elle représente la norme par excellence à l'aune de laquelle on détermine si une faute a été commise et le cadre de référence servant à passer au crible d'autres éléments importants à prendre en considération, tels la véracité, la fausseté et l'intérêt public. Il faut donc rechercher en l'espèce si les journalistes du Point ont respecté les normes professionnelles du journaliste raisonnable dans leur reportage du 12 janvier.

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2 *Poulin c. Groupe Jean Coutu (PJC) inc.*, J.E. 2006-235 (C.A.); *Corporation McKesson Canada c. Losier*, [2004] R.J.Q. 1178 (C.A.); *Hénault c. Les entreprises Berthier inc.*, AZ-50111771, 2002-05-17 (C.A.); *Charbonneau c. Multi Restaurants inc.*, [2000] R.J.Q. 705 (C.A.); *St-Onge Lebrun c. Hôtel-Dieu de St-Jérôme*, [1990] R.D.J. 56 (C.A.); *Kruger Inc. c. Kruger*, [1987] R.D.J. 11 (C.A.); Denis Ferland et Benoît Emery, *Précis de procédure civile du Québec*, 4e éd., vol. 1, Cowansville, Éditions Yvon Blais, 2003, p. 301-304; J.-C. Royer, *supra*, note 1, p. 751-753.

3 [1994] R.J.Q. 1811(C.A.).

4 [2004] 3 R.C.S. 95.

[24] Vue sous cet angle, la décision du Conseil de presse paraît pertinente, du moins à ce stade-ci des procédures, en ce qu'elle énonce les normes professionnelles applicables. À cet égard, je renvoie à l'affaire *Le Devoir inc. c. Centre de psychologie préventive et de développement humain G.S.M. inc.*[5], dans laquelle la Cour écrit :

> C'est en se basant sur les principes mis de l'avant par le Conseil de presse du Québec, à l'effet que les journalistes doivent livrer une information conforme et complète, qui ne doit pas laisser planer des malentendus risquant de discréditer les personnes, que le juge conclut au non-respect des standards journalistiques. Je suis aussi de cet avis.

[25] Le Conseil de presse est un organisme tripartite fondé en 1973 dont le conseil d'administration et les comités sont composés de journalistes, de membres désignés par les entreprises de presse et de représentants du public. Il s'agit d'un organisme privé, à but non lucratif, dont la mission consiste à protéger la liberté de la presse et à défendre le droit du public à une information de qualité. Il agit comme tribunal d'honneur de la presse québécoise et il n'impose aucune autre sanction qu'une sanction morale[6].

[26] Cela ne signifie pas que le juge du procès sera nécessairement lié par les conclusions du Conseil de presse. En effet, la force probante de son opinion peut être affectée notamment par le fait que les intimés n'ont pas fait valoir leur point de vue. De plus, comme il ne s'agit pas d'une décision judiciaire ou quasi judiciaire, on ne peut lui reconnaître une présomption simple de vérité comme l'a fait la Cour d'appel dans l'affaire *Ali c. Compagnie d'assurances Guardian du Canada*[7]. Dans cette affaire, la Cour a décidé que, à l'occasion d'une poursuite civile d'un assuré contre son assureur pour obtenir une indemnité d'assurances à la suite de l'incendie d'un immeuble, un jugement retenant un verdict de culpabilité pour un incendie criminel de l'assuré constituait un fait juridique pertinent.

[27] Sur cette question de présomption découlant d'une décision judiciaire ou quasi judiciaire, l'affaire *Ali* précitée a provoqué un changement dans l'orientation des tribunaux québécois. Depuis, la jurisprudence considère que toute constatation de fait à la base d'une décision judiciaire ou quasi judiciaire bénéficie de la présomption simple d'exactitude. À cet égard, Léo Ducharme[8] répertorie les cas suivants à l'appui de la thèse de la présomption simple d'exactitude :

> C'est ainsi qu'il a été jugé :
>
> - qu'un jugement blâmant sévèrement un avocat pour avoir agi à titre de procureur de la partie demanderesse dans un recours manifestement mal fondé peut lui être opposé dans une action subséquente en responsabilité fondée sur les mêmes faits, au motif

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5 [1999] R.R.A.17 (C.A.).
6 En ligne : Conseil de presse du Québec <http://www.conseildepresse.qc.ca> (5 janvier 2009).
7 [1999] R.R.A. 427 (C.A.).
8 Léo Ducharme, *Précis de la preuve*, 6e éd., Montréal, Wilson & Lafleur, 2005, p. 233-234.

que le jugement constitue une présomption simple et réfutable des faits en question;

- qu'un jugement du comité de déontologie policière déclarant qu'un policier a commis un acte dérogatoire au code de déontologie en émettant deux constats d'infraction à un motocycliste, ainsi que le verdict d'acquittement prononcé par la Cour municipale au sujet de ces infractions constituent une preuve réfutable qu'il a commis un abus de pouvoir lorsqu'il a émis les constats en question;

- que, dans une action en dommages-intérêts, contre un Centre jeunesse, pour avoir eu un comportement fautif à l'égard d'un enfant de neuf ans qui avait verbalisé des intentions suicidaires, le fait que la prise de position du DPJ avait été entérinée par le Tribunal de la jeunesse faisait présumer que le Centre avait agi correctement;

- qu'un jugement de la Cour supérieure infirmant une décision de la Cour municipale et déclarant une personne coupable d'avoir fait l'extraction, sans permis, de sol arable sur deux lots vu qu'elle ne pouvait prétendre avoir des droits acquis à ce sujet, constituait, dans le cadre d'une requête, par cette personne, en jugement déclaratoire et en mandamus visant à se faire reconnaître, sur l'un de ces lots, des droits acquis pour ce genre d'exploitation, une présomption qu'elle n'en avait pas;

- que lorsque sur la base qu'un homme âgé de 37 ans avait, alors qu'il était enfant, été adopté de fait par une femme indienne, un jugement d'adoption est prononcé, ce jugement ne constitue pas chose jugée à l'égard de la bande indienne quant à la réalité de l'adoption de fait, mais seulement une présomption simple qu'elle peut réfuter par une preuve contraire à l'occasion d'un recours contestant l'inscription de l'adopté sur la liste des membres de la bande;

- qu'une personne qui a été acquittée de l'accusation de tentative de meurtre et qui est poursuivie en responsabilité sur la base des mêmes faits, doit être condamnée si le demandeur établit, par prépondérance de preuve, qu'elle a attenté à sa vie.

[28] Par ailleurs, la séquence des faits allégués, la plainte au Conseil de presse et l'absence de collaboration des intimés lors de l'étude de la plainte font partie du contexte factuel et sont de nature à soutenir la demande de dommages exemplaires de l'appelante. Un découpage très pointu des allégations à ce stade des procédures paraît imprudent. Le juge du fond sera mieux placé pour apprécier la pertinence de ces faits.

**La légalité**

[29] Le juge de première instance a radié toutes les allégations de la requête introductive d'instance qui contiennent des renvois à des articles de loi, à la jurisprudence et à la doctrine. Il a basé sa décision sur les articles 76 et 111 *C.p.c.*

[30] Le *Code de procédure civile* énonce à titre de règle générale que, dans les actes de procédure, les parties doivent exposer les faits qu'elles entendent invoquer et les conclusions qu'elles recherchent. Le but de ces exigences est de permettre aux parties de connaître les faits qui seront prouvés au procès de façon à ce qu'elles soient en mesure de se préparer adéquatement. Les articles précités ont toujours été compris comme excluant les allégations de droit. La règle a cependant été appliquée avec souplesse comme il se doit en matière de procédure d'autant qu'aucune disposition du *Code de procédure civile* n'interdit aux parties d'énoncer, de façon concise, les principes de droit invoqués au soutien de leur acte de procédure lorsque cela est nécessaire ou utile. D'ailleurs, dans certains domaines spécialisés du droit, il s'agit d'une pratique qui s'est développée et qui est acceptée, car elle permet de faire connaître à l'autre partie et au tribunal le fondement de l'action ou de tout moyen invoqué pour y faire échec. Je pense, par exemple, à certains recours déclaratoires où de telles allégations de droit peuvent même être essentielles à l'intelligibilité de la procédure.

[31] En revanche, il est contraire à l'économie du *Code de procédure civile* de transformer la requête introductive d'instance en plaidoirie comme l'a fait ici l'appelante en citant au long toutes les dispositions législatives applicables, en faisant état de leur interprétation et en citant la doctrine et la jurisprudence s'y rapportant.

[32] L'article 168 *in fine C.p.c.* permet la radiation des allégations « non pertinentes, superflues ou calomnieuses ». En l'espèce, le juge de première instance a eu raison de radier ces allégations qui sont, à l'évidence, superflues.

[33] Pour ces motifs, je propose d'accueillir l'appel en partie, avec dépens, d'infirmer en partie le jugement de première instance et de substituer aux conclusions du jugement de première instance les conclusions suivantes :

> **ACCUEILLE** la requête en partie, avec dépens;
>
> **ORDONNE** la radiation des allégations mentionnées aux paragraphes 39, 40, 41, 42, 43, 44, 45, 46, 57, 60, 62, 65 et 72 de la requête introductive d'instance.

FRANCE THIBAULT, J.C.A.

# COUR SUPÉRIEURE



CANADA
PROVINCE DE QUÉBEC
DISTRICT DE GATINEAU

N° : 550-24-000041-206

DATE : 16 juin 2020

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**SOUS LA PRÉSIDENCE DE L'HONORABLE PIERRE DALLAIRE, J.C.S.**

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**[INTERVENANTE 1]**
Partie appelante - Demanderesse
c.

**A**
**ET B**
Partie intimée - Défenderesse

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JUGEMENT

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## L'APERÇU

[1] Dans cette affaire, la Cour supérieure est saisie d'un appel interjeté[1] par [Intervenante 1] en sa qualité de personne autorisée par la Directrice de la protection de la jeunesse (ci-après : l'Appelante) à l'encontre d'un jugement rendu par la Cour du Québec, Chambre de la jeunesse, le 29 janvier 2020.

[1] Ce droit d'appel devant la Cour supérieure est prévu aux articles 99 et suivants de la *Loi sur la protection de la jeunesse,* RLRQ, c. P-34.1.

[2] Ce jugement rejette la demande de l'Appelante, qui invoque un risque sérieux d'abus sexuel, de déclarer compromis la sécurité et le développement de l'enfant X âgée de 9 ans sur la base du fait que son père (le défendeur B, ci-après : le père) aurait « posé des gestes de nature sexuelle à l'endroit de Y, la fille de sa conjointe »[2].

[3] Le procès devant la Chambre de la jeunesse n'a pas été long, à peine une heure trente, en présence de la mère (non représentée) et du père (dûment représenté par procureure).

[4] L'enfant X était aussi représentée par procureure qui a, tant devant la Chambre de la jeunesse que devant la Cour supérieure, appuyé la position de l'Appelante, soit qu'il existe un risque sérieux d'abus sexuel à l'égard de sa cliente à la lumière de la preuve.

[5] Il ressort du dossier que tout a été ficelé rapidement.

[6] D'une part, la preuve documentaire a été déposée de consentement avec l'accord de toutes les parties.

[7] D'autre part, les témoignages de Mme [Intervenante 1], qui a été entendue sans la moindre objection de la part de quiconque relativement à l'admissibilité de ses propos, de Mme [Intervenante 2], une technicienne en assistance sociale, et de la mère de l'enfant, ont été brefs.

[8] L'enfant X n'a pas témoigné, mais était disponible si la Cour ou une partie avait demandé qu'elle témoigne. Il faut en comprendre que ses verbalisations étaient rapportées au Tribunal soit par le rapport, soit par le témoignage de Mme [Intervenante 1] et que personne n'a jugé nécessaire ou utile de faire entendre l'enfant.

[9] Le père, quant à lui, était présent tout au long du procès mais n'a pas témoigné. Bien que le juge ait pris la précaution de s'enquérir auprès de sa procureure s'il entendait témoigner, la réponse a été : « Non, pas aujourd'hui ».[3]

[10] La preuve documentaire était composée essentiellement du rapport[4] préparé par Mme [Intervenante 1] pour la Cour du Québec Chambre de la jeunesse, ainsi que d'un jugement[5] rendu par le juge Denis Saulnier, de la Cour du Québec Chambre de la jeunesse, dans le dossier de l'enfant Y où le juge conclut qu'il y a eu « abus sexuel par le conjoint de la mère »[6], ce dernier étant, précisons-le, le père de X dans le présent dossier.

[11] Au terme de l'audition, le dossier a été pris en délibéré et le jugement rendu subséquemment le 29 janvier 2020.

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[2] Jugement dont appel, par. 1.
[3] Notes sténographiques, p. 46.
[4] Pièce D-2.
[5] Pièce D-3.
[6] *Id.,* par. 26.

## 1. LE JUGEMENT DONT APPEL

[12] Le premier juge cerne très bien la question dont il est saisi lorsqu'il écrit :

> [8] La principale question en litige est de savoir si l'enfant X se retrouve dans une situation de risque sérieux d'abus sexuel compte tenu des gestes d'abus sexuel qu'aurait posé son père à l'endroit de l'enfant Y.

[13] Il souligne par ailleurs correctement que la Directrice (l'Appelante) a le fardeau de prouver « de manière prépondérante que le père s'est livré à des gestes sexuels sur l'enfant Y. »[7]

[14] Le juge n'a pas tort non plus d'indiquer : « En l'espèce, le père niant les abus sexuels allégués, il appartient à la Directrice d'en faire la preuve de manière prépondérante»[8]. En effet, à défaut d'un aveu de la part du père, la partie demanderesse doit apporter une preuve prépondérante de ce qu'elle avance.

[15] Il faut toutefois préciser que le père n'a pas témoigné et n'a pas affirmé sous serment nier les abus sexuels allégués, ni n'a donné sa version des faits à l'encontre de la preuve déposée par la Directrice.

[16] C'est simplement sa procureure qui a annoncé en cours de procès que son client niait ces abus sexuels. Dit autrement, aucune preuve n'a été apportée à l'appui de cette annonce de dénégation des abus sexuels à l'encontre de l'enfant Y qui ne peut, en soi, être considérée comme une preuve admissible.

[17] Au terme de son analyse, le premier juge conclut que l'Appelante ne s'est pas déchargée du fardeau de prouver « de manière prépondérante en l'espèce, que le père s'est livré à un abus sexuel à l'égard de l'enfant Y. »[9]

[18] En ce qui concerne la preuve documentaire, composée du jugement rendu par le juge Saulnier déclarant que le père est reconnu responsable d'abus sexuels sur l'enfant de sa conjointe Y, et du rapport de Mme [Intervenante 1], le premier juge en dispose de la façon suivante.

[19] Pour ce qui est de la portée du jugement du juge Saulnier, il écrit :

> [20] En l'espèce, la Directrice invite le Tribunal à tirer des conclusions de faits en se basant sur un jugement antérieur dans lequel les présentes parties (père, mère, enfant) n'étaient pas impliquées. L'exercice paraît pour le moins périlleux et le danger invoqué par mon collègue le juge La Rue, bien présent.

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[7] Jugement dont appel, par. 15.
[8] *Id.* par. 18.
[9] *Id.* par 25.

[20] Plus loin, il ajoute :

> [22] Ainsi, le jugement rendu par mon collègue (le juge Saulnier) dans la situation de Y (…) ne saurait faire la preuve de l'abus sexuel invoqué par la directrice dans le cadre du présent litige. Conclure autrement aurait pour résultat de priver le père de son droit à une audition juste et équitable.

[21] Il faut dire qu'en première instance, l'Appelante, en plaidoirie, avait proposé que le jugement du juge Saulnier constituait « chose jugée » relativement à la question de savoir si Y avait été victime d'abus sexuels de la part du père, une affirmation qui a été mentionnée et retenue par le premier juge.[10]

[22] Dans ce contexte, il ne faut pas se surprendre que le premier juge ait été très réticent, pour ne pas dire tout à fait opposé à l'idée de rendre jugement sur la question de savoir si l'enfant Y avait été victime d'abus sexuel en s'appuyant sur un jugement rendu dans un contexte où le père n'était pas partie au débat.

[23] Toutefois, dans son appel devant la Cour supérieure, l'Appelante a modifié son tir pour donner au jugement du juge Saulnier sa véritable portée juridique, qui n'est pas qu'il constitue chose jugée, ce qui serait choquant vu que le père n'était pas partie au débat, mais plutôt que le jugement est un fait juridique important qui bénéficie d'une présomption simple d'exactitude, selon la Cour d'appel.

[24] Dans l'affaire *Association des propriétaires de boisés de la Beauce*[11], la Cour d'appel précise la portée qu'il faut donner aux constatations de faits que l'on retrouve dans une décision judiciaire ou quasi judiciaire :

> [27] Sur cette question de présomption découlant d'une décision judiciaire ou quasi judiciaire, l'affaire *Ali* précitée a provoqué un changement dans l'orientation des tribunaux québécois. Depuis, la jurisprudence considère que toute constatation de fait à la base d'une décision judiciaire ou quasi judiciaire bénéficie de la présomption simple d'exactitude. (soulignement ajouté)

[25] La conséquence qui découle de cette présomption simple est qu'il déplace le fardeau de la preuve sur les épaules de celui qui conteste les faits découlant de cette présomption.

[26] En d'autres mots, le jugement du juge Saulnier, bénéficiant de la présomption simple d'exactitude, constitue une preuve *prima facie* de ses constatations de faits, soit que le père est responsable d'abus sexuel sur l'enfant Y.

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[10] Jugement dont appel, par. 15 : « lors des plaidoiries, la procureure de la Directrice invoque que le Tribunal ne peut pas en l'espèce conclure que X n'a pas été victime d'abus sexuel puisqu'il y a là chose jugée. »

[11] *Association des propriétaires de boisés de la Beauce* c. *Le monde forestier,* 2009 QCCA 48.

[27] Par contre, cette présomption simple peut être renversée par une preuve contraire, par exemple le témoignage du père.

[28] Or, en l'espèce, le dossier ne révèle absolument aucune preuve à l'encontre de la présomption d'exactitude dont bénéficie le jugement du juge Saulnier.

[29] À la lumière du dossier, le Tribunal est d'avis que si le premier juge avait eu l'avantage d'avoir l'excellent éclairage dont a bénéficié la Cour supérieure relativement aux principes juridiques permettant de définir la portée du jugement du juge Saulnier, il aurait appliqué la présomption simple d'exactitude des faits qu'il contient et constaté qu'aucune preuve permettant de renverser cette présomption ne lui avait été soumise.

[30] Il en découle qu'il n'aurait eu d'autre choix que de conclure à l'existence d'une preuve prépondérante que l'enfant Y avait été victime « d'abus sexuel par le conjoint de la mère ».

[31] Par ailleurs, vu sous l'angle de la présomption simple d'exactitude, il en ressort que le père n'était pas privé d'une défense pleine et entière car il pouvait, confronté au jugement Saulnier, témoigner pour réfuter cette preuve ou présenter toute autre preuve en vue de renverser la présomption.

[32] À mon avis, il ne peut donc se plaindre d'avoir été privé du droit d'avoir une défense pleine et entière car il pouvait, comme le premier juge lui en a d'ailleurs donné l'occasion, être entendu et présenter des preuves contradictoires (comme par exemple demander que l'enfant Y soit entendu), ce qu'il a décidé de ne pas faire.

[33] Aussi, bien que présent, assisté d'une procureure, tout au long de l'audition devant le premier juge, le père n'a formulé aucune objection[12] au début et pendant l'audition à la mise en preuve du jugement Saulnier et du témoignage et du rapport de Mme [Intervenante 1].

[34] À mon avis, dans ce contexte, considérer que le père a été privé d'une défense pleine et entière serait une erreur.

[35] Par contre, dans la mesure où l'Appelante bénéficiait d'une présomption d'exactitude découlant du jugement Saulnier à l'effet qu'une « preuve non contredite d'abus sexuel »[13] était faite relativement à l'enfant Y, le père avait le fardeau de renverser cette présomption par une preuve satisfaisante aux yeux de la Cour, ce qu'il n'a pas fait.

[36] Pour ce seul motif[14], l'appel doit être accueilli.

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[12] Il faut souligner que la procureure de l'Appelante avait pris la peine de vérifier, lors du dépôt de la pièce D-3 si elle « était admise en preuve ». Le juge ayant demandé s'il y avait objection « d'une partie ou l'autre au dépôt de cette preuve là », les procureures ont répondu : « Non ». (Voir : notes sténographiques, p. 3).

[13] Pièce D-3, p.3.

[14] Plusieurs autres arguments et moyens sont soulevés dans le mémoire de l'Appelante à l'encontre du jugement dont appel mais, vu la conclusion à laquelle le Tribunal en arrive sur la question de l'existence d'une preuve prépondérante, il n'est pas nécessaire d'y ajouter d'autres moyens.

[37] Le premier juge, ayant conclu que l'Appelante « ne s'était pas déchargée de son fardeau de prouver de manière prépondérante, en l'espèce, que le père s'est livré à un abus sexuel à l'égard de l'enfant Y »[15], il n'a pas procédé à évaluer s'il y avait, comme le proposait l'Appelante, un risque sérieux d'abus sexuel pour X. Il écrit :

> [26] Compte tenu de la conclusion du Tribunal en lien avec l'abus sexuel et du rôle central de cette question dans la théorie de la cause de la Directrice, la preuve ne permet pas de conclure à un risque sérieux d'abus sexuel dans la situation de l'enfant X.

[38] Or, dans la mesure où la Cour supérieure, siégeant en appel du jugement en question, considère qu'il y a une preuve prépondérante d'abus sexuel à l'égard de l'enfant Y, il devient nécessaire de pousser l'analyse plus loin et déterminer si cet abus sexuel, et l'ensemble de la preuve, permettent de conclure que la sécurité ou le développement de l'enfant sont compromis au sens de la *Loi sur la protection de la jeunesse.*

[39] Compte tenu du fait que le premier juge ne s'est pas rendu à cette étape, deux scénarios sont possibles.

[40] D'une part, la Cour supérieure peut retourner le dossier à la Cour du Québec Chambre de la famille pour qu'elle procède à déterminer si la preuve prépondérante d'abus sexuel du père sur l'enfant Y et les autres éléments de preuve au dossier permettent de conclure à un risque sérieux d'abus sexuel de la part du père à l'égard de sa fille X.

[41] D'autre part, la Cour supérieure peut, dans le cadre de l'appel, à la lumière de la preuve documentaire et des notes sténographiques, décider si, en l'espèce, il existe un risque sérieux d'abus sexuel à l'égard de X justifiant de déclarer la sécurité ou le développement de l'enfant compromis et rendre les ordonnances appropriées pour assurer sa protection.

[42] En l'espèce, le Tribunal est d'avis qu'il serait contraire à l'intérêt de la justice et à son efficacité[16] de retourner le dossier à la Cour du Québec Chambre de la famille dans un contexte où il est évident que la preuve prépondérante de l'abus sexuel dont le père est responsable à l'égard de l'enfant de sa conjointe mène inéluctablement, à la lumière de l'ensemble de la preuve, à la conclusion qu'il existe un risque sérieux d'abus sexuel à l'égard de X.

[43] Il est vrai, comme l'a indiqué la procureure de l'Appelante, que ce n'est pas parce qu'il y a eu un abus sexuel sur un enfant qu'il y en aura automatiquement sur un autre.

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[15] Jugement dont appel, par. 25.

[16] Dans un contexte où les tribunaux sont débordés à cause de la pandémie et ne peuvent que difficilement faire face aux dossiers urgents, il ne serait pas approprié de retourner le dossier à la Cour du Québec Chambre de la jeunesse quand les éléments nécessaires pour trancher la question sont au dossier porté en appel, à la disposition de la Cour supérieure.

[44] Toutefois, la véritable question n'est pas de savoir s'il y aura automatiquement un abus sexuel sur l'enfant X mais bien s'il y a un risque sérieux[17] qu'il y en ait un.

[45] En l'espèce, compte tenu du fait qu'il s'agit de deux très jeunes filles à peu près du même âge, entre six et huit ans, et des nombreux autres facteurs de risques identifiés par Mme [Intervenante 1] dans son rapport et dans son témoignage, encore une fois qui ont été mis en preuve de consentement et qui n'ont fait l'objet d'aucune objection de la part du père, le Tribunal est d'avis qu'il y a lieu de conclure à l'existence d'un risque sérieux d'abus sexuel de la part du père, justifiant de déclarer la sécurité et le développement de l'enfant compromis.

[46] Sans s'étendre indument sur les facteurs de risques qui sont expliqués dans le rapport de Mme [Intervenante 1][18], il y a lieu de signaler qu'elle retient la durée de la période des abus sur l'enfant Y, la gravité de la nature des gestes posés[19], et l'attitude du père à l'égard de la situation.

[47] Par ailleurs, elle note la propension du père à se centrer sur ses propres besoins plutôt que sur ceux de son enfant, ce qui est troublant. Il a tendance à blâmer les autres et à se déresponsabiliser. Il reproche à l'enfant de ne pas lui téléphoner alors que c'est lui l'adulte qui peut joindre son enfant.

[48] Aussi, il encourage X à mentir à la DPJ et à « garder le secret » relativement à des accès qu'il souhaite en contravention aux règles de supervision en place. Il tient par ailleurs des propos totalement inappropriés dans ses échanges avec l'enfant, ce qui amène d'ailleurs le premier juge à « questionner le jugement du père en lien avec les propos qu'il a tenus à sa fille ».

[49] Le soussigné est en accord avec le premier juge sur le fait que le jugement du père soulève des questions. Ceci, ajouté à tous les autres facteurs de risque, fait pencher la balance en faveur d'une intervention pour favoriser la sécurité et le développement de l'enfant.

[50] Il faut ajouter à cela qu'il ressort du dossier que le père, malgré qu'il aime de toute évidence sa fille, a tendance à ne pas exercer ou à annuler les accès qui lui sont permis. Ceci, de toute évidence, peine l'enfant qui veut voir son père et met en lumière un manque d'engagement et d'intérêt de sa part à l'égard de la petite, ce qui fait craindre quant à sa capacité à faire prévaloir les besoins et la sécurité de l'enfant sur ses désirs et ses pulsions.

[51] Tout ceci permet de conclure à un risque sérieux d'abus sexuel au sens de la loi et à mettre en place les mesures recommandées pour assurer la sécurité et le développement de l'enfant.

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[17] *Loi sur la protection de la jeunesse,* préc. note 1, art. 38 d) 2.
[18] Pièce P-2.
[19] Notes sténographiques, p. 22.

**PAR CES MOTIFS, LE TRIBUNAL :**

[52] **ACCUEILLE** l'appel;

[53] **INFIRME** le jugement de première instance;

[54] **DÉCLARE** la sécurité et le développement de l'enfant compromis pour motif de risque sérieux d'abus sexuel de la part du père;

[55] **ORDONNE** que l'enfant soit confié à sa mère;

[56] **ORDONNE** que les contacts entre l'enfant et son père soient supervisés et selon entente entre les parties quant aux autres modalités;

[57] **RECOMMANDE** que le père s'implique dans un suivi en lien avec l'abus sexuel;

[58] **ORDONNE** que les parents collaborent au suivi social, notamment à l'élaboration et à l'application du plan d'intervention;

[59] **ORDONNE** qu'une personne travaillant pour le CISSS[A] apporte aide, conseil et assistance à l'enfant et à sa famille pour une période de douze mois;

[60] **CONFIE** la situation de l'enfant à la directrice de la protection de la jeunesse pour l'exécution de la présente ordonnance;

[61] **ORDONNE** aux personnes visées par cette ordonnance de s'y conformer;

[62] **SANS FRAIS** vu la nature du litige.

_____
PIERRE DALLAIRE, J.C.S.

**Me Laura Normandin**
Avocate de la partie appelante - Demanderesse

**A**
**B**
Partie intimée - Défenderesse

**Me Sara De Castro**
Avocate de l'enfant – Mise-en-cause

Date d'audience : 5 juin 2020

**SUPREME COURT OF CANADA**

**CITATION:** Montréal (City) *v.* Deloitte Restructuring Inc., 2021 SCC 53

**APPEAL HEARD:** May 20, 2021
**JUDGMENT RENDERED:** December 10, 2021
**DOCKET:** 39186

**BETWEEN:**

**Ville de Montréal**
Appellant

and

**Deloitte Restructuring Inc.**
Respondent

- and -

**Alaris Royalty Corp., Integrated Private Debt Fund V LP, Thornhill Investments Inc., Ville de Laval and Union des municipalités du Québec**
Interveners

**OFFICIAL ENGLISH TRANSLATION**

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

**JOINT REASONS FOR JUDGMENT:** (paras. 1 to 100)
Wagner C.J. and Côté J. (Moldaver, Karakatsanis, Rowe and Martin JJ. concurring)

**DISSENTING REASONS:** Brown J.
(paras. 101 to 143)

**Ville de Montréal** *Appellant*

*v.*

**Deloitte Restructuring Inc.** *Respondent*

and

**Alaris Royalty Corp.,**
**Integrated Private Debt Fund V LP,**
**Thornhill Investments Inc.,**
**Ville de Laval and**
**Union des municipalités du Québec** *Interveners*

**Indexed as: Montréal (City) *v.* Deloitte Restructuring Inc.**

**2021 SCC 53**

File No.: 39186.

2021: May 20; 2021: December 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR, c. R-2.2.0.0.3 — Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.*

In August 2018, the Superior Court made an initial order by which SM Group, a consulting engineering firm, became subject to proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The order stayed the rights and remedies of creditors, among other things, and appointed a monitor. Following that order, SM Group continued to perform work for Ville de Montréal ("City"). However, the City refused to pay for that work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group that arose before the initial order. Those claims are related to the application of the *Act*

*to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* ("Bill 26") and, according to the City, result from fraud on SM Group's part. The first claim arises from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") that resulted from Bill 26 ("VRP claim"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract.

In response to the City's refusal to pay for the work done by SM Group after the initial order, the monitor applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion as the supervising judge: that the compensation invoked by the City could not be effected. It found that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is not an exception to the rule stated in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, whereby compensation between debts arising before and after an initial order ("pre-post compensation") is prohibited. It was also of the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, the Court of Appeal agreed with the supervising judge that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

*Held* (Brown J. dissenting): The appeal should be dismissed.

*Per* **Wagner** C.J. and Moldaver, Karakatsanis, **Côté**, Rowe and Martin JJ.: First, a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. In this case, the City has not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. Second, with regard to pre-post compensation, a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. In the case at bar, the initial order stayed the City's right to pre-post compensation, and it would not be appropriate to lift the stay in relation to the claims in issue.

To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*.

The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(2) provides, by way of exception, that certain claims may

not be dealt with by a compromise or arrangement, including those that result from fraud. To prove that its claim relates to a debt resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d), a creditor has the burden of establishing, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service.

In this case, the City did not try to prove or even allege any of these elements. The content of the VRP agreement, Bill 26 and the regulation made under it ("VRP Regulation") must therefore be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. This interpretation exercise confirms that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

First, it is clearly stipulated in the VRP agreement entered into by the parties that the amount fixed in the agreement can in no way be considered to constitute an admission of liability. As a result, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

Second, Bill 26 and the VRP Regulation do not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations to a public body. The use of the words "may have been" in s. 3 of Bill 26 and in s. 1 of the VRP Regulation to describe the purpose of the VRP indicates that fraud is a possibility rather than a certainty. Section 7 of the VRP Regulation supports this point,

since it states that the fact that a natural person or an enterprise participates in the VRP does not constitute an admission of liability or of a fault committed by the natural person or enterprise. The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8.

The City is wrong to say that reading ss. 1, 3 and 10 of Bill 26 together leads to the conclusion that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. Although s. 1 of Bill 26 does not refer to fraud as being hypothetical, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. Finally, the two schemes created by Bill 26 must not be confused. Section 10 states that fraud was committed, but this section is part of the scheme introduced by Chapter III (ss. 10 to 17), which applies to judicial proceedings brought against a natural person or enterprise that allegedly participated in fraud in relation to a public contract, and not part of the VRP scheme introduced by Chapter II (ss. 3 to 9). It is up to the courts to conclude that fraud has been committed, and the existence of fraud will be recognized by a court only under the Chapter III scheme, which did not take effect until the VRP scheme introduced by Chapter II ended. The reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies. Accordingly, the City has not shown that the VRP claim falls within s. 19(2)(d) of the

*CCAA*. Neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act.

Furthermore, a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law can be stayed by a court under ss. 11 and 11.02 of the *CCAA*. Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. While at first glance the language of this provision limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order. A court has the power to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation. Such an interpretation advances the *CCAA*'s remedial objectives and is consistent with its scheme.

In the vast majority of cases, an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. However, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. The absolute prohibition against pre-post compensation imposed by the Quebec Court of Appeal in *Kitco* must therefore be tempered. However, a court must be cautious before allowing such a form of compensation, given its high disruptive potential.

Moreover, s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is limited to authorizing compensation between debts that arise before an initial order is made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. It follows that a supervising judge retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. The first consideration relates both to the order itself and to the means that are employed. It is assessed in light of the *CCAA*'s remedial objectives, which include protecting the public interest. In very specific circumstances, a court could conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*. However, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors. The second consideration is also important because it discourages parties from sitting on their rights

and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage.

In the case at bar, the words of the stay order made by the Superior Court are broad enough to stay pre-post compensation, and it would not be appropriate to lift the stay in relation to the VRP claim. Because the City has not proved the alleged fraud and has not relied, in support of its position, on any of the *CCAA*'s remedial objectives other than protecting the public interest, it has not discharged its burden of proving that the order being sought is appropriate. In addition, the City did not act with the diligence expected in *CCAA* proceedings.

With regard to the water meter contract claim, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in that case. That order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of that case would not be appropriate for the same reasons as those relating to the VRP claim.

*Per* **Brown** J. (dissenting): The appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect pre-post compensation for the VRP claim and whether compensation is available in respect of the water meter claim. There is agreement with the majority that

a supervising judge has a discretion under s. 11 of the *CCAA* as to whether to allow a creditor to effect pre-post compensation, or set-off. However, this discretion is not limited solely to the exceptional circumstances the majority describes. The scope of s. 21 of the *CCAA* is not limited to pre-pre compensation; pre-post compensation is permitted, but must be subject to the exercise of a supervising judge's discretion. Moreover, nothing in s. 21 of the *CCAA* prohibits judicial compensation.

The approach taken by the Quebec Court of Appeal in *Kitco*, according to which pre-post compensation will never be authorized under the *CCAA*, involves several errors and must be rejected. To begin with, the Court of Appeal erred in relying on a judgment rendered by the Court in the context of a bankruptcy under the *Bankruptcy and Insolvency Act* ("*BIA*"). Although the scheme established by the *CCAA* and the one established by the *BIA* must be viewed as an integrated body of insolvency law, there remain many differences between them, including two that are fundamental. First, when an insolvent company has recourse to the *CCAA*, it continues its business activities and is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee. There is thus no loss of mutuality under the *CCAA*. This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. Secondly, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective of restructuring a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules. The *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to

be achieved. Because of these objectives, a broad discretion is also conferred on supervising judges by s. 11 of the *CCAA*. This discretion has no equivalent in the *BIA*.

Next, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*. The approach proposed in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces, which is contrary to the principle of homogenous interpretation of federal statutes.

Lastly, staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance. However, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process in this situation.

In the instant case, there is no need to decide whether the VRP claim must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. Section 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). It is true that proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit pre-post compensation; however, whether the City's VRP claim results from fraud is a question to be decided by the supervising judge, not by the Court.

Given that the supervising judge did not exercise her discretion under s. 11 of the *CCAA*, believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, it is not for the Court to exercise that discretion in order to determine whether to permit pre-post compensation. Supervising judges are in the best position to decide whether to exercise their discretion in a particular case. In cases involving an exercise of discretion by a court of first instance, it is not in the interests of justice for the Court to step into that court's shoes and decide these matters.

**Cases Cited**

By Wagner C.J. and Côté J.

**Overruled:** *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268; **considered:** *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, aff'd 2015 BCCA 426, 378 B.C.A.C. 116; *North American Tungsten Corp., Re*, 2015

BCSC 1382, 28 C.B.R. (6th) 147; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; **referred to:** *R. v. Fedele*, 2018 QCCA 1901; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Léger v. Ouellet*, 2011 QCCA 1858; *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225; *Lambert v. Macara*, [2004] R.J.Q. 2637; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164; *Tavan v. Rostami*, 2014 QCCA 304; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280; *Sharma v. Sandhu*, 2019 MBQB 160; *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102, aff'd (1985), 53 C.B.R. (N.S.) 275; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261; *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369; *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1; *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co.*

*(Liquidator of)* (1993), 13 Alta. L.R. (3d) 115; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Stein v. Blake*, [1996] 1 A.C. 243; *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299.

By Brown J. (dissenting)

*Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, aff'd 2015 BCCA 426, 378 B.C.A.C. 116; *Re Just Energy Corp.*, 2021 ONSC 1793; *Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33.

**Statutes and Regulations Cited**

*Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12.

*Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, ss. 1, Chapter II, 3 to 9, Chapter III, 10 to 17.

*Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 71, 97(3), 121(1), 178(1)(e).

*Civil Code of Québec*, art. 2849.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 6(1), Part II, 11, 11.01, 11.02, 11.08, 11.1, Part III, 19, 20, 21, 32.

*Integrity in Public Contracts Act*, S.Q. 2012, c. 25.

*Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1, ss. 1, 4, 7, 8.

*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 73(1).

**Authors Cited**

Alberta. Court of Queen's Bench. *Alberta Template CCAA Initial Order*, January 2019 (online: https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_1_eng.pdf).

Anderson, A. Robert, Thomas Gelbman and Benjamin Pullen. "Recent Developments in the Law of Set-off", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009*. Toronto: Carswell, 2010, 1.

Boucher, Bernard. "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration*, par Stéphane Rousseau, dir. Montréal: LexisNexis, 2010, fascicule 14 (feuilles mobiles mises à jour avril 2021, envoi nº 20).

British Columbia. Supreme Court. *Model CCAA Initial Order*, August 1, 2015 (online: https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_2_eng.pdf).

Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 5e éd. Montréal: LexisNexis, 2016.

*Code civil du Québec: Annotations — Commentaires 2020-2021*, 5e éd. par Benoît Moore, dir., et autres. Montréal: Yvon Blais, 2020.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 3, 4th ed. rev. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).

Keay, Andrew. "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509.

McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed. Toronto: LexisNexis, 2019.

Morin, Luc, and Guillaume-Pierre Michaud. "Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA*: After the *Kitco* and *Beyond the Rack* Decisions", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 311.

Ontario. Superior Court of Justice. Commercial List. *Initial Order*, January 21, 2014 (online: https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-EN.doc; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_3_eng.pdf).

Quebec. Superior Court. Commercial Division. *Initial Order*, May 2014 (online: https://www.barreaudemontreal.qc.ca/sites/default/files/frm-ordonnanceinitiale_mai2014.doc; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_4_eng.pdf).

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.

Sarra, Janis P. "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 9.

Sarra, Janis P., Geoffrey B. Morawetz and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*. Toronto: Thomson Reuters, 2020.

Saskatchewan. Court of Queen's Bench. *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online: https://sasklawcourts.ca/wp-content/uploads/2021/07/QB1.CCAAInitialOrder.docx; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_5_eng.pdf).

Thornton, Robert. "Air Canada and Stelco: Legal Developments and Practical Lessons", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006*. Toronto: Thomson/Carswell, 2007, 73.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Healy and Ruel JJ.A.), 2020 QCCA 438, [2020] J.Q. nº 1852 (QL), 2020 CarswellQue 1987 (WL Can.), affirming a decision of Corriveau J., 2019 QCCS 2316, [2019] J.Q. nº 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Appeal dismissed, Brown J. dissenting.

*Raphaël Lescop* and *Eleni Yiannakis*, for the appellant.

*Guy P. Martel* and *Danny Duy Vu*, for the respondent.

*Alain Tardif*, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP.

*Luc Béliveau*, for the intervener Thornhill Investments Inc.

*Elizabeth Ferland*, for the intervener Ville de Laval.

*Marc Duchesne*, for the intervener Union des municipalités du Québec.



English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE AND CÔTÉ J. —

**TABLE OF CONTENTS**

## I. Introduction

[1] This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The question is whether compensation is permitted for debts between the same parties: on the one hand, a debt resulting from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3 ("Bill 26"), that predates an initial order made under the *CCAA* and, on the other hand, a debt between the same parties that postdates that order. In these reasons, we will use the expression "pre-post compensation" to refer generally to compensation between debts arising before and after an initial order.

[2] This question thus affords the Court an occasion to interpret, for the first time, certain provisions of Bill 26 as well as the regulation made under it, the *Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1 ("VRP Regulation"). In doing so, we will clarify for public bodies the burden of proof that rests on them in seeking to establish that a claim arising from an agreement entered into under the Voluntary Reimbursement Program ("VRP") is fraudulent.

[3] Bill 26 was passed by the Quebec National Assembly in March 2015 in response to a commission of inquiry that had brought to light the existence of schemes involving collusion and corruption in the awarding and management of public contracts in the construction industry ("Charbonneau Commission"), and the VRP Regulation

was made a few months later. The program resulting from this legislation, which was in effect for two years, allowed enterprises to "reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics" (s. 3 of Bill 26).

[4] To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*. We would answer this question in the negative. It cannot be presumed that a claim arising from the VRP falls within that provision where no evidence to this effect has been tendered. We also conclude that a court should generally exercise its discretion to stay pre-post compensation, although it may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases. In the case at bar, however, we conclude that the initial order stayed the right of the appellant, Ville de Montréal ("City"), to pre-post compensation and that it would not be appropriate to lift the stay in relation to the claims in issue.

[5] The appeal should therefore be dismissed.

## II. Facts

[6] SM Group, which at the relevant time was a consulting engineering firm, performed a variety of contracts for the City over a period of several years. The Charbonneau Commission's work uncovered a link between SM Group and certain central players in the collusion schemes. Two of its former officers were in fact charged with criminal offences. SM Group subsequently became insolvent.

[7] On August 24, 2018, the Quebec Superior Court made an initial order by which SM Group became subject to proceedings under the *CCAA* and the rights and remedies of creditors were stayed. The respondent, Deloitte Restructuring Inc. ("Deloitte"), was appointed as monitor. Following that order, SM Group continued to perform work for the City, including the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[8] The City refused to pay for that work. On November 7, 2018, it invoked its right to effect compensation between its debt to SM Group for the work done after the initial order and two claims against SM Group that, according to the City, arose before the order and resulted from fraud on SM Group's part.

[9] On November 12, 2018, the Superior Court approved the sale of some of SM Group's assets to Thornhill Investments Inc. ("Thornhill"). One week later, SM Group's contracts were assigned to Thornhill.

[10] The two claims raised by the City are related to the application of Bill 26. The purpose of that statute, read in conjunction with the *Integrity in Public Contracts*

*Act*, S.Q. 2012, c. 25, enacted in 2012, and the *Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18, enacted in 2016, is to strengthen public confidence in government institutions by addressing the revelations made by the Charbonneau Commission. Bill 26 has been described as [TRANSLATION] "a statutory benchmark for establishing a lack of ethics and lax (if not criminal) morals in a number of enterprises in relation to the awarding of public contracts in Quebec" (*R. v. Fedele*, 2018 QCCA 1901, at para. 44 (CanLII)).

[11] The first claim the City alleges it has against SM Group arises from a settlement agreement entered into in November 2017 by SM Group and the Minister of Justice, acting on the City's behalf, under the VRP ("VRP claim"). The second is based on a proceeding brought by the City against SM Group in September 2018, in which it claimed more than $14 million from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim").

[12] Because SM Group had failed to repay the VRP claim and because the sale of certain assets to Thornhill was imminent, the City advised SM Group that it intended to effect compensation between what it owed SM Group and the above-mentioned claims, noting that those claims could not be discharged or dealt with by a compromise or arrangement in the planned restructuring process given that they resulted from fraud and from a misappropriation of public funds.

[13] In response, Deloitte applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group for work performed for the City.

## III. Judicial History

### A. *Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)*

[14] The supervising judge granted Deloitte's application for a declaratory judgment and held that pre-post compensation could not be effected in favour of the City. Even though, in her view, the VRP claim was linked to an allegation of fraud that had not been refuted by SM Group, she concluded that, according to the principles laid down in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation.

### B. *Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy JJ.A., Ruel J.A. Dissenting in Part)*

[15] Rochette J.A., writing for the majority, rejected the City's argument regarding the VRP claim. Relying on *Kitco*, he reached the same conclusion as the supervising judge: that pre-post compensation could not be effected in this case. He also rejected the City's argument that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is an exception to the rule stated in that case. In any event, he expressed

the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, Rochette J.A. added that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.



[16] Ruel J.A., dissenting in part, agreed with his colleagues on the nature of the water meter contract claim. However, he was of the view that the VRP claim had to be presumed to fall within s. 19(2)(d) of the *CCAA* and that *Kitco* had to be distinguished on the basis that it had been rendered in a different context. In the final analysis, Ruel J.A. found that s. 19(2)(d) of the *CCAA* represents an exception to the principle established in that case and that it therefore allowed pre-post compensation between the two parties' respective debts.

## IV. Issues

[17] This appeal raises the following three questions:

1. Is the VRP claim a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*?

2. Does the *CCAA* permit compensation between a debt that arises before an initial order and one that arises after that order?

3. If compensation is permitted, should the City be authorized to withhold the payments owed to SM Group until judgment is rendered in the case relating to the water meter contract?

[18] We will deal with these questions by considering each of the City's claims separately.

## V. Analysis

[19] In essence, the City argues that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. According to the City, such a claim falls outside the absolute prohibition against pre-post compensation imposed by *Kitco*. The City also argues that the absolute nature of the *Kitco* rule is inconsistent with the broad discretion conferred on supervising judges by the *CCAA*. It submits that supervising judges can, in exercising their discretion, authorize pre-post compensation in appropriate circumstances. The exercise of this discretion is particularly appropriate where fraud is involved.

[20] For the reasons that follow, we are of the view that the VRP claim in this case is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. We also conclude that a right to pre-post compensation, or set-off, invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the *CCAA*. In our opinion, however, a supervising judge has the discretion to authorize

pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. In this regard, the fact that the debt underlying a VRP claim is fraudulent, where this is shown, is a relevant factor in the exercise of the supervising judge's discretion. In this case, we find that it would not be appropriate to allow the City to effect compensation with respect to the VRP claim. Nor would it be appropriate to authorize the City to withhold the payments owed to SM Group pending the outcome of the case relating to the water meter contract.



## A. *Voluntary Reimbursement Program Claim*

### (1) Characterization of the Voluntary Reimbursement Program Claim

[21] We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the *CCAA* is inapplicable in this case because there is no plan providing for a compromise or arrangement.

[22] The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from

those that are not. Section 19(1) of the *CCAA* sets out the general scheme governing claims that may be dealt with by a compromise or arrangement:

> **19 (1)** Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> **(a)** claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> **(i)** the day on which proceedings commenced under this Act, and
>
> **(ii)** if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> **(b)** claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[23] As an exception to this scheme, s. 19(2) of the *CCAA* provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud:

> **(2)** A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:
>
> . . .
>
> **(d)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; . . .

[24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which is analogous in every respect to s. 19(2)(d) of the *CCAA*. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes "for[m] part of an integrated body of insolvency law" (para. 78; see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 74).

[25] To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the *CCAA* applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a

compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the *CCAA* must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

[26] The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.

[27] As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the majority of the Court of Appeal that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

[28] First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service.

[29] In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the *BIA* that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII);

*Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58).



[30] Second, Bill 26 and the VRP Regulation published in the *Gazette officielle du Québec* pursuant to ss. 3 and 4 of that statute do not provide any greater support for the City's position. We agree with the majority of the Court of Appeal, who rejected the idea of a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. That scheme, which was in effect from November 2015 to December 2017, created no such presumption.

[31] The purpose of the VRP as defined in s. 3 of Bill 26 — in Chapter II, entitled "Reimbursement Program" — supports this conclusion:

> **3.** The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics.

[32] The use of the words "may have been" in the phrase "there may have been fraud or fraudulent tactics" clearly contradicts the City's argument. Moreover, the same words are also used in s. 1 of the VRP Regulation in describing the purpose of that program:

> **1.** The Voluntary Reimbursement Program makes it possible for every natural person and every enterprise to reimburse certain amounts improperly paid by a public body in the course of the tendering, awarding or management of a public contract entered into after 1 October 1996 in relation to which there may have been fraud or fraudulent tactics.

[33] The fact that fraud is characterized as a possibility rather than a certainty is by no means surprising. Given the VRP's purpose of recovering amounts paid improperly by public bodies, it stands to reason that Bill 26 does not provide for any mechanism to determine whether amounts agreed to under the VRP are in fact related, in whole or in part, to fraud. Section 7 of the VRP Regulation supports this point, since it states the following:

> **7.** The fact that a natural person or an enterprise participates in the Program does not constitute an admission of liability or of a fault committed by the natural person or enterprise.

[34] The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8:

> **8.** Every natural person or enterprise participating in the Program acknowledges that revealing information or sending documents within the Program framework does not restrict in any manner whatever a public body's capacity to bring civil proceedings against the natural person or enterprise in relation to public contracts for which a settlement has not been reached under the Program or to which the Act does not apply.

> Every natural person or enterprise acknowledges that participation in the Program and the conclusion of an agreement under it in no manner protects the natural person or enterprise, or its officers, against any penal or criminal proceedings that have been or may be brought in connection with public contracts entered into by the natural person or enterprise.

[35] Evidence that a natural person or enterprise participated in the VRP therefore cannot on its own justify characterizing a claim as being related to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*.

[36] However, the City submits that reading ss. 1, 3 and 10 of Bill 26 together leads to an entirely different conclusion, namely that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. In our view, the City is wrong.

[37] It is true that s. 1 of Bill 26 does not refer to fraud as being hypothetical:

> **1.** This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

As we saw above, however, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: there is no question that, unlike s. 1 of Bill 26, which sets out the purpose of that statute generally, the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. In addition, the City's interpretation cannot be reconciled with ss. 7 and 8 of the VRP Regulation, which are reproduced above.

[38] That being said, the City points out that s. 3 of Bill 26 refers to s. 10, which specifically states that fraud was committed:

> **10.** Any enterprise or natural person who has, in any capacity, participated in fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.
>
> In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.
>
> The directors of the enterprise in office at the time the fraud or fraudulent tactics occurred are also held liable if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned, unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.
>
> The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

[39] We do not agree with the City's interpretation on this point. It is up to the courts to conclude that fraud of this kind has been committed. More precisely, we are of the view that the City is confusing two schemes created by Bill 26: one — the VRP (ss. 3 to 9) — introduced by Chapter II and the other by Chapter III, which is entitled "Special Rules Applicable to Judicial Proceedings" (ss. 10 to 17). The first scheme was designed to encourage — for a two-year period — natural persons or enterprises fearing that a public body would bring civil proceedings against them to participate in the VRP with a view to entering into an agreement through a completely confidential process

(s. 7 of Bill 26; s. 4 of the VRP Regulation). It was only once the first scheme ended that the second, one of an entirely different nature, took effect.



[40] The scheme provided for in ss. 10 to 17 of Bill 26 is one that deviates from the general law. It applies to judicial proceedings brought by a public body, or by the Minister of Justice on behalf of a public body, against a natural person or enterprise that allegedly participated in fraud in relation to a public contract. When a court allows such an action, not only can it assume that the defendant caused injury to the public body through its fraudulent act (s. 10 para. 1), but in addition, "[t]he injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 20% of the total amount paid for that contract" (s. 11 para. 1). The enterprises and natural persons contemplated by the statute are solidarily liable for such injury (s. 10 para. 4). An amount granted "bears interest from the date the work is accepted by the public body concerned for the contract concerned" (s. 11 para. 3). As well, the court "must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of th[e] Act" (s. 14).

[41] In other words, these provisions are designed to make it easier to prove causation and injury when such a proceeding is brought, but it should be noted that they are of no effect if a court finds that the evidence of fraud is insufficient; as well, and most importantly, they in no way make it easier to prove such a fault. Section 10 of Bill 26 is therefore of no assistance to the City, which in any event has not sought to show, on any basis other than the mere existence of the VRP agreement, that SM Group took

part in fraud in connection with a contract the City awarded to it. The schemes created by Bill 26 suggest that a court will recognize the existence of fraud only under the Chapter III scheme. Moreover, it appears that the reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies, namely directors and officers of enterprises.



[42] Lastly, it should be mentioned that it can easily be imagined that an enterprise that entered into a potentially contentious public contract with a public body would make the strategic choice to participate in the VRP out of fear of bad publicity or to avoid exposing itself to the exceptional scheme of Chapter III of Bill 26, the result of which, if the proceeding were decided in the public body's favour, would likely be significant additional financial liability for the enterprise on top of the legal fees it would have to pay.

[43] In sum, neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act; nor does the VRP agreement constitute a serious, precise and concordant presumption of fact (art. 2849 of the *Civil Code of Québec*). It follows that the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*.

(2) Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)

[44] The bankruptcy of large companies often resulted in "the entire disruption of the corporation, loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[45] Initially, restructuring under the *CCAA* was done through a plan of arrangement or compromise negotiated between the debtor company and its creditors that averted the company's bankruptcy by allowing it to adjust its debts and reorganize its business (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at pp. 588-90 and 592). Later, liquidation under the *CCAA* emerged as a practice. Liquidation can also serve as a tool for restructuring a struggling business "by allowing the business to survive, albeit under a different corporate form or ownership" (*Callidus*, at para. 45; see also Sarra, at p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311).

[46] The primary tool that allows the *CCAA* to achieve its restructuring objective is a stay of proceedings and of creditors' rights (Sarra, at pp. 17 and 52; McElcheran, at p. 5). The direct effect of a stay is that it creates a status quo period that stabilizes the debtor company's situation by shielding it from its creditors while the

restructuring process is under way (*Century Services*, at para. 60; see also *Kitco*, at para. 43 (CanLII)). Without such a period, there would be a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company's survival or the maximization of its liquidation value (*Century Services*, at para. 22).



[47] During the status quo period, the debtor company can therefore continue operating without fear of being driven into bankruptcy by its creditors. This temporary respite creates an environment conducive to fair negotiations between the various stakeholders and gives the debtor the necessary time to prepare a plan of compromise or arrangement ensuring its survival, or to take steps to maximize the value of the business it operates with a view to its liquidation under the *CCAA* (*Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (Q.B.), at para. 15; *Kitco*, at para. 43; *Callidus*, at paras. 40 and 46).

[48] The fundamental feature of the *CCAA* is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the *CCAA*'s objectives are achieved (*Century Services*, at para. 19). The true "engine" driving the statutory scheme (*Callidus*, at para. 48, citing *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36), this judicial discretion also plays a prominent part in stays of proceedings.

[49] In principle, a court may deny a stay application. Such applications are rarely denied, however, to the point where the terms "initial order" and "stay order"

have, in practice, become interchangeable (Sarra, at p. 51). Stays are in fact requested and granted systematically, other than in certain exceptional cases (p. 51).



[50] A stay is a temporary measure, however; once it has been lifted, creditors regain their ability to fully exercise their rights and remedies (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, at paras. 9 and 14). On an initial application in respect of a debtor company, a court may include in its initial order a first stay period of no more than 10 days (s. 11.02(1) of the *CCAA*). After that, the court may renew the stay for any period it considers necessary (s. 11.02(2) of the *CCAA*). When a stay is renewed, or at any other time in the course of the proceedings, an interested creditor may, in accordance with the procedure set out in the initial order, apply to the court to lift a stay affecting any of its rights or remedies (Sarra, at pp. 58-60 and 88; see also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J.), at para. 5; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, at paras. 7-8 and 14-15).

[51] While it is true that the *BIA* and the *CCAA* form part of an integrated body of insolvency law, there are nonetheless some fundamental differences between the two schemes (*Century Services*, at para. 78). Unlike the *BIA*, the *CCAA* gives courts a broad discretion to decide whether a stay is appropriate, to determine how long it should last and to adjust its scope depending on what is needed to restructure the debtor company and to achieve the objectives of the *CCAA*. In this regard, the *CCAA* has been described as a "skeletal" statute that does not contain "a comprehensive code that lays out all that

is permitted or barred" (*Century Services*, at para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44).



[52] To fully understand the rights and restrictions applicable in a given case, it is therefore not enough to read the legislation; it is also important to consider the court's exercise of its discretion, which is reflected in all of the many orders made throughout the proceedings.

[53] The question raised by this appeal is therefore whether a court's discretion allows it to stay a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law and, by extension, to authorize pre-post compensation in appropriate cases.

(a) *Power to Grant and Lift a Stay of the Right to Pre-post Compensation*

[54] In our view, the broad discretion conferred on a court by ss. 11 and 11.02 of the *CCAA* allows it to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation.

[55] Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. Despite the language of s. 11.02, which at first glance limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights

and remedies that can be included in a stay order (see *Meridian*, at para. 26; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, at paras. 31-33; McElcheran, at pp. 135 and 245-46; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 363). For example, in *Quintette Coal*, the British Columbia Court of Appeal concluded that a creditor's right to pre-post set-off can be stayed just like any other enforcement measure with a high disruptive potential (see also *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), at paras. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116, at paras. 28-30). In our view, this interpretation is the correct one, as it advances the *CCAA*'s remedial objectives and is consistent with its scheme.

[56] It can also be seen from the various model initial orders adopted by the country's superior courts that prohibitions against setting off debts are standard practice, and in the vast majority of cases take effect as soon as an initial order is made (see Court of Queen's Bench of Alberta, *Alberta Template CCAA Initial Order*, January 2019 (online), at paras. 14 and 16; Supreme Court of British Columbia, *Model CCAA Initial Order*, August 1, 2015 (online), at paras. 16 and 18; Ontario Superior Court of Justice, Commercial List, *Initial Order*, January 21, 2014 (online), at paras. 15-16; Superior Court of Quebec, Commercial Division, *Initial Order*, May 2014 (online), at paras. 10 and 12; Court of Queen's Bench for Saskatchewan, *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online), at paras. 15-16).

[57] A court's discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in *Kitco*, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

[58] The instances in which a court should not stay the right to effect pre-post compensation in an initial order will be rare, however. It must be borne in mind that a supervising judge's discretion, although broad, is not boundless. It must be exercised in furtherance of the *CCAA*'s remedial objectives (*Callidus*, at para. 49).

[59] The status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint (see *Kitco*, at paras. 20 and 43). *Tungsten*, in which the court stayed pre-post set-off, provides a good example of the disruptive potential of this form of set-off (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten* (S.C.)"), at para. 32, aff'd 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116, at para. 29). If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed. The debtor would have a disincentive to provide its creditors with goods

and services because it would fear not being paid for them; it would then be deprived of the funds needed to continue operating (see *Kitco*, at paras. 46-48). Section 32 of the *CCAA* in fact gives the debtor a right — subject to the limits and formal requirements provided for in that provision — to disclaim or resiliate any agreement to which it is a party on the day on which the restructuring proceedings commence. In addition, an interim lender would most likely refuse to continue to finance the debtor's operations during this period if the loaned funds were destined to enrich another creditor at its expense. Lastly, the rampart set up by a stay to protect against attacks from all sides by creditors would also crumble, thereby increasing the risk of the debtor's collapse and bankruptcy (see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 22 and 29).

[60] The inevitable interruption of the business relationship between the debtor and those who are at once creditors and customers could not come at a worse time. Without these contracts and without the payment of accounts receivable and interim financing to replenish the debtor's working capital, the resale value of its business would melt away, thus setting up roadblocks for restructuring it by way of liquidation. And such a situation could also be unfavourable to creditors that wish to effect compensation. If the debtor terminates a contract and refuses to perform it, the creditor concerned will be deprived of the benefit of the contract and will have to find a new contracting party in place of the debtor, with no guarantee that the price will remain the same.

[61] Furthermore, where pre-post compensation has been stayed, the court retains the discretion to lift the stay based on the specific facts of each case. However, it must be cautious in doing so, given the high disruptive potential of such compensation.

[62] In conclusion, we are of the view that ss. 11 and 11.02 of the *CCAA* authorize a court to stay pre-post compensation. Although we would temper the rule from *Kitco*, which involves an absolute prohibition against pre-post compensation, it is our view that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances.

(b) *Scope of Section 21 of the CCAA*

[63] In addition, we note that s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Although s. 21 of the *CCAA* indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, "pre-pre compensation"). The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd

ed. 1983), at p. 87). Our interpretation of s. 21 of the *CCAA* is not based on an inappropriate analogy with the provisions of the *BIA*.



[64] Section 21 does state that it is possible to effect compensation in insolvency proceedings under the *CCAA*, but it does not specifically deal with pre-post compensation. It reads as follows:

> **Law of set-off or compensation to apply**
>
> **21** The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings.

[65] With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider s. 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception.

[66] What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts.

[67] Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim.[1]

[68] Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a creditor may have against the debtor on the *date of commencement of proceedings*. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] "the claims

[1] A plan of compromise or arrangement must be approved by a special majority representing two thirds in value of the creditors or a class of creditors (s. 6(1) of the *CCAA*).

must be established" and therefore when the mutuality of debts must be assessed (B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

[69] With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

[70] This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the *CCAA* to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

[71] It is true that compensation "creat[es] a type of security interest in the [insolvent company's] estate" because it "[authorizes] the party claiming set-off [to] 'reorde[r]' . . . his priority" by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 59-60; see *Kitco*, at paras. 63-68). The creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company

(*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the *CCAA*, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors" (McElcheran, at p. 78).

[72] The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil*, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

> The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes $1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for $1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

[74] Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (S.C.), at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security

interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.

[75] To repeat, viewing s. 21 as allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival of the debtor company or the business it operates and could derail the restructuring process. It is clear that Parliament could not have intended that a struggling company, deprived of its only lifeline, be condemned to drown in its debts solely because a single creditor wanted to gain an advantage over the others. Such an outcome is contrary to the fundamental objectives of the *CCAA*.

[76] Before concluding, we will pause to briefly discuss *Kitco*. In that case, the Court of Appeal rejected a literal interpretation of s. 21 as allowing all forms of compensation, including pre-post compensation, without any restrictions. Our colleague is of the view that *Kitco*, which was applied by the majority of the Court of Appeal and by the supervising judge in the instant case, has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. He cites *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.), and *Tungsten* in this regard.

[77] In our view, *Kitco* is not at odds with the jurisprudence of the rest of the country on the interpretation of s. 21. *Air Canada* and *Tungsten* did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors.

[78] First of all, in *Air Canada*, the issues did not relate to the impact of pre-post compensation on the achievement of the *CCAA*'s objectives. Rather, the case concerned the requirements for legal set-off at common law and the interpretation of a provision of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, that was worded differently from s. 18.1 (now s. 21) of the *CCAA*. On the subject of legal set-off, Air Canada argued that the making of an initial order under the *CCAA* results in a loss of mutuality between debts, by analogy with the vesting of a bankrupt's property in a trustee under the *BIA*. This was the context in which the court found that an initial order under the *CCAA* does not alter the status of creditor and debtor of the insolvent company, unlike what happens in a bankruptcy proceeding.

[79] Moreover, in *Tungsten*, the dispute related primarily to the possibility of staying the right to pre-post set-off. The judge who ruled on the applications did not analyze the arguments concerning the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, finding that it was not necessary to do so in the circumstances. Our colleague maintains that the question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted by s. 21 of the *CCAA*. In our view, the fact that the possibility of effecting pre-post set-off was not argued tends more to weaken the authority of that decision than to strengthen it.

[80] Therefore, and with due respect for the contrary view, the state of the law on the interpretation of s. 21 had not been settled elsewhere in Canada. When ruling in *Kitco*, the Court of Appeal was not bound by *Air Canada* and *Tungsten*.

[81] In summary, we conclude, as the Court of Appeal did in *Kitco*, that s. 21 of the *CCAA* allows pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings (*Kitco*, at para. 82). This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. A supervising judge therefore retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

[82] We turn now to the situation in this case.

(c) *Application*

[83] In the case at bar, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation:

> **No Exercise of Rights or Remedies**
>
> ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person,

> firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.
>
> . . .
>
> **No Interference with Rights**
>
> ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court. [Emphasis added.]
>
> (A.R., vol. I, at p. 75)

[84] Given that the order stayed compensation in respect of pre-post claims, what remains to be determined is whether the Superior Court should have exercised its discretion under s. 11 of the *CCAA* and allowed such compensation in respect of the VRP claim. Although we are of the view that the supervising judge erred in finding, in reliance on *Kitco*, that she had no discretion to authorize pre-post compensation, we feel that remanding the case to the court of original jurisdiction would be unhelpful and would not be in the interests of justice. What is more, the delays resulting from this case have prejudiced the rights of third persons in good faith involved in the restructuring of SM Group. In this regard, Thornhill was unable to reimburse, as stipulated, the transition financing granted by the interveners Alaris Royalty Corp. and Integrated Private Debt Fund V LP, which are also creditors of SM Group, largely because of the City's refusal to pay the cost of the work done by SM Group.

[85] In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part (*Callidus*, at para. 49; *Century Services*, at para. 70).

[86] The first consideration, the appropriateness of the order being sought, relates both to the order itself and to the means that are employed (*Century Services*, at para. 70). It is assessed in light of the remedial objectives of the *CCAA* (*Callidus*, at para. 49; *Century Services*, at para. 70). These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). In this regard, the context of restructuring by way of liquidation, and the impact of pre-post compensation on its progress, can be weighed by a court in exercising its discretion. In addition, protecting the public interest, although it overlaps a number of the remedial objectives to be considered by the courts, must also be included in this list (*Callidus*, at para. 40; *Century Services*, at para. 60).

[87] Here, the City argues that protecting the public interest is a consideration that favours pre-post compensation. It submits that the majority of the Court of Appeal erred in not considering [TRANSLATION] "the public interest in ensuring the recovery of

fraudulently misappropriated public funds" (A.F., at para. 2; see also para. 80). We cannot accept this argument, for the following reasons.



[88] In our view, the City is wrongly conflating the public interest with its own interest as a public body with a claim. The objective of protecting the public interest does not mean that public bodies should be placed in a better position than other creditors because their claims relate to public funds. That would be contrary to the principle of equality among creditors. In the context of the *CCAA*, protecting the public interest therefore cannot be reduced to protecting the interests of a particular creditor. It involves taking account of interests beyond those of the debtor company and its creditors, such as the interests of employees whose jobs are threatened or of the community in which the debtor company operates (*Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 102; *Metcalfe*, at paras. 50-52; Sarra, at pp. 162 and 501; Wood, at p. 341; see also, for a clear illustration, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), at para. 50).

[89] Protecting the public interest can also encompass considerations of commercial morality that reflect societal norms, such as considerations related to the fact that no one should profit from fraudulent activities in which they have taken part (A. Keay, "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509, at pp. 513 and 525). In very specific circumstances, a court could therefore conclude that protection of the public interest and the *CCAA*'s other remedial objectives

justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*, which explains the relevance of determining whether the VRP claim is a claim resulting from fraud in this case. But while such a conclusion is possible in law, it should not be drawn automatically. In every case, a court should exercise its discretion as indicated in *Callidus* and *Century Services*, and if it so happens that predominant weight must be given to the objective of protecting the public interest, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors.

[90] In the instant case, the City's VRP claim is an ordinary claim because, as we have indicated, the City has not proved the alleged fraud and such proof cannot be inferred solely from the fact that its claim is related to an agreement entered into under the VRP. Its argument that the objective of protecting the public interest favours pre-post compensation must therefore be rejected. The City has not relied on any of the *CCAA*'s other remedial objectives in support of its position. It follows that it has not discharged its burden of proving that the order being sought is appropriate. Moreover, the work performed for the City by SM Group was in the public interest, as it involved continuing to carry out major projects, such as the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[91] The second consideration, due diligence, clearly weighs against pre-post compensation by the City. Under the *CCAA*, this consideration is important because it "discourages parties from sitting on their rights and ensures that creditors do not

strategically manoeuver or position themselves to gain an advantage" (*Callidus*, at para. 51). The procedure set out in the *CCAA* involves negotiations as well as compromises between the debtor and stakeholders and is overseen by a court and a monitor; it follows that all those who participate must be on an equal footing and must have a clear understanding of their respective obligations and rights (para. 51). This Court accordingly reached the following conclusion in *Callidus*:

> A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently). [para. 51]

[92] In this case, it is clear that the City did not act in accordance with the standard of diligence expected in *CCAA* proceedings. On this point, Deloitte submits that the City should have given notice of its intention to effect compensation in the days after the initial order was made on August 24, 2018. The record does not show that the City learned of the initial order on August 24, 2018, but, as indicated in an email to counsel for Deloitte, the City was aware of the existence of that order by at least September 10, 2018. Whatever the case may be, we are of the view that a diligent creditor, after learning of the debtor's insolvency when it is subject to proceedings under the *CCAA*, cannot wait 47 to 58 days to notify the debtor of its intention to effect compensation.

[93] The City justifies the lateness of its application by stating that it was waiting for one of the payments on the VRP claim, which was due on October 31, 2018, before taking any action. Yet the VRP agreement indicates that the payment in question was actually due on October 1, 2018. Furthermore, the City knew or ought to have known that the term had already expired several weeks earlier, as SM Group's insolvency had resulted in the loss of the benefit of the term of the VRP claim.

[94] Whether intentional or not, this inaction on the City's part tended to place it in a better position than other ordinary creditors at what, we should point out, was a critical time in the restructuring process. By invoking compensation, the City could obtain services without paying for them. The City had to suspect that if it had indicated its intention to proceed in this manner right from the start, as due diligence requires, SM Group would likely have refused to undertake the work provided for in the contract, knowing that it would not be paid and that this would be a major stumbling block in the interim financing process. What is more, under s. 32 of the *CCAA*, SM Group could even have asked that the contract be resiliated.

[95] In summary, the considerations that guide the exercise of a court's discretion do not justify lifting the stay of the City's right to pre-post compensation. Given our conclusions on the first two considerations, it is not necessary for us to discuss the City's good faith. In our view, remanding the case to the court of original jurisdiction would lead inevitably to the same outcome.

B. *Water Meter Contract Claim*

[96] Here again, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation. However, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in the case relating to the water meter contract. The relevant excerpts from its judgment are as follows:

> [TRANSLATION]
>
> **THE COURT**, seized of the Application of Ville de Montréal dated September 27, 2018 for authorization to lift the stay of proceedings in order to deal with and liquidate a claim in the Civil Division ("**Application**");
>
> . . .
>
> **LIFTS**, in favour of the Applicant, Ville de Montréal, the stay of proceedings ordered in this case with regard to S.M. Consultants Inc., The S.M. Group Inc., The SMI Group Inc. and The S.M. Group International L.P. ("**Debtors Concerned**") . . . for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned . . . in the proceedings instituted in the Superior Court of Quebec bearing number 500-17-104932-184; [Emphasis added.]
>
> (A.R., vol. IV, at p. 129)

[97] This order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. The City submits that it is entitled to withhold the payments owed to SM Group until judgment is rendered in that case.

[98] In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of the case relating to the water meter contract

would not be appropriate. Remanding the case to the court of original jurisdiction for a decision on this question would, once again, be unhelpful and contrary to the interests of justice.



[99] Not only would the order being sought by the City place Thornhill at the mercy of the outcome of lengthy and complex judicial proceedings — which, it must not be forgotten, concern a claim for several million dollars — but it would not be appropriate for the same reasons as those relating to the VRP claim. The City is conflating the public interest with its own interest as a public body with a claim that was never established. In addition, the City did not act diligently. Although its originating application in the case relating to the water meter contract was filed on September 26, 2018, it breached its obligation of diligence by waiting until November 7, 2018 before indicating its intention to effect compensation, even though it had been aware of the initial order since at least September 10, 2018.

## VI. Conclusion

[100] For these reasons, we would dismiss this appeal with costs.

English version of the reasons delivered by

BROWN J. —

[101] I agree with the majority that a supervising judge has a discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), as to whether to allow a creditor to effect compensation, or set-off, between pre-initial order and post-initial order debts ("pre-post compensation"). I find, however, that this discretion is not limited solely to the exceptional circumstances the majority describes. While my colleagues in the majority recognize the broad discretion conferred on a supervising judge by the *CCAA*, in my view they fail to give full effect to it by concluding that pre-post compensation will never be authorized unless there are exceptional circumstances.

[102] Moreover, unlike my colleagues who limit the scope of s. 21 of the *CCAA* to compensation between debts arising before an initial order is made, I conclude that pre-post compensation is permitted under s. 21 of the *CCAA* but that it must be subject to the exercise of a supervising judge's discretion. The majority at the Quebec Court of Appeal (2020 QCCA 438), like the supervising judge (2019 QCCS 2316), erred in relying on the Quebec Court of Appeal's decision in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, to conclude that pre-post compensation will never be authorized. But, for the reasons set out below, this Court must in my view reject the approach taken in *Kitco*.

[103] Given that the supervising judge in this case did not exercise her discretion, believing herself to be bound by *Kitco*, it would be unwise for this Court to exercise that discretion for the first time in order to determine whether Ville de Montréal (the

"City") may effect compensation here. I would therefore allow the appeal solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect compensation between the debts incurred by SM Group before the initial order and the amounts owed by the City to SM Group for work performed by the latter after the initial order. I would also allow the appeal so that it can be determined whether compensation is available in respect of the City's water meter claim against SM Group, as nothing in s. 21 of the *CCAA* prohibits judicial compensation.

[104] Furthermore, and again unlike my colleagues, I find that there is no need in this appeal to decide whether the City's claim against SM Group, which derives from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. In my view, s. 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). I nonetheless agree with my colleagues that proof by a creditor that it was a victim of fraud within the meaning of s. 19(2)(d) is a factor favouring pre-post compensation that must be weighed by a supervising judge along with the other relevant considerations.

[105] My colleagues consider it necessary to characterize the City's claim arising from the Voluntary Reimbursement Program ("VRP") because proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising

judge's discretion to permit or to deny pre-post compensation (para. 20). As they acknowledge, this is a relevant factor in the exercise of *a supervising judge's* discretion. As I will explain in greater detail below, whether the City's VRP claim results from fraud is a question to be decided *by the supervising judge* in the exercise of her discretion, not by *my colleagues* or this Court.



## I. Decision of the Quebec Court of Appeal in *Kitco*

[106] Kitco Metals Inc. specialized in buying scrap gold and extracting fine gold from it for resale. It was subject to special tax rules: it paid the goods and services tax ("GST") and the Quebec sales tax ("QST") on the purchase of scrap gold ("inputs"), but the sale of fine gold was not subject to these taxes. Under these special rules, Kitco paid the taxes to its gold suppliers, which were required to remit them to the Agence du revenu du Québec ("Agency"). When the fine gold was sold, Kitco was then entitled to a refund of the taxes paid. The Agency, however, became aware of a fraudulent scheme by which the gold suppliers were not remitting to it the taxes they collected, even though it was refunding Kitco for them.

[107] The Agency, suspecting that Kitco was involved in this fraudulent scheme, sent it a notice of assessment for more than $300 million (the pre-order debt). On June 7, 2011, the Agency proceeded with compulsory execution on that notice to recover the amounts it considered it was owed. The next day, Kitco filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), thereby staying its creditors' remedies (s. 69). One month later, it instead obtained an

initial order under the *CCAA* that continued the stay of remedies (stay still in effect at the time of judgment). Meanwhile, Kitco had been continuing its business activities since June 8, 2011: it was paying taxes on inputs and claiming tax refunds from the Agency in accordance with the applicable tax rules. The Agency owed it more than $1.7 million in refunds (the post-order debt) but applied this amount as compensation against the tax assessments it was claiming from Kitco. Kitco successfully brought a motion in the Superior Court to force the Agency to refund it $1.7 million on the basis that this compensation was unlawful.

[108] Vézina J.A., writing for the Court of Appeal in *Kitco*, began by explaining that June 8, 2011 was the date of commencement of insolvency proceedings and therefore the date on which the creditors' remedies were stayed and their claims had to be established (para. 34 (CanLII)). He also took the view that the compensation effected by the Agency was unlawful. In his opinion, although s. 21 of the *CCAA* does not expressly state that compensation can be effected only in respect of debts that arose prior to insolvency proceedings, a literal interpretation of the section must be rejected because it would be incompatible with, among other things, the principle that ordinary creditors must be treated equally (para. 20). Such an interpretation would also undermine the status quo period that companies in financial difficulty need in order to develop a plan of arrangement (para. 43). Vézina J.A. therefore concluded that a literal interpretation would ultimately be contrary to the *CCAA*'s restructuring objective (para. 45).

[109] This conclusion was based in large part on Vézina J.A.'s observation that the schemes of the *BIA* and the *CCAA* have [TRANSLATION] "close links" and are two "integrated" schemes, which means that "case law and scholarly opinion can be applied to both equally" (paras. 51-52). Relying on para. 56 of *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, he considered that "[t]he general principles of the *BIA* preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy" (*Kitco*, at para. 61). On this point, he found that the principles laid down in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which the Court stated that set-off is like a form of security, cannot readily be transposed into the civil law, in which compensation is automatic and is effected by operation of law once two debts coexist and are certain, liquid and exigible (para. 65). Lastly, he was of the view that s. 21 of the *CCAA* and s. 97(3) of the *BIA* identify the point in time when compensation may be effected, that is, on the date on which the creditors' "provable claims" must be established, which is the date of commencement of insolvency proceedings:

> [TRANSLATION] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims. . .", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of [commencement of proceedings] that temporal reciprocity is established. [para. 82]

[110] Vézina J.A. found, at para. 78, that the question of what constitutes a "provable claim" is answered by s. 121(1) of the *BIA*, which refers to "[a]ll debts and

liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".

[111] With respect, I am of the view that several errors were made in *Kitco*. First, Vézina J.A. erred in relying on this Court's judgment in *D.I.M.S. Construction* to reach the conclusion that pre-post compensation can never be allowed under the *CCAA*, even though that judgment was rendered in the context of a bankruptcy under the *BIA*. Despite the similarities between the insolvency schemes established by the *CCAA* and the *BIA*, these are two different statutes, and their differences are significant in the case at bar. Secondly, *Kitco* was based on an inappropriate narrow interpretation of s. 21 of the *CCAA* that disregarded the "flexible" nature the *CCAA* is recognized as having (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 337) as well as the broad discretion conferred on supervising judges, whereas courts of other Canadian provinces have held that pre-post set-off can be permitted. Thirdly, *Kitco* was decided in a context where a company in financial difficulty was actually restructured, and it cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. *Fundamental Differences Between the Two Insolvency Schemes*

[112] It is important to underscore the fundamental differences between the scheme established by the *CCAA* and the one established by the *BIA*, differences that highlight that, under the *CCAA* scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as "an integrated body of insolvency law" and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

[113] The three principal Canadian statutes dealing with insolvency, the *CCAA*, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), have the following main objectives: ". . . to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value" (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 40). More specifically, the *CCAA*'s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les*

*créanciers des compagnies*", in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

[114] For these reasons, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The *CCAA* is therefore characterized as "remedial" legislation (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

[115] The Court has found that the *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the *CCAA*, a "broad" discretion is also conferred on supervising judges by s. 11 of the *CCAA* (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make "any order that [the judge] considers appropriate", although it specifies that such an order must be consistent with the restrictions set out in the *CCAA* and must be "appropriate" in light of the circumstances

of each case. As this Court noted in *Callidus*, s. 11 is in a sense the "engine" of the *CCAA* (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the *CCAA* allows for the implementation of "creative and effective" solutions (*Century Services*, at para. 21, quoting Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41), in recognition of the "positional advantage" gained by supervising judges, who "acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [*CCAA*] proceedings" (*Callidus*, at paras. 47-48). Examples of "creative" solutions adopted by courts under the *CCAA* include "security for debtor in possession financing or super-priority charges on the debtor's assets" and the release of "claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors" (*Century Services*, at para. 62).

[116] As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the *CCAA* enables them to propose solutions "that respond to the circumstances of each case and 'meet contemporary business and social needs'" (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the *CCAA* and has no equivalent in the *BIA*, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

[117] Another major difference between these two schemes is that the *CCAA* allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company's business activities averts "the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70) and "preserves going-concern value" (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the *CCAA*, it is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee (s. 71 of the *BIA*). There is thus no loss of mutuality under the *CCAA*. The status of debtor or creditor of the insolvent company remains unchanged and is not bestowed on a third party.

[118] This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. This same fundamental difference between the *CCAA* scheme and the *BIA* scheme also played a crucial role in *D.I.M.S. Construction*, on which Vézina J.A. largely relied in *Kitco*. In *D.I.M.S. Construction*, this Court had to determine whether the schemes established in two Quebec labour law statutes subverted the scheme of distribution provided for by the *BIA*. Those two statutes created a similar mechanism that required an employer subject to one of them to pay an assessment due from a contractor whose services it had retained. Once the employer had paid the assessment, it was entitled to retain the amount it had paid out of any sums it owed to the contractor, thereby effecting compensation (para. 2). In that case, three employers had been directed to pay the

assessments of a contractor, D.I.M.S. Construction inc., *before* it went bankrupt on April 1, 1999, but only one of them had done so before that date (paras. 3-4). D.I.M.S. Construction's trustee in bankruptcy, relying on the Court's judgment in *Husky Oil*, asked the Court to declare that two sections of the statutes in question were inoperable in the context of a bankruptcy under the *BIA* (para. 5).

[119] In her analysis, Deschamps J. began by discussing s. 97(3) of the *BIA*, which concerns compensation, and made two relevant observations. First, because s. 97(3) applies to claims against a bankrupt's estate, a creditor must meet the conditions set out in s. 121(1) of the *BIA*, which means that, in order to effect compensation, the creditor must "prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy" (para. 40 (emphasis added)). Second, s. 97(3) states that compensation is effected in the same manner as if the bankrupt were a plaintiff or a defendant in a lawsuit and, exceptionally, makes it possible to proceed "as if the bankrupt's patrimony had not vested in the trustee as a result of the bankruptcy" (para. 41).

[120] Deschamps J. concluded that there are three possible scenarios in Quebec civil law, depending on when an employer pays an assessment due from a contractor: (1) the payment is made by the employer *before* the bankruptcy, and the debts become certain, liquid and exigible *before* the bankruptcy; (2) the payment is made *before* the bankruptcy and the employer is in debt to the bankrupt contractor, but one of the conditions for legal compensation is not met; and (3) the payment is made *after* the

bankruptcy (para. 42). Regarding the third scenario — one that also brings into play art. 1651 of the *Civil Code of Québec*, which provides that a person subrogated to the rights of another (the employer in that case) does not have more rights than the subrogating creditor — Deschamps J. concluded that when the employer pays after the contractor's bankruptcy, "[t]he dual status of creditor and debtor", and therefore the mutuality of the debts, does not arise until *after* the bankruptcy (para. 51). It must therefore be inferred that s. 97(3) of the *BIA*, read in conjunction with ss. 121, 136(3) and 141 of the *BIA*, requires that "the mutual debts come into existence before the bankruptcy" in order for compensation to be effected (para. 55 (emphasis added)). Deschamps J. added at para. 56 that, according to the rules specific to the bankruptcy scheme under the *BIA*, the trustee may object to the substitution of a creditor (the employer in that case) if this has the effect of giving the creditor a security that did not exist at the time of the bankruptcy:

> What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. [Emphasis added.]

[121] The argument is a simple one. For legal compensation to be effected, in addition to the fact that a claim must be shown to be certain, liquid and exigible, [TRANSLATION] "two persons must be reciprocally debtor and creditor of each other" (*Code civil du Québec: Annotations — Commentaires 2020-2021* (5th ed. 2020), by

B. Moore, ed., et al., at p. 1558). This is one of the four essential conditions for compensation to be possible. This mutuality of claims is severed when an insolvent company becomes bankrupt, because a trustee in bankruptcy is appointed and the company's property is vested in the trustee (s. 71 of the *BIA*). On the date of the initial bankruptcy event, the bankrupt company loses its status as creditor or debtor in favour of the trustee. As well, the bankrupt company ceases its business activities and normally does not incur any obligations after the bankruptcy. This is why claims provable under the *BIA* must be established on the date of the initial bankruptcy event and why, logically, compensation cannot be effected between pre- and post-bankruptcy debts (ss. 97(3) and 121(1)). However, as the intervener Union des municipalités du Québec rightly noted at the hearing, the situation is very different when an insolvent company applies for an initial order under the *CCAA*, since the company continues its business activities while at the same time seeking a stay of its creditors' remedies (transcript, at pp. 48-49). Under the *CCAA*, the property of the company applying for an initial order is not vested in a monitor. The mutuality of debts remains intact, as the company continues to be the debtor or creditor of a claim (see, on this point, L. Morin and G.-P. Michaud, "Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA*: After the *Kitco* and *Beyond the Rack* Decisions", in Sarra and Romaine, *Annual Review of Insolvency Law 2016*, 311, at pp. 343-44; see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 23-25 (these authors acknowledge that an insolvent company's property is not vested in a monitor under the

*CCAA* and that the mutuality of debts is not severed, but they advocate having the courts interpret the *CCAA* in such a way as to put an end to this mutuality)).



[122] These two fundamental differences between the *CCAA* scheme and the *BIA* scheme suffice to explain why this Court should reject the approach proposed in *Kitco*. As we will see below, courts of other Canadian provinces have relied in part on these differences between the two schemes to find that s. 21 of the *CCAA*, unlike the equivalent provisions in the *BIA* (s. 97(3)) and the *WURA* (s. 73(1)), does not prohibit pre-post set-off.

### B. *Courts of Other Canadian Provinces Have Recognized the Possibility of Effecting Pre-post Set-off*

[123] For two reasons, the right to effect set-off under the *CCAA* has been a subject of debate among Canadian courts. First, before the legislative reform of 1997 (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12) and the addition of s. 21 (formerly s. 18.1), this right was not formally recognized in the *CCAA*. Secondly, questions relating to the framework for the right to effect set-off have arisen in recent decades, particularly with regard to the possibility of staying this right temporarily after an initial order has been made (*CCAA*, s. 11.02(1); see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 ("*Tungsten No. 1*") (decision on

application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 ("*Tungsten No. 2*"); *Re Just Energy Corp.*, 2021 ONSC 1793); or of directly restricting the right in the language of an initial order under the *CCAA* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] More specifically, the question now before this Court is whether s. 21 of the *CCAA* allows pre-post compensation. This question is all the more relevant in the context of a restructuring process under the *CCAA* because the insolvent company continues its business activities.

[125] One of the first cases in which this question was considered after the 1997 legislative reform was *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, a judgment of Farley J. of the Ontario Superior Court of Justice. There, Farley J. had to decide whether a paragraph included in an initial order whose purpose was to limit the right of Air Canada's creditors to effect set-off should be varied.[2] Air Canada essentially argued that under the *CCAA*, as under the *BIA*, legal set-off cannot be permitted between pre- and post-order debts (paras. 10-11). Because the *BIA* provides, in s. 71 (formerly s. 71(2)), that the bankrupt's property vests in the trustee on the date of the initial bankruptcy event, Farley J. concluded that there is no longer any mutuality

[2] The paragraph in question read as follows: "THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date" (para. 2). The last sentence was particularly problematic.

between a creditor and a bankrupt debtor following a bankruptcy, despite such mutuality being a necessary condition for set-off:

> *In a bankruptcy*, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. . . . Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. [Emphasis in original; para. 14.]

[126] Farley J. next considered Air Canada's second argument, that s. 21 (then s. 18.1) of the *CCAA* must be interpreted similarly to s. 73(1) of the *WURA* (at paras. 16-17), which provides that the law of set-off applies to "all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company". He rejected this argument for several reasons, emphasizing in particular the differences between the words of s. 73(1) of the *WURA* and those of s. 21 of the *CCAA*. For example, s. 21 does not provide that set-off must be between claims accruing due as of the date an initial order is made. Farley J. noted that these differences in wording reflect a choice made by Parliament, which did not intend to enact identical set-off provisions in Canada's three insolvency statutes (para. 23). For these reasons, he ordered that the paragraph of the order restricting the right to effect set-off be varied (para. 24).

[127] Although he struck out the part of the initial order that precluded pre-post set-off, Farley J. nonetheless stayed set-off until Air Canada's situation was more stable

in order to avoid the disruptive consequences that would result from allowing set-off during the status quo period. He suggested that the best time to effect set-off would be in conjunction with the formation of a plan of arrangement (para. 25).



[128] My colleagues argue (at para. 77) that "*Air Canada* and *Tungsten* [which I will discuss below] did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors." This, however, ignores that *Air Canada* is widely recognized as being authoritative and as standing for the proposition that mutuality is not severed by an initial order made under the *CCAA*, which means that pre-post set-off or compensation is possible but is subject to a supervising judge's power to stay it (see R. Thornton, "Air Canada and Stelco: Legal Developments and Practical Lessons", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten No. 3*"), at para. 15). For example, Robert Thornton writes:

> Air Canada was indebted to certain parties as at the date of the Initial Order. Subsequent to the date of the Initial Order, those parties became indebted to Air Canada. They wished to set-off their post-CCAA debts against Air Canada's pre-CCAA debts owing to them. . . .
>
> . . .
>
> . . . Farley J. held that there was no loss of mutuality upon the commencement of a CCAA proceeding. Accordingly, legal set-off is available both in respect of debts existing as at the date of an initial order and in respect of debts that arose after the date of an initial order. Farley J. was correct in so doing.
>
> . . .

> It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA other than (i) the right to exercise them may be "temporally" stayed and (ii) if the CCAA applicant refuses to acknowledge the set-off, it would be necessary for the creditor to seek judicial intervention.
>
> It is the authors' view that it is appropriate for set-off rights to continue after the commencement of a CCAA proceeding. The CCAA applicant continues to carry on business in the ordinary course. [Emphasis added; pp. 94-96.]



[129] In *Tungsten*, the British Columbia Court of Appeal also considered set-off under s. 21 of the *CCAA* — first in an application for leave to appeal two orders of the British Columbia Supreme Court (*Tungsten No. 1*, per Savage J.A.) and then in an appeal from that decision denying leave to appeal (*Tungsten No. 2*). The insolvent company had obtained an initial order under the *CCAA* effective June 9, 2015, at which time it owed approximately $4.4 million to Global Tungsten and Powders Corp. ("GTP") under a loan agreement. It subsequently continued selling tungsten to GTP, which gave notice that it wished to set off its claim (the pre-order debt) against the amounts due or accruing due for the tungsten sold to it (the post-order debt) (*Tungsten No. 1*, at paras. 2 and 6). The chambers judge had held that GTP had a valid right of set-off (*Tungsten No. 2*, at para. 7).

[130] In these two decisions, the main question before the Court of Appeal was whether the chambers judge had erred in concluding that the right to effect set-off could be stayed, like the other creditors' remedies, once the initial order had been made. The question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted under the *CCAA*. Relying on s. 21

of the *CCAA* as well as on s. 11 of that statute, which confers a broad discretion on a supervising judge, the Court of Appeal explained that nothing in the words of s. 21 prohibits a supervising judge from making the right of set-off subject to a stay of remedies (*Tungsten No. 1*, at paras. 12-13 and 16; *Tungsten No. 2*, at paras. 31 and 34-35).



[131] Contrary to what my colleagues say at para. 79, in that case both the chambers judge and the Court of Appeal considered the arguments relating to the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, but they did so from the perspective of a stay of the right to effect set-off rather than by questioning the very possibility of pre-post set-off. This shows that my colleagues' concerns about the disruptive potential of pre-post set-off were given adequate consideration by the supervising judge in exercising his discretion to permit or to stay set-off.

[132] In particular, the chambers judge wrote the following: ". . . a temporal stay of rights can be granted to further the purpose of the initial order and the purposes of the *Act*" (*Tungsten No. 3*, at para. 25). While conceding that there was some merit to the arguments on the effects of pre-post set-off, he was not prepared to reverse the decision in *Air Canada* (paras. 17-18). Moreover, he stayed the right to effect set-off on the basis that, "[i]n order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential", and he added, among other things, that if the stay of set-off were not continued, the restructuring efforts "would be thrown into

disarray" and "[t]he status quo would be significantly altered and the restructuring would effectively be at an end" (para. 32). The judge who considered the application for leave to appeal noted in turn that, "[c]learly, if an attempt at compromise or arrangement is to have any prospect of success there must be a means of holding creditors at bay" (*Tungsten No. 1*, at para. 16). He added that not staying the right to effect set-off would favour GTP to the detriment of the other creditors (paras. 18 and 25). Groberman J.A., who wrote the judgment of the Court of Appeal, stressed the principle that a creditor should not be able to exercise a right of set-off to circumvent a compromise or arrangement under the *CCAA* (*Tungsten No. 2*, at paras. 37-39).

[133] Despite my colleagues' protestations to the contrary, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*.

[134] It must be concluded that the approach proposed by the Quebec Court of Appeal in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. This asymmetry is contrary to the principle of homogenous interpretation of federal statutes (Morin and Michaud, at p. 344).

C. *Restructuring an Insolvent Company Versus Liquidating Its Assets*

[135] Finally, in *Kitco*, Vézina J.A. noted that his conclusions were based on the fact that the insolvent company was engaged in a genuine restructuring process and that staying its creditors' remedies was crucial to bringing this process to a successful conclusion. He stressed that Kitco's restructuring plan was in jeopardy because the Agency was effecting compensation with the amounts it was supposed to pay Kitco. Kitco was required to carry on its activities while paying 15 percent in taxes on its gold inputs without receiving the refund to which it was entitled in this regard. It was thus in an [TRANSLATION] "untenable" position relative to competitors in its field (paras. 47-48).

[136] Staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance, particularly where the exercise of a creditor's right to effect pre-post compensation might sabotage the company's efforts to regain financial health.

[137] In this case, however, and in the opinion of the monitor and the interveners themselves, there has never been any question of SM Group proposing a plan of arrangement. Once SM Group's principal creditors filed an application for an initial order under the *CCAA*, it was clear that they wished to opt for a liquidation process — that is, the sale of the insolvent company to a new buyer. In this particular situation, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid

and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, because a plan of arrangement cannot be contemplated, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process.



## II. Discretion Not Exercised by the Supervising Judge in This Case

[138] In my view, pre-post compensation is permitted under s. 21 of the *CCAA*, but it must be subject to the exercise of a supervising judge's discretion. In *Callidus*, this Court clarified the framework for the exercise of this discretion under s. 11 of the *CCAA*. The first two criteria are found in s. 11, which provides that a supervising judge may make any order that is "appropriate" in the circumstances of the case and consistent with the restrictions set out in the *CCAA*. The Court added that the exercise of the discretion must also further the remedial objectives of the *CCAA* and be focused in particular on the criteria of appropriateness, good faith and due diligence (para. 70).

[139] My colleagues make a series of arguments against compensation in general and pre-post compensation in particular: the high disruptive potential of compensation; respect for the status quo period; the loss of incentive for the debtor to provide goods and services during the stay period because it would fear not being paid for them, which would deprive it of the funds needed to continue operating; the fact that an interim lender would most likely refuse to continue to finance the debtor's operations if the loaned funds were destined to enrich another creditor; the fact that the rampart set up

by a stay to protect against attacks by creditors would crumble; the fact that compensation deviates from the principle of equality among ordinary creditors and that pre-post compensation amounts to giving certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings; etc. (paras. 59, 61 and 73).



[140] Most of these arguments presuppose that pre-post compensation will be systematically allowed without regard for the circumstances of each case and without considering whether it is "appropriate" — hence my colleagues' position that pre-post compensation should never be authorized unless there are exceptional circumstances. Although these arguments are legitimate, they must be left to the supervising judge, who will weigh them — along with the other relevant considerations and circumstances — in exercising the discretion to permit or to deny pre-post compensation in a particular case, having regard to the remedial objectives of the *CCAA*.

[141] Believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, the supervising judge in this case did not exercise her discretion under s. 11 of the *CCAA*. Given that this discretion was not exercised by the supervising judge, it is not for this Court to exercise it to determine whether to permit compensation between the amounts owed by the City to SM Group and the claim held by the City against SM Group. The Court has made it clear that supervising judges are in the best position to decide whether to exercise their discretion in a particular case based on "a

circumstance-specific inquiry that must balance the various objectives of the *CCAA*" (*Callidus*, at para. 76).

[142] My colleagues are of the view that remanding the case to the court of original jurisdiction would be unhelpful and not in the interests of justice (paras. 84 and 98). I respectfully disagree. In fact, this Court recently noted in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, that in cases involving an exercise of discretion by a court of first instance, "it is not in the interests of justice for this Court to step into [that court's] shoes and decide these matters at first instance", and that this Court's role is limited to reviewing the exercise of the discretion "through [a] deferential lens" (para. 88).

## III. Conclusion

[143] For these reasons, I would allow the appeal solely for the purpose of remanding the case to the Superior Court to have it determine whether the City may effect compensation between SM Group's pre-initial order debts and the post-initial order amounts owed by the City to SM Group. I would also allow the appeal so that it can be determined whether the City may effect compensation in respect of its water meter claim.

*Appeal dismissed with costs,* BROWN J. *dissenting.*

*Solicitors for the appellant: IMK, Montréal.*

*Solicitors for the respondent: Stikeman Elliott, Montréal.*

*Solicitors for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP: McCarthy Tétrault, Montréal.*

*Solicitors for the intervener Thornhill Investments Inc.: Fasken Martineau DuMoulin, Montréal.*

*Solicitor for the intervener Ville de Laval: Service des affaires juridiques de la Ville de Laval, Laval.*

*Solicitors for the intervener Union des municipalités du Québec: Borden Ladner Gervais, Montréal.*

# COUR SUPÉRIEURE



CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : **450-11-000167-134**

DATE : 3 août 2015

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**SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, j.c.s.**

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**DANS L'AFFAIRE DU PLAN DE TRANSACTION OU D'ARRANGEMENT DE :**

**MONTREAL, MAINE & ATLANTIC CANADA CO.** (**MONTREAL, MAINE & ATLANTIQUE CANADA CIE**)

Débitrice

et

**RICHTER ADVISORY GROUP INC.** (**RICHTER GROUPE CONSEIL INC.**)

Contrôleur

et

**COMPAGNIE DE CHEMIN DE FER CANADIEN PACIFIQUE**

Opposante

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**JUGEMENT RECTIFICATIF**

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JD 2364

[1] **VU** l'article 475 C.p.c.;

[2] **VU** qu'un jugement a été rendu le 13 juillet 2015;

[3] **VU** l'erreur matérielle dans les paragraphes [98], [102] et [103] du jugement;

[4] **CONSIDÉRANT** qu'il y a lieu de corriger le jugement du 13 juillet 2015 en ce qui concerne la numérotation des paragraphes auxquels le soussigné fait référence;

**PAR CES MOTIFS, D'OFFICE** :

[5] **LE TRIBUNAL ORDONNE** la correction du jugement du 13 juillet 2015 afin que les paragraphes [98], [102] et [103] se lisent ainsi :

> [98] **ORDERS** that, without limiting anything in this Order, including without limitation, paragraph **97** hereof, or anything in the Plan, any Claim that any Person (regardless of whether or not such Person is a Creditor or Claimant) holds or asserts or may in the future hold or assert against any of the Released Parties or that could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, arising out of, in connection with and/or in any way related to the Derailment, the Policies, MMA, and/or MMAC, is hereby permanently and automatically released and the enforcement, prosecution, continuation or commencement thereof is permanently and automatically enjoined and forbidden. Any and all Claims against the Released Parties are permanently and automatically compromised, discharged and extinguished, and all Persons and Claimants, whether or not consensually, shall be deemed to have granted full, final, absolute, unconditional, complete and definitive releases of any and all Claims to the Released Parties;
>
> [102] **ORDERS** that, subject to paragraphs **103** and **105** hereof, upon the Plan Implementation Date, all CCAA Charges against the Petitioner or its property created by the Initial Order or any subsequent orders (as defined in the Initial Order, the "**CCAA Charges**") shall be terminated, discharged and released;
>
> [103] **ORDERS** that, notwithstanding paragraph **102** hereof, the Canadian Professionals and U.S. Professionals are entitled to the Administration Charge set out in Article 7 of the Plan as security for the payment of the fees and disbursements of the Canadian Professionals and U.S. Professionals;

_____

**GAÉTAN DUMAS, j.c.s.**

**COUR SUPÉRIEURE**
**(Chambre commerciale)**



CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : **450-11-000167-134**

DATE : 13 juillet 2015

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**SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, J.C.S.**

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**DANS L'AFFAIRE DU PLAN DE TRANSACTION OU D'ARRANGEMENT DE :**

**MONTREAL, MAINE & ATLANTIC CANADA CO. (MONTREAL, MAINE & ATLANTIQUE CANADA CIE)**

Débitrice

et

**RICHTER ADVISORY GROUP INC. (RICHTER GROUPE CONSEIL INC.)**

Contrôleur

et

**COMPAGNIE DE CHEMIN DE FER CANADIEN PACIFIQUE**

Opposante

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**JUGEMENT SUR REQUÊTE**
**EN APPROBATION DU PLAN D'ARRANGEMENT**

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JD 2364

[1] Le tribunal est saisi d'une requête en approbation d'un plan d'arrangement accepté à l'unanimité lors d'une assemblée des créanciers de la débitrice tenue à Lac-Mégantic le 9 juin 2015.

[2] Ce plan d'arrangement fait suite à la tragédie ferroviaire qui a coûté la vie à 48 personnes, et a dévasté le centre-ville de la ville de Lac-Mégantic le 6 juillet 2013.

[3] Après une ordonnance initiale prononcée par notre collègue, Martin Castonguay, j.c.s., en août 2013, le soussigné s'est vu assigner le présent dossier.

[4] Plus de 40 jugements et ordonnances ont été rendus par le soussigné dans le cadre du présent dossier.

[5] Comme le rappelait le soussigné dans un jugement rendu le 17 février 2014 :

> [26] Les procédures en vertu de la LACC avaient pour but de poursuivre, dans la mesure du possible, l'exploitation du chemin de fer afin de desservir les nombreuses municipalités et les nombreux clients situés le long de son parcours. Elles avaient également pour but de mettre en place un processus de vente afin de procéder à la vente des actifs de MMA et de MMAR en tant qu'entreprises en exploitation (*as a going concern*). Railroad Acquisition Holdings (RAH) a été la soumissionnaire gagnante pour la quasi-totalité des actifs des sociétés pour lesquelles le tribunal a autorisé la vente le 23 janvier 2014.
>
> [27] Les procédures en vertu de la LACC avaient également pour but de maintenir les emplois du personnel spécialisé qui travaille toujours chez la requérante, et ce, afin de maximiser la valeur des actifs de la requérante et idéalement pour assurer que les emplois soient maintenus après la vente.
>
> [28] Selon l'entente d'achat d'actifs, RAH devrait conserver le poste de la majorité des employés actuels de MMA.
>
> [29] Les procédures en vertu de la LACC avaient également pour but de mettre en place un processus de réclamation pour éviter que plusieurs recours judiciaires soient menés en parallèle et pour traiter efficacement les réclamations de toutes les parties intéressées, y compris les familles des victimes et les détenteurs de réclamations liées au déraillement.

[6] L'importance de conserver un chemin de fer pour les industries desservies n'a pas besoin de plus amples explications.

[7] Ce premier objectif a été atteint dès février 2014, soit moins de sept mois après la tragédie ferroviaire, par la vente des actifs de la débitrice avec les ordonnances

nécessaires pour pouvoir parfaire la vente des actifs. Il reste donc à compléter le deuxième but clairement exprimé dès le départ par la débitrice, à savoir d'indemniser les victimes de cette tragédie ferroviaire pour laquelle la débitrice a presque immédiatement reconnu sa responsabilité.

[8] Le tribunal ne reprendra pas ici l'historique complet du dossier, puisque tous les jugements rendus précédemment en font amplement état. Qu'il suffise de rappeler que le soussigné a rendu un jugement le 27 mai 2015 résumant les faits depuis le début du dossier ainsi que le jugement rendu par le soussigné par le 17 février 2014 qui faisait état de la situation à l'époque.

[9] Par contre, il est important de rappeler que dès février 2014, le soussigné s'est questionné sur l'obligation de déposer un plan d'arrangement viable pour la continuation du sursis d'exécution et sur la question de savoir si un plan d'arrangement pouvait prévoir la liquidation d'une compagnie, ou si le plan devait obligatoirement prévoir une restructuration complète de l'entreprise.

[10] Puisque le déroulement du dossier semble être la suite logique de ce qu'affirme le soussigné aux pages 8 à 30 du jugement du 17 février 2014, et puisque plus de 4 000 créanciers se fient à l'orientation donnée au dossier, il nous semble important de rappeler ce que mentionne le soussigné dans ce jugement, à savoir :

> **Obligation de déposer un plan d'arrangement viable pour la continuation du sursis des procédures**
>
> [57] Il existe depuis fort longtemps un débat sur l'obligation de déposer un plan d'arrangement si l'on désire bénéficier de la *LACC*.
>
> [58] Avant les amendements de 2009, il existait même un débat sur l'autorité des tribunaux d'autoriser la liquidation d'une compagnie sans l'acceptation d'un plan d'arrangement. L'article 36 *LACC* (L.C. 2007, c.36) adopté en 2007 prévoit :
>
> > « 36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce, malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.
> >
> > Avis aux créanciers
> >
> > *(2)* La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

> Facteurs à prendre en considération
>
> *(3)* Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :
>
> *a*) la justification des circonstances ayant mené au projet de disposition;
>
> *b*) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
>
> *c*) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
>
> *d*) la suffisance des consultations menées auprès des créanciers;
>
> *e*) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
>
> *f*) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande. »

[59] Avant cet amendement, aucune disposition de la loi ne permettait expressément la liquidation partielle ou totale des actifs d'une compagnie.

[60] Les tribunaux utilisaient leurs pouvoirs inhérents pour autoriser la vente des actifs hors du cours ordinaire des affaires.

[61] L'auteure Shelley C. Fitzpatrick[1] mentionnait que la flexibilité de la *LACC* permettait la liquidation d'actifs excédentaires. Le débat découlait plutôt du fait que plusieurs tribunaux ont autorisé la liquidation d'actifs qui n'entraient pas dans cette catégorie :

> « *As is evident from the comments of Blair J.A. in Metcalfe, one of the major strengths of the CCAA is its flexibility in meeting any particular fact situation. Clearly, Parliament intended to allow a downsizing of redundant assets as part of the restructuring process. Such downsizing would assist in returning the debtor company to profitability and thereby enable it to remain in business. (page 41)*
>
> *The courts, however, have permitted asset sales that extend well beyond a sale of redundant assets as part of a downsizing of operations. There are a variety of liquidation scenarios. On one end of the spectrum is a sale of assets to various purchasers who do not intend to continue the operations of any part of the debtor's business. On the other end of the spectrum is a sale to a single purchaser who does intend to continue operating the debtor's business.*

> *Somewhere in the middle is a sale to one or more purchasers who do intend to continue certain parts of the debtor's business on a going concern basis.* »

[1] Shelley C. Fitzpatrick, *Liquidating CCAAs – Are We Praying to False Gods?*, dans *AnnualReview of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.41.

[62] L'auteur Bill Kaplan[2] abonde dans le même sens en précisant que les tribunaux provinciaux à travers le Canada s'accordent sur la possibilité d'autoriser la liquidation d'actifs sous la *LACC*, mais que la jurisprudence n'est pas constante en ce qui a trait à la façon dont on permet cette liquidation :

> « *We will see later that there is no consensus among the Alberta Court of Appeal, the Ontario Courts and the British Columbia Court of Appeal considering the proper exercise of that jurisdiction, but there is no disagreement that there is jurisdiction under the CCAA to approve a liquidation of assets.* » (page 94)

[2] Bill Kaplan, *Liquidating CCAAs: Discretion gone Awry?*, dans *Annual Review of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.79

[63] Il y avait donc un débat sur les circonstances dans lesquelles une liquidation d'actifs sous la *LACC* pouvait être autorisée tant en ce qui a trait aux actifs visés qu'à l'obligation ou non de soumettre la liquidation au vote des créanciers.

**<u>Arguments favorables à la liquidation</u>**

[64] Dans certains cas, la liquidation d'actifs par le biais de la *LACC* est préférable à la liquidation sous un autre régime d'insolvabilité et c'est pourquoi certains tribunaux l'ont permise. Le fait de poursuivre les activités de la compagnie peut avoir pour effet d'augmenter sa valeur lors d'une liquidation et ainsi améliorer le sort des créanciers et des diverses parties prenantes[3].

[3] *Ibid*, p.89.

[65] Selon l'auteure Fitzpatrick[4], ce courant jurisprudentiel a été enclenché par les affaires suivantes :

> *« The line of cases that, in obiter, "endorse" liquidating CCAAs can be traced to two early authorities: Re Amirault Fish Co. and Re Associated Investors of Canada Ltd.* »
> [**Citations omises**]

[4] *Supra,* note 1, p. 47.

[66] Elle réfère également à d'autres décisions[5] qui ont justifié la liquidation d'actifs dans l'intérêt des créanciers. Il est à noter que ces décisions sont issues de tribunaux ontariens qui au fil du temps ont été autrement plus proactifs qu'ailleurs au Canada pour autoriser la liquidation d'actifs sous la *LACC*, nous y reviendrons :

> « *In Re Anvil Range Mining Corp.,* **[…]** *Farley J. referred to Olympia & York and Lehndorff as support for the principle that "the CCAA may be used to effect a sale, winding up or liquidation of a company and its assets in appropriate circumstances".*
>
> *It is important to note that in Anvil Range, Farley J. also mentioned "maximizing the value of the stakeholders pie". In Lehndorff, Farley J. stated that it appeared to him that "the purpose of the CCAA is also to protect the interests of creditors" which may involve a liquidation or downsizing of the business, "provided the same is proposed in the best interests of the creditors generally".* »
>
> [5] *Re Lehndorff General Partner Ltd*. (1993), 17 C.B.R. (3d) 24; *Re Olympia & York Developments Ltd*, (1995), 34 C.B.R. (3d) 93; *Re Anvil Range Mining Corp*. (2001), 25 C.B.R. (4th) 1.

[67] Dans un deuxième temps, et c'est ici l'argument qui suscite le plus de controverse, les professionnels qui interviennent dans le cadre d'une liquidation encourent des risques moindres si la liquidation est faite sous la *LACC* que si elle procédait sous la *Loi sur la faillite et l'insolvabilité* (*LFI*). En effet, lorsqu'un administrateur est nommé sous la *LFI* et qu'il prend possession et administre les actifs de la compagnie, celui-ci engage sa responsabilité[6]. Sous la LACC, la compagnie demeure propriétaire de ses actifs et continue d'assurer ses opérations, ce qui n'engage pas la responsabilité d'un tiers, ce qui peut contribuer à rassurer les créanciers sur la gestion de l'entreprise.

> [6] *Supra*, note 2, p.90.

**<u>Arguments défavorables à la liquidation</u>**

***Utilisation contraire à l'objectif de la loi***

[68] Le premier argument à l'encontre de la liquidation d'actifs autres qu'excédentaires est que l'objectif de la *LACC* n'est pas de permettre la liquidation d'une entreprise et qu'il existe d'autres régimes, comme la *LFI*, sous lesquels la liquidation devrait se dérouler. Dans l'affaire *Hongkong Bank of Canada* c. *Chef Ready Foods Ltd*[7], la Cour d'appel de la Colombie-Britannique définit l'objectif de la LACC et le rôle du tribunal comme suit :

> « *The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business.* **[…]** *When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.*»
>
> [7] (1990), 4 C.B.R. (3d) 311 (CB C.A.).

[69] Cette interprétation est supportée par la décision de la Cour d'appel de la Colombie-Britannique dans *Cliffs Over Maple Bay Investments Ltd*. c. *Fisgard Capital Corp*.[8] dont nous discuterons plus loin.

[8] 2008 BCCA 327.

[70] Au Québec, la Cour d'appel sous la plume du juge Louis Lebel, abondait dans le même sens et établissait une distinction entre la *LACC* et la *LFI*. Elle mentionnait dans *Banque Laurentienne du Canada* c. *Groupe Bovac Ltée*[9] :

> « *26 Plus que vers la liquidation de la compagnie, cette Loi est orientée vers la réorganisation de l'entreprise et sa protection pendant la période intermédiaire, au cours de laquelle l'on procédera à l'approbation et à la réalisation du plan de réorganisation. A l'inverse, la Loi sur la faillite (L.R.C. 1985, c. B-3) recherche la liquidation ordonée* **(sic)** *des biens du failli et la répartition du produit de cette liquidation entre les créanciers, suivant l'ordre de priorité définie par la Loi. La Loi sur les arrangements répond à un besoin et à un objectif distinct, du moins selon l'interprétation qui lui a été généralement donnée depuis son adoption. On veut soit prévenir la faillite, soit faire émerger l'entreprise de cette situation.* »

[9] EYB 1991-63766 (QC C.A.), par. 26.

[71] Toutefois, comme le soulève Shelley C. Fitzpatrick[10], la situation demeure non résolue, car aucune cour d'appel au Canada ne s'est récemment penchée sur la question à savoir si la liquidation d'actifs sous la *LACC* est conforme à son objectif.

[10] *Supra*, note 1.

***Les créanciers garantis accomplissent indirectement ce qu'ils ne peuvent faire directement***

[72] Comme mentionné un peu plus tôt, la liquidation d'actifs sous la *LACC* a l'avantage de réduire les risques qu'engagent les professionnels qui y sont impliqués. Dans le cas d'une liquidation sous la *LFI*, les créanciers garantis doivent verser une indemnité à ces professionnels pour pallier à ces risques. Bien qu'ils doivent faire de même lors d'une liquidation sous la *LACC*, l'indemnité est inévitablement moindre, car le risque encouru est diminué. Ainsi, avec l'accord de la compagnie débitrice, les créanciers garantis procèdent à une liquidation des actifs de la compagnie sous la *LACC* sans n'avoir jamais eu l'objectif de s'entendre sur un plan d'arrangement ou de voir la compagnie survivre, ce qui est contraire à l'objectif de la loi[11].

[11] *Supra*, note 2, p.54, 55.

***Iniquités envers les diverses parties prenantes***

[73] Comme le rappelle la Cour d'appel de l'Ontario dans l'affaire *Metcalfe*[12], la *LACC* a été adoptée lors de la grande dépression des années 1930 et avait pour objectif de réduire le nombre de faillites d'entreprises et par le fait même le taux de chômage anormalement élevé. Au fil du temps, les tribunaux ont accordé une visée sociale à cette loi qui doit maintenant servir l'intérêt des investisseurs, créanciers, employés et autres parties prenantes impliquées dans une entreprise.

[12] *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 (Ont. C.A.), par.51, 52.

[74] Cette évolution a eu pour effet de pousser les tribunaux à prendre des positions plus politiques que judiciaires dans certains cas, et ce, dans l'intérêt plus large de la collectivité.

[75] Le fait d'inclure ces critères sociaux dans le processus décisionnel des tribunaux a parfois pour effet de créer certains traitements inégaux entre les diverses parties prenantes impliquées. En effet, il est rare que les intérêts des investisseurs, des créanciers, des employés et des autres parties prenantes se rejoignent dans une même solution. Cette situation s'est produite dans l'affaire *Re Pope &Talbot Ltd*[13] dans laquelle la Cour suprême de la Colombie-Britannique a autorisé la vente d'actifs de la compagnie non pas à celui qui présentait l'offre la plus lucrative, mais bien à une compagnie qui proposait de continuer les activités de l'entreprise, et ce, malgré l'existence d'une offre plus élevée. Essentiellement, le tribunal a déterminé que l'intérêt de la collectivité et du maintien des emplois dans cette entreprise devait primer sur l'obtention du meilleur prix et de la satisfaction des créanciers, ce que décrie l'auteure Fitzpatrick[14] :

> *« The court is essentially making a legislative statement grounded in public policy as to whether the community of Nanaimo is better off with pulp mill jobs as opposed to construction/golf course jobs (or whatever alternative use the site would have been put to). It is difficult to see the evidentiary basis upon which the court could come to the conclusion that the interests of the employees, suppliers and the community of Nanaimo outweighed obtaining the best price for the assets. »*

[13] 2009 BCCS 17 (CanLII).
[14] *Supra*, note 1, p.60.

[76] L'auteure soulève également un point intéressant dans ce passage en mentionnant que le tribunal prend une position législative. En effet, comme elle le soulève plus loin, ce type de position à caractère social devrait être laissé au pouvoir législatif et non aux tribunaux[15].

[15] *Supra*, note 1, p.61.

***Impacts sur les droits des tiers***

[77] Lorsqu'une compagnie est placée sous la protection de la *LACC*, ses fournisseurs n'ont pas à remplir leurs obligations contractuelles si la compagnie ne le souhaite pas ou si elle n'entend pas exécuter ses obligations corrélatives[16].

[16] *Supra*, note 1, p.71.

[78] Dans l'affaire *Pope & Talbot*, Canfor, un fournisseur de Pope & Talbot, s'est vu imposer de continuer à remplir ses obligations contractuelles envers Pope & Talbot par ordonnance du tribunal à l'occasion de la demande initiale. De plus, le tribunal a ordonné de surseoir au droit de Canfor de mettre fin au contrat la liant à Pope & Talbot, et ce, malgré les inexécutions contractuelles de cette dernière[17].

[17] *Supra*, note 1, p.72, 73.

[79] Ainsi, Pope & Talbot, et par le fait même ses créanciers, pouvaient maintenir le contrat en vie sans remplir leurs obligations et éventuellement le transférer à un acheteur de l'entreprise. Cette situation a pour effet d'accorder plus de droits aux créanciers de la compagnie qui bénéficie de la protection de la *LACC* que la compagnie elle-même si elle ne bénéficiait pas de cette protection, et ce, aux dépens de fournisseurs tels Canfor[18]. Pour reprendre une métaphore employée dans le texte de Shelley C. Fitzpatrick, les créanciers utilisent la loi comme une épée leur permettant d'obtenir une meilleure position stratégique et donc un prix supérieur pour les actifs de la compagnie et non comme un bouclier permettant de maintenir le statu quo comme il se doit[19].

[18] *Supra*, note 1, p.73.
[19] *Supra*, note 2, p.67.

***Circonstances et paramètres de la liquidation***

[80] Le nouvel article 36 de la loi règle la question du pouvoir des tribunaux de permettre la liquidation. Par contre, il donne très peu d'indications quant à la façon dont le tribunal devra exercer ce pouvoir. Le nouvel article 36 prévoit tout de même que le tribunal pourra autoriser la liquidation sans l'accord des créanciers.

**Diverses applications de la discrétion exercée par les tribunaux**

***Ontario***

[81] Comme nous l'avons mentionné précédemment, les tribunaux ontariens sont significativement plus actifs qu'ailleurs au Canada dans l'exercice de leur discrétion d'autoriser la liquidation d'actifs sous la *LACC*. Ainsi, des liquidations ont été autorisées sans qu'un plan d'arrangement ait été préalablement approuvé.

[82] C'est le cas dans *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*[20]. Alors que l'organisme faisait face à des poursuites de près de 8

milliards de dollars de victimes ayant contracté diverses maladies par des transfusions de sang contaminé, le tribunal a autorisé le transfert de ses actifs à d'autres organismes avant qu'un plan d'arrangement ait été proposé aux créanciers. Le juge Blair justifie sa décision par la flexibilité de la *LACC* qui lui permet d'agir de la sorte et par les circonstances en l'espèce qui en font la meilleure solution[21] :

> « *[45] It is very common in CCAA restructurings for the Court to approve the sale and distribution of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy.*
>
> […]
>
> *[46]* […] *There is no realistic alternative to the sale and transfer that is proposed and the alternative is a liquidation/bankruptcy scenario, which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To forego that purchase price supported as it is by reliable expert evidence would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.* »

[20] 1998 CanLII 14907 (ON S.C.).
[21] *Ibid*, par.45, 47.

[83] L'auteur Bill Kaplan donne également l'exemple de l'affaire *Re Anvil Range Mining Corp.*[22] dans laquelle le tribunal a autorisé la liquidation des actifs de la compagnie suite à un plan d'arrangement qui n'avait été voté que par les créanciers garantis. Le plan prévoyait que seuls les créanciers garantis étaient autorisés à voter et que les créanciers non garantis ne recevraient aucun montant des suites de la liquidation. Le tribunal s'appuya sur le fait que ces derniers créanciers n'en souffriraient aucun préjudice, car, peu importe la solution retenue, la liquidation ne permettrait en aucun cas de leur verser une quelconque indemnité[23].

[22] 2001 CanLII 28449 (ON S.C.).
[23] *Ibid*, par.12.

[84] Bill Kaplan résume la position des tribunaux ontariens quant à la liquidation d'actifs sous la *LACC* comme suit, tout en précisant qu'elle s'éloigne de celle des autres provinces[24] :

> « *The Ontario authority demonstrates not only that the courts in Ontario have embraced liquidating CCAAs, but will approve asset sales under the CCAA without requiring that a plan of arrangement be filed. That is not an approach sanctioned by the Alberta Court of Appeal, or apparently by the British Columbia Court of Appeal, nor as we shall see, is it an approach that as met favour with Courts in the province of Quebec.* »

[24] *Supra*, note 2, p.103.

***Colombie-Britannique***

[85] La situation en Colombie-Britannique est intéressante, car jusqu'à récemment les tribunaux de cette province emboîtaient le pas aux tribunaux ontariens lorsqu'il s'agissait d'autoriser la liquidation d'actifs sous la *LACC*. Toutefois, la situation a été diamétralement modifiée depuis la décision *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*[25]

[25] *Supra*, note 8.

[86] Dans cette décision, la Cour d'appel de la Colombie-Britannique conclut que, conformément à l'objectif de la *LACC*, elle ne peut octroyer la protection de la *LACC* lorsque la compagnie débitrice n'a pas l'intention de proposer un plan d'arrangement à ses créanciers. Comme l'explique Bill Kaplan[26] :

> « *The Court of Appeal observed that the fundamental purposes of the CCAA was to facilitate, comprises and arrangements between companies and their creditors. Section 11, the stay provision, was merely ancillary to that fundamental purpose, and should only be granted in furtherance of that fundamental purpose. While the filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11, the Court concluded that a stay should not be granted if the debtor company does not intend to propose a compromise or arrangement to its creditors.* »

[26] *Supra*, note 2, p.85.

***Alberta***

[87] La jurisprudence en Alberta est plus exigeante qu'ailleurs qu'au Canada lorsque vient le temps d'autoriser une liquidation d'actifs sous la *LACC*. L'affaire *Royal Bank c. Fracmaster Ltd.*[27] en est un bon exemple. En effet, la Cour d'appel de l'Alberta a profité de cette décision pour prendre position sur les conditions qui devraient guider le tribunal lors de l'autorisation d'une liquidation sous la *LACC*[28] :

> « *Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the interests of the creditors generally […] There must be an ongoing business entity that will survive the asset sale […] A sale of all or substantially all of the assets of the company to an entirely different entity with no continued involvement by former creditors and shareholders does not meet this requirement.* »
> **[citation provenant du texte *Liquidating CCAAs: Discretion Gone Awry?*]**

[27] (1999), 11 C.B.R. (4th) 204 (Alta. Q.A.).
[28] *Ibid*, par.16.

[88] En imposant la condition de la survie de l'entreprise pour qu'une liquidation des actifs sous la *LACC* soit autorisée, l'affaire *Fracmaster* a eu pour effet de rendre

cette procédure significativement plus difficile à obtenir en Alberta qu'ailleurs au Canada[29].

[29] *Supra*, note 2, p.112.

***Québec***

[89] Selon l'auteur Bill Kaplan, les tribunaux québécois exigent qu'il existe une preuve matérielle de la structure générale et du contenu d'un éventuel plan d'arrangement à être présenté aux créanciers avant d'octroyer la protection de la *LACC* à une compagnie[30].

[30] *Supra*, note 2, p.113.

[90] Au soutien de ses dires, il invoque la décision *Re Boutiques San Francisco Incorporées*[31]. Dans cette affaire, le tribunal refuse d'octroyer la protection de la loi sous l'article 11 *LACC* au motif que le plan présenté par la compagnie débitrice était incomplet[32] :

> « 20 As a result, while it is receptive to issue some Initial Order to allow the BSF Group the possibility to avail itself of some of the protections of the CCAA under the circumstances, the Court will not grant all the conclusions sought at this stage because of this situation and the lack of information on the proposed plan. »

[31] EYB 2003-51913 (QCCS).
[32] *Ibid*, par.20.

[91] Au soutien de cette décision, le tribunal réfère au jugement du juge LeBel de la Cour d'appel dans *Banque Laurentienne du Canada c. Groupe Bovac Ltée*[33] :

> *« 56* […] *Si les art.4 et 5 indiquent que l'ordre de convoquer les créanciers ou, le cas échéant, les actionnaires de la compagnie dépend de la discrétion du juge, l'exercice de celui-ci suppose l'existence d'un élément de base. Cet événement survient lorsqu'une transaction ou un arrangement "est proposé". Il faut que, matériellement, existe un projet d'arrangement. L'on ne peut se satisfaire d'une simple déclaration d'intention. Autrement, l'on transforme radicalement les mécanismes de la Loi. On fait de celle-ci une méthode pour obtenir un simple sursis, sans que l'on ait à établir qu'il existe un projet d'arrangement et sans que l'on puisse faire évaluer sa plausibilité. La Loi n'est pas formaliste. Elle n'exige pas que le projet d'arrangement soit incorporé dans le texte de la requête. Il peut se retrouver dans des documents annexes, dans des projets de lettres aux créanciers, pourvu que l'on puisse indiquer au juge, auquel on demande la convocation de l'assemblée, qu'il existe et que l'on puisse en décrire les éléments principaux.* […]
>
> *57 Non seulement cette nécessité se dégage-t-elle du texte de Loi mais correspond-elle aussi aux exigences d'un exercice suffisamment éclairé de la discrétion du tribunal de convoquer les créanciers et actionnaires et, dans certains cas, d'émettre des ordres de sursis en vertu de l'art. 11.*

> *58 En l'absence d'une description du projet d'arrangement des éléments principaux, certaines des informations nécessaires pour permettre au tribunal d'exercer sa discrétion en connaissance de cause font défaut. Elles sont requises pour assurer la prise en compte des intérêts de tous les groupes concernés. En effet, les conséquences de la mise en oeuvre des mécanismes de la Loi sur les arrangements avec les créanciers des compagnies sont plus draconiennes, particulièrement pour les créanciers garantis et comportent, à l'inverse, moins de risques d'abord pour la débitrice, puisque le recours infructueux à la Loi ou le rejet de ces propositions n'entraîne pas la faillite. Par surcroît, l'on peut arrêter toutes les procédures de réalisation des créanciers, de quelque nature que ce soit, pour des périodes indéterminées.*
>
> *59 Le recours à la Loi suppose un contrôle judiciaire. Il appartient au juge de peser, au départ, l'intérêt pour l'entreprise de présenter une proposition, la plausibilité de sa réussite, les conséquences de cette proposition et des ordres de sursis qui sont demandés pour les créanciers, les risques qu'elle ferait courir pour ses créanciers garantis, le juge doit examiner ces intérêts divers avant d'autoriser la convocation des créanciers et de déclencher la mise en œuvre de la Loi. La Loi n'est pas une législation conçue pour accorder, sans conditions ni réserves, des termes de grâce à des débiteurs en difficulté. Elle se veut une loi de réorganisation d'entreprises en difficulté. À ce titre, saisi de la demande de convocation d'une assemblée et de sursis, le juge doit être en mesure d'apprécier, d'abord si l'entreprise est susceptible de survivre pendant la période intermédiaire jusqu'à l'approbation du compromis puis s'il est raisonnable d'estimer que l'accord projeté est réalisable. Pour savoir s'il est réalisable, l'une des conditions de base est d'en connaître les termes essentiels, quitte à ce que ceux-ci soient précisés ou modifiés par la suite.* […] »
>
> [33] *Supra*, note 9, par.56-59 (EYB 1991-63766).

[92] Malgré les dires de l'auteur Kaplan, il ne semble pas que cette exigence de présenter des preuves matérielles suffisantes d'un éventuel plan d'arrangement ait été suivie uniformément par les tribunaux québécois. L'affaire *Re Papier Gaspésia Inc.*[34] en est un exemple alors que la protection de la loi a été accordée sans que des éléments d'un plan d'arrangement aient été présentés.

> [34] 2004 CanLII 41522 (QC C.S.).

[93] Comme le mentionne la Cour d'appel dans cette même cause[35], le processus de vente d'actif en l'espèce devra être soumis à l'accord des créanciers :

> « *[14] Par ailleurs, l'appel d'offres permis à certaines conditions par le jugement de première instance n'équivaut pas à liquidation pure et simple, malgré qu'on puisse le considérer comme l'amorce d'un éventuel processus de liquidation, qui pourrait cependant ne pas avoir lieu si un acheteur se manifestait et se montrait intéressé à la relance de l'entreprise (quoique cela paraisse peu probable). En outre, afin d'assurer la protection de l'intérêt des créanciers (dont les requérantes), le premier juge ordonne que leur soient soumis les termes et conditions de cet appel d'offres, les recommandations*

> *d'acceptation ou de refus des soumissions reçues et le mode de distribution du prix de vente, le tout par le biais d'un amendement au plan d'arrangement déjà proposé (voir par. 101 du jugement de première instance). Non seulement ce plan d'arrangement doit-il être présenté aux créanciers, mais il doit en outre être homologué par la Cour supérieure. S'il y a lieu, les requérantes pourront s'assurer alors que leurs droits soient convenablement protégés (notamment en réclamant la constitution d'une classe particulière de créanciers) et elles pourront s'adresser au tribunal dans ce but. Les requérantes pourront aussi, ce qu'elles n'ont d'ailleurs pas manqué de faire valoir à plusieurs reprises lors de l'audition, voter contre le plan d'arrangement, s'il ne leur convient pas, ou en déférer au tribunal si elles estiment que leurs droits ne sont pas pris en considération ou sont bafoués*. »
>
> **[Citation omise]**
>
> [35] *Papier Gaspésia inc., Re*, 2004 CanLII 46685 (QC C.A.), par.14.

[94] Ainsi, bien que l'exigence d'un plan d'arrangement pour octroyer la protection de la loi ne soit pas automatique au Québec, on exige tout de même qu'un tel plan soit soumis au vote des créanciers.

***La voie à suivre***

[95] On se retrouve donc dans une situation où l'application et l'interprétation d'une loi de juridiction fédérale diffèrent de façon importante d'une province à l'autre. Malgré certaines décisions plus drastiques, telles *Fracmaster* ou *Cliffs Over Maple*, il semble faire l'unanimité que la liquidation d'actifs sous la *LACC* est possible, surtout depuis l'adoption de l'article 36 *LACC*. On peut être en désaccord avec cette situation, mais l'état du droit à ce jour est à cet effet.

[96] Il existe toutefois des divergences fondamentales dans l'application de cette discrétion à travers le Canada, et ce, tant en ce qui a trait aux actifs qui peuvent faire l'objet d'une telle liquidation qu'aux critères qui doivent guider le tribunal dans l'application de son pouvoir.

[97] Dans la recherche d'une solution, il faut garder à l'esprit les objectifs de la *LACC* qui doivent guider l'interprétation qu'on en fait et que Kaplan résume comme suit[36] :

> « *The judicial and academic pronouncements all identify the following general policy objectives: maximization of creditor recovery, minimization of the detrimental impact upon employment and supplier, customer and other economic relationships, preservation of the tax base and other contributions the enterprise makes to its local community, and the rehabilitation of the debtor company.* »
>
> [36] *Supra*, note 2, p.117.

**Solutions proposées par Bill Kaplan**

[98] L'auteur Bill Kaplan débute son appréciation de l'état de la jurisprudence en affirmant que les affaires *Fracmaster* et *Cliffs Over Maple* ne viennent pas condamner les liquidations sous la *LACC*. Selon lui, ces deux décisions d'importances viennent surtout prévenir contre un usage abusif de la *LACC* pour effectuer la liquidation des actifs d'une compagnie et mettre l'emphase sur les droits des créanciers qui sont brimés lorsque la liquidation est permise.

[99] Kaplan précise toutefois qu'il est d'avis que l'affaire *Fracmaster* est trop drastique lorsqu'on l'interprète comme posant l'exigence de la survie de l'affaire pour octroyer la protection de la loi. Kaplan voit toutefois une utilité dans la décision quand elle suggère qu'une partie qui requiert la protection de la *LACC,* alors que les objectifs commerciaux en jeu seraient remplis par une d'autres procédures d'insolvabilité, telles la *LFI* ou l'exécution de droits hypothécaires, doit démontrer pourquoi l'application de la *LACC* est nécessaire.

[100] Pour ce qui est du vote des créanciers avant de procéder à une liquidation d'actifs, Kaplan est d'avis que le vote n'est pas nécessaire en tout temps et qu'il revient au tribunal de déterminer lorsqu'il est nécessaire. Il souligne que l'accord du tribunal est nécessaire pour procéder à une telle liquidation, ce qui assure un certain contrôle, et qu'il serait néfaste de rendre le vote obligatoire peu importe la situation, car il s'agit d'un processus long et coûteux. Afin de déterminer s'il doit y avoir un vote, le tribunal devrait évaluer le degré d'opposition des créanciers à une telle liquidation et soupeser la valeur des alternatives à une liquidation sous la *LACC*. Il précise que le tribunal doit accorder une plus grande importance aux droits des créanciers qu'à ceux des autres parties prenantes lorsque vient le temps d'évaluer les bénéfices et les inconvénients d'une liquidation sous la *LACC* par rapport aux autres solutions proposées.

[101] Enfin, l'auteur propose de rendre obligatoire la présentation d'un plan d'arrangement aux créanciers dans tous les cas. Il ajoute que ledit plan devrait être présenté à tous les créanciers, incluant les créanciers ordinaires même dans les cas où ces derniers ne recevraient rien de la liquidation des actifs. Cette mesure irait davantage dans l'objectif de la loi qui demeure d'obtenir un arrangement avec les créanciers.

[102] Il est important de préciser que la position proposée dans l'affaire Fracmaster ne ferme pas complètement la porte à la liquidation d'actifs sous la *LACC*. En effet, et je suis également de cet avis, la liquidation d'actifs excédentaires peut et doit être possible sous la *LACC* afin d'assainir les finances de la compagnie. Le critère devrait donc revenir à déterminer si l'affaire, et pas nécessairement la compagnie elle-même, survivra suite au plan d'arrangement.

[103] La solution de Bill Kaplan est intéressante, mais elle a pour effet d'accorder une très grande latitude aux tribunaux, ce qui est à la base même du courant jurisprudentiel qui est aujourd'hui critiqué. L'approche de *Fracmaster* est plus draconienne et a pour effet de restreindre le large pouvoir d'interprétation des tribunaux, mais elle est nécessaire dans les circonstances.

[104] Bien que le soussigné aurait été porté à privilégier la thèse que la *LACC* et la *LFI* sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la *LACC* et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la *LACC*.

[105] Tous les facteurs à prendre en considération mentionnés à l'article 36(3) *LACC* militaient en faveur de l'autorisation d'une vente des actifs. Non seulement cela a permis une réalisation supérieure à ce qui aurait pu être obtenu de n'importe quelle autre façon, elle a aussi permis le maintien d'un chemin de fer indispensable à l'économie régionale.

[106] Le jugement rendu par le soussigné autorisant la vente des actifs a été rendu du consentement de toutes les parties impliquées. Il n'y a pas eu appel de ce jugement. Le jugement a donc l'autorité de la chose jugée sur l'opportunité de vendre les actifs de la compagnie.

[107] C'est également en tenant compte de l'intérêt de la collectivité et du maintien des emplois que le tribunal avait permis que la vente puisse se faire même si ce n'était pas au meilleur prix. Finalement, nous avons obtenu le meilleur prix mais il y avait possibilité que ce ne soit pas le cas.

[108] Cela étant dit, que faisons-nous pour la suite du dossier?

[109] Dans l'état actuel du dossier, il semble peu probable qu'un plan d'arrangement puisse être déposé. Il est donc inutile pour le moment de prévoir un processus coûteux de dépôt de preuves de réclamation puisqu'aucun vote ne sera nécessaire si aucun plan d'arrangement n'est proposé.

**La seule possibilité de continuation du processus en vertu de la *LACC***

[110] Plusieurs pourraient être portés à penser qu'il n'y a plus de raison de continuer le présent dossier.

[111] Par contre, la seule lecture du *service list* et la présence des personnes représentées à chaque étape des procédures peuvent laisser penser qu'un arrangement est possible.

[112] Nous avons déjà mentionné qu'exceptionnellement, notre collègue Martin Castonguay avait ordonné le sursis des procédures contre *XL Insurance Company Limited*. Cela a été fait de façon exceptionnelle et pour éviter le chaos et la course aux jugements contre la compagnie d'assurance.

[113] Nous l'avons déjà dit, en principe, la *Loi sur les arrangements des créanciers et des compagnies* ne s'applique qu'aux compagnies débitrices. Par contre, exceptionnellement, des ordonnances peuvent être rendues pour libérer certains tiers qui participent au plan d'arrangement par une contribution monétaire, mais en échange d'une quittance.

[114] Le soussigné dans l'affaire du plan d'arrangement de la *Société industrielle de décolletage et d'outillage (SIDO)*[37] avait homologué un plan d'arrangement qui prévoyait la quittance à certains tiers en plus des administrateurs.

[37] 460-11-001833-097, 2009 QCCS 6121.

[115] La juge Marie-France Bich dans un jugement rejetant une requête pour permission d'appeler de ce jugement mentionnait[38] :

[38] 2010 QCCA 403.

> [32] **Les quittances.** L'article 7.2 du plan d'arrangement approuvé par le juge de première instance comporte les dispositions suivantes :
>
> **Article 7.2 Quittances**
>
> À la date de prise d'effet, la Débitrice et/ou les autres Personnes nommées ci-dessous bénéficieront des quittances et des renonciations suivantes, lesquelles prendront effet à l'Heure de prise d'effet :
>
> 7.2.1 Une quittance complète, finale et définitive des Créanciers quant à toute Réclamation contre la Débitrice et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard des Réclamations;
>
> 7.2.2 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation, autre qu'une réclamation visée au paragraphe 5.1(2) LACC, qu'ils ont ou pourraient avoir, directement ou indirectement, contre les administrateurs, dirigeants, employés ou autres représentants ou mandataires de la Débitrice en raison ou à l'égard d'une Réclamation Visée et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard de toute telle réclamation;
>
> 7.2.3 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre DCR et Fortin, de même que leurs dirigeants, administrateurs, directeurs, employés, conseillers financiers, conseillers

> juridiques, banquiers d'affaires, consultants, mandataires et comptables actuels et passés respectifs à l'égard de l'ensemble des demandes, réclamations, actions, causes d'action, demandes reconventionnelles, poursuites, dettes, sommes d'argent, comptes, engagements, dommages-intérêts, décisions, jugements, dépenses, saisies, charges et autres recouvrements au titre d'une créance, d'une obligation, d'une demande ou d'une cause d'action de quelque nature que ce soit qu'un Créancier pourrait avoir le droit de faire valoir à l'encontre de DCR ou Fortin;
>
> 7.2.4 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre la Débitrice ou le Contrôleur ou leurs administrateurs, dirigeants, employés ou autres représentants ou mandataires ainsi que leurs conseillers juridiques à l'égard de toute mesure prise ou omission faite de bonne foi dans le cadre des Procédures ou de la préparation et la mise en œuvre du Plan ou de tout contrat, effet, quittance ou autre convention ou document créé ou conclu, ou de toute autre mesure prise ou omise relativement aux Procédures ou au Plan, étant entendu qu'aucune disposition du présent paragraphe ne limite la responsabilité d'une Personne à l'égard d'une faute relativement à une obligation expressément formulée qu'elle a aux termes du Plan ou aux termes de toute convention ou autre document conclu par cette Personne après la Date de détermination ou conformément aux modalités du Plan, ni à l'égard du manquement à un devoir de prudence envers quelque autre Personne et survenant après la Date de prise d'effet. À tous égards, la Débitrice et le Contrôleur et leurs employés, dirigeants, administrateurs, mandataires et conseillers respectifs ont le droit de s'en remettre à l'avis de conseillers juridiques relativement à leurs obligations et responsabilités aux termes du Plan; et
>
> 7.2.5 Une quittance complète, finale et définitive de la Débitrice quant à toute réclamation qu'elle a ou pourrait avoir, directement ou indirectement, contre ses administrateurs, dirigeants et employés.

[…]

[37] Or, devant la Cour supérieure, se basant principalement sur l'arrêt de la Cour d'appel de l'Ontario dans *A.T.B. Financial* v. *Metcalfe & Mansfield Alternative Invesments II Corp.*, l'intimée faisait à cet égard valoir que la quittance en faveur de DCR était légale et appropriée en l'espèce, considérant que cette quittance a un lien raisonnable avec la réorganisation proposée. Dans l'argumentaire écrit remis au juge de première instance, l'intimée citait les passages suivants de l'arrêt *Metcalfe* :

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional

findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that :

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[38] Manifestement, le juge de première instance a estimé que la quittance dont DCR est bénéficiaire selon la clause 7.2.3 du plan d'arrangement répondait à ces exigences.

[39] Le plan d'argumentation produit par l'intimée devant la Cour supérieure et, de même, le plan d'argumentation déposé aux fins du présent débat citent aussi, entre autres, l'affaire *Muscletech Research and Development Inc.,* où l'on reconnaît la possibilité, dans le cadre d'un arrangement régi par la *L.a.c.c* de stipuler une quittance en faveur du tiers qui finance la restructuration de l'entreprise débitrice. Or, c'est précisément, en l'espèce, le cas de DCR, qui versera une somme considérable afin de soutenir la réorganisation des affaires de l'intimée dans le cadre du plan d'arrangement.

[40] Il n'est pas inutile de reproduire ici quelques-uns des passages de l'affaire *Muscletech* :

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or

any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

> the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

[8] Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.

[9] It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:

> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

[Soulignements ajoutés]

[41] Ultérieurement, la Cour supérieure de justice de l'Ontario, dans une décision rendue dans le même dossier en 2007, écrira que :

> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other

stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

[21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

[…]

[23] The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.

[…]

[Soulignements ajoutés]

> [42] Dans le même sens, on pourra consulter la décision de la Cour supérieure dans *Charles-Auguste Fortier inc. (Arrangement relatif à)*, qui fait une étude approfondie de la question et conclut à l'opportunité d'une quittance en faveur de la caution de la société débitrice, caution qui joue un rôle central dans la réorganisation des affaires de celle-ci et sans le concours de laquelle le plan échouera.
>
> [43] La situation de l'espèce est analogue : DCR injectera des sommes substantielles dans la réorganisation de l'intimée en vertu du plan d'arrangement, ce qu'elle ne fera pas si elle ne peut bénéficier de la quittance prévue par la clause 7.2.3. La requête pour permission d'appeler et les observations présentées à l'audience ne permettent pas de conclure que le requérant conteste ce fait ou conteste l'absence d'une autre source de financement, son argument étant plutôt que cette quittance est sans lien avec les activités de l'entreprise. Avec égards, cet argument ne peut être retenu et, à mon avis, il n'a pas de chance raisonnable de succès devant cette Cour. La permission d'appeler ne saurait donc, sur le fondement de ce moyen, être accordée.

[116] La débitrice ne s'en cache pas, elle désire continuer les procédures sous la *LACC* pour ultimement obtenir la libération des administrateurs.

[117] Divers recours collectifs ont été intentés contre la débitrice. Un des recours déposés au Québec et dont les requérants ont produit des requêtes qui ont été remises au 26 février implique non seulement la débitrice et ses administrateurs, mais aussi plus de 35 défendeurs.

[118] Ce sont ces défendeurs que la débitrice veut faire asseoir à la table pour tenter d'en venir à un règlement qui profiterait à tous. Plusieurs de ces défendeurs sont présents à toutes les étapes dans le présent dossier.

[119] Un règlement dans le présent dossier aurait l'avantage d'éviter, à tous ceux qui y participent, des recours judiciaires qui s'échelonneront sur plusieurs années.

[120] Dans l'état actuel du dossier, il est impossible pour un tribunal d'ordonner que les sommes que reconnaît devoir la Compagnie d'Assurance XL soient payées à un créancier plutôt qu'à un autre.

[121] La seule façon pratique, économique et juridiquement possible de régler le présent dossier est que des tiers participent à une proposition d'arrangement qui devra être soumise à la masse des créanciers.

[122] Rien n'empêchera les requérants au recours collectif de continuer les procédures contre les défendeurs qui n'y participeront pas, mais cela leur permettra de participer à la distribution de l'indemnité d'assurance totalisant 25 000 000 $.

[123] Évidemment, pour réussir, il faudra que des tiers participent pour des montants substantiels. Les requérants du recours collectif ne peuvent se voir attribuer les sommes des assurances, ils n'y ont pas droit. Il y a d'autres victimes, pas seulement les requérants en recours collectif. Ces autres victimes ont autant le droit au bénéfice de l'assurance que les requérants en recours collectif. Un autre facteur à tenir en considération est que le gouvernement du Québec par la voix de ses procureurs déclare depuis le début qu'il désire que le montant des assurances soit remis aux victimes. Ce souhait a été mentionné lors des différentes auditions, mais ne lie personne pour le moment. Le procureur du gouvernement a aussi déclaré que sa définition de victimes n'est pas la même que celle du tribunal. En effet, une compagnie d'assurance qui aurait indemnisé un commerçant pour la perte d'un immeuble ou pour perte de chiffres d'affaires est aussi une victime de la tragédie ferroviaire. Légalement cette compagnie d'assurance aurait parfaitement le droit de recevoir une part du 25 000 000 $ de XL Assurance.

[124] Le gouvernement du Québec peut bien vouloir préférer les victimes physiques, cela ne lie pas XL Assurance.

[125] Évidemment si la province de Québec a une réclamation de 200 000 000 $ et qu'elle réussit à récupérer des sommes, elle pourra en faire ce qu'elle veut.

[126] La somme de 200 000 000 $ mentionnée semble d'ailleurs conservatrice. Si la province récupère des sommes, elle est en droit d'en faire ce qu'elle veut.

[127] Mais pour le moment, nous sommes dans une situation où il n'y a aucun actif possiblement partageable entre les créanciers. Il est donc inutile d'établir un processus de réclamation très coûteux. D'ailleurs, qui financerait ce processus? Les requérants en recours collectif et le gouvernement du Québec ne peuvent non plus agir comme s'ils étaient les seuls créanciers de MMA. On peut facilement croire que la valeur des réclamations autres dépasse aussi la centaine de millions de dollars. Mais les créanciers entre eux sont souverains. S'ils décident qu'une catégorie de créanciers recevra des sommes alors que d'autres auraient été en droit d'en recevoir, mais y renoncent, ils en ont le droit. Ils en ont peut-être le droit, mais les moyens d'y arriver rapidement ne sont pas nombreux. Pour le moment, les procédures engagées pourraient mener à un tel règlement pourvu qu'un plan soit déposé et que les créanciers l'acceptent. Oublions une proposition concordataire en vertu de la *LFI*, le processus serait trop coûteux dans l'état actuel du dossier. La *LACC* a aussi l'avantage d'être plus flexible. La seule solution possible et rapide est donc celle proposée par la débitrice. Que des tiers participent à l'élaboration d'une proposition. Un apport monétaire est essentiel pour y participer. Si un plan acceptable est proposé, les créanciers pourront l'accepter et pourront décider de catégories de créanciers pouvant participer au partage. Ils pourraient également accepter que des tiers soient libérés.

> [128] Si le tribunal lève le sursis des procédures contre XL Compagnie d'Assurance, ce sera le chaos et la course aux jugements.
>
> [129] Le procureur de XL a déjà mentionné au tribunal que son interprétation du contrat lui permet d'affirmer que le contrat d'assurance oblige la compagnie à payer les indemnités en payant le premier arrivé.
>
> [130] D'innombrables recours pourraient donc être intentés contre la débitrice et la compagnie d'assurance et celle-ci n'aurait plus l'obligation de payer lorsqu'une somme de 25 000 000 $ aurait été déboursée.
>
> [131] Les chances d'obtenir un jugement suite à un recours collectif avant les recours intentés par la voie ordinaire seraient illusoires surtout lorsque les défendeurs admettent leur responsabilité.
>
> [132] Le tribunal ne voit pas comment les procédures devant d'autres instances pourraient être suspendues en attendant le résultat du recours collectif. Nul n'est tenu de participer à un tel recours.

[12] À la suite de ce jugement, un processus de négociation, avec les tiers potentiellement responsables, débute. C'est cette négociation qui permet la formation d'un fonds d'indemnisation de 430 millions de dollars pour indemniser les victimes de la tragédie ferroviaire qui, rappelons-le, sont toutes créancières de la débitrice.

[13] Tous les défendeurs poursuivis dans un recours collectif intenté au Québec ont accepté de participer au fonds d'indemnisation, à l'exception de l'opposante, la compagnie de chemin de fer Canadien Pacifique (CP).

[14] L'honorable Martin Bureau, j.c.s. a accordé la requête pour autorisation d'exercer un recours collectif contre le CP et World Fuel Services qui s'est par la suite jointe au groupe contribuant au fonds d'indemnisation.

[15] Le CP refuse de participer au fonds plaidant qu'elle n'est pas responsable de la tragédie ferroviaire. Cela est parfaitement son droit.

[16] Par contre, pour les motifs ci-après exposés, il est évident que la contestation de CP n'a pour seul but que de faire avorter le plan d'arrangement proposé ou de se donner un avantage stratégique de négociation qui lui créerait même plus de droits qu'elle n'en aurait, si les parties avaient tout simplement décidé de régler hors cour le recours collectif intenté. Nous y reviendrons.

[17] Dans son plan d'argumentation, CP soulève les questions suivantes :

a) L'article 4 de la LACC confère-t-il à un tribunal siégeant en vertu de la LACC la compétence d'homologuer un « plan » qui ne propose pas de transaction ni d'arrangement entre un débiteur en vertu de la LACC et ses créanciers?

b) Si le Tribunal répond à la question a) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer une quittance en faveur d'un tiers solvable qui n'est pas « raisonnablement liée à la restructuration » du débiteur en vertu de la LACC?

c) Si le Tribunal répond à la question b) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer un « plan » qui contient des quittances en faveur des tierces parties sans rapport avec la résolution de toutes les réclamations contre le débiteur insolvable, c'est-à-dire que les réclamations contre le débiteur ne sont pas visées par le plan et que ce plan ne confère aucun avantage à ce débiteur?

d) Une réponse affirmative à la question b) ou à la question c) constitue-t-elle une interprétation constitutionnelle valide de la compétence du Tribunal pour homologuer un plan d'arrangement ou de transaction en vertu de la LACC?

e) Si le Tribunal répond à toutes les questions précédentes par l'affirmative, le Plan et les conventions de règlement partielles qui en font partie intégrante sont-ils raisonnables, justes et équitables pour toutes les parties concernées, y compris les entités non parties au règlement?

[18] Le 31 mars 2015, MMAC dépose un plan de transaction et d'arrangement, dont l'article 2.1 stipule l'objet :

> **2.1 Objet**
>
> Le Plan vise :
>
> a) à proposer un compromis, une quittance, une libération et une annulation complètes, finales et irrévocables de toutes les Réclamations Visées contre les Parties Quittancées;
>
> b) à permettre la distribution des Fonds pour Distribution et le paiement des Réclamations Prouvées, tel qu'il est indiqué aux paragraphes 4.2 et 4.3;
>
> Le Plan est présenté eu égard au fait que les Créanciers, lorsqu'ils sont considérés globalement, tireront un plus grand avantage de sa mise en œuvre que cela ne serait le cas dans l'éventualité d'une faillite de MMAC.

[19] Le *Dix-neuvième rapport du Contrôleur sur le plan d'arrangement de la requérante* du 14 mai 2015 indique le contexte dans lequel le plan a été mis de l'avant par MMAC, et plus précisément, son objectif sous-jacent.

- Les paragraphes 11 et 13 du Dix-neuvième rapport :

> « 11. Afin de compenser les créanciers pour les dommages subis en raison du Déraillement, il était clair dès le départ pour toutes les parties intéressées que cela ne pouvait être accompli qu'avec la contribution de tiers potentiellement responsables (les "Tiers"), en échange de quittances totales et finales à l'égard de tout litige pouvant découler du Déraillement.
>
> […]
>
> 13. Le Plan est le résultat de plusieurs mois de discussions multilatérales entre le conseiller juridique de la Requérante, […] le Syndic, les principales parties intéressées de la Requérante, soit la province de Québec (la "Province"), les Représentants d'un groupe de créanciers, les avocats des victimes du déraillement dans le cadre des procédures en vertu du Chapitre 11 (les "Conseillers juridiques américains") et l'avocat du Comité officiel des victimes dans le cadre des procédures en vertu du Chapitre 11 (le "Comité officiel") (collectivement les "Principales parties intéressées"), avec les Tiers, qui visaient à négocier des contributions à un Fonds de Règlement au profit des victimes du Déraillement. […]
>
> [nos soulignés]

[20] CP plaide que l'objectif exclusif du plan est par conséquent irréfutable, à savoir le *règlement des réclamations des créanciers victimes contre des tiers potentiellement responsables*, et que le plan ne porte d'aucune façon sur la restructuration de MMAC.

[21] Cela est inexact. Si l'on suit la logique du CP, il faudrait obligatoirement que la restructuration de l'entreprise se fasse après l'approbation du plan par les créanciers.

[22] Or, il arrive fréquemment que la restructuration soit complétée avant l'approbation du plan par les créanciers. C'est ce qui s'est produit dans le présent dossier.

[23] En l'instance, le chemin de fer est sauvé, les emplois sont sauvés et toutes les industries et les municipalités bénéficiant du chemin de fer sont assurées de pouvoir continuer d'en bénéficier.

[24] Ce n'est pas parce qu'une partie des objectifs de départ sont atteints qu'il faut faire abstraction de cette réussite.

[25] Sans le bénéfice de la *LACC,* les rails de chemin de fer auraient bien pu être vendus à la ferraille. Cette deuxième catastrophe a été évitée.

[26] En contrepartie de leurs contributions respectives au Fonds d'indemnisation, les parties quittancées bénéficieront de « Quittances et Injonctions » ayant une portée très générale.

[27] MMAC n'est pas une partie quittancée aux termes du plan.

[28] Plus précisément, le paragraphe 5.1 du plan prévoit l'exécution (i) de quittances ayant une portée très large en faveur des parties quittancées, et (ii) des injonctions interdisant toute future réclamation contre les parties quittancées :

> **5.1 Quittances et Injonctions aux termes du Plan**
>
> Toutes les Réclamations Visées feront entièrement, définitivement, absolument, inconditionnellement, complètement, irrévocablement et à jamais, l'objet d'un compromis, d'une remise, d'une quittance, d'une libération, d'une annulation et seront proscrites à la Date de Mise en Œuvre du Plan contre les Parties Quittancées.
>
> Toutes les Personnes (peu importe si ces Personnes sont ou non des Créanciers ou des Réclamants) seront empêchées et il leur sera interdit, en permanence et à jamais, i) de poursuivre toute Réclamation, directement ou indirectement, contre les Parties Quittancées, ii) de poursuivre ou d'entreprendre, directement ou indirectement, toute action ou autre procédure à l'égard d'une Réclamation contre les Parties Quittancées ou de toute Réclamation qui pourrait donner lieu à une Réclamation contre les Parties Quittancées, au moyen d'une demande reconventionnelle, d'une réclamation de tiers, d'une réclamation au titre d'une garantie, d'une réclamation récursoire, d'une réclamation par subrogation, d'une intervention forcée ou autrement, iii) de tenter d'obtenir une exécution, une imposition, une saisie-arrêt, une perception, une contribution ou un recouvrement concernant un jugement, une sentence, un décret ou une ordonnance contre les Parties Quittancées ou leurs biens relativement à une Réclamation, iv) de créer, de parfaire ou de faire valoir autrement, de quelque manière que ce soit et directement ou indirectement, toute priorité ou charge de quelque nature que ce soit contre les Parties Quittancées ou leurs biens à l'égard d'une Réclamation, v) d'agir ou de procéder de quelque manière que ce soit et à tout endroit quel qu'il soit qui ne serait pas conforme aux dispositions des Ordonnances d'Approbation ou qui ne les respecteraient pas dans toute la mesure permise par les lois applicables, vi) de faire valoir tout droit de compensation, de dédommagement, de subrogation, de contribution, d'indemnisation, de réclamation ou d'action en garantie ou d'intervention forcée, de recouvrement ou en annulation de quelque nature que ce soit à l'égard des obligations dues aux Parties Quittancées relativement à une Réclamation ou de faire valoir un droit de cession ou de subrogation concernant une obligation due par l'une des Parties Quittancées relativement à une Réclamation et vii) de prendre toute mesure destinée à entraver la mise en œuvre ou la conclusion du présent Plan; il est toutefois entendu que les interdictions précitées ne s'appliqueront pas à l'exécution des obligations aux termes du Plan. Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.
>
> Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-

> Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.
>
> [nos soulignés]

[29] En plus de ce qui précède, le paragraphe 5.3 du plan stipule expressément que toute réclamation contre des tiers défendeurs :

> « a) n'est pas visée par le plan;
>
> b) n'est pas quittancée;
>
> c) pourra suivre son cours;
>
> d) ne sera pas limitée ni restreinte de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement; et
>
> e) ne constitue pas une réclamation visée. »

De plus, le paragraphe 5.3 du plan réitère qu'aucune personne ne peut faire valoir de réclamation contre l'une ou l'autre des parties quittancées.

> **5.3 Réclamations contre des Tiers Défendeurs**
>
> Toute Réclamation d'une Personne, y compris MMAC et MMA, contre les Tiers Défendeurs qui ne sont pas également des Parties Quittancées : a) n'est pas visée par le présent Plan; b) n'est pas libérée, quittancée, annulée ou exclue conformément au présent Plan; c) pourra suivre son cours contre lesdits Tiers Défendeurs; d) ne sera pas limitée ni restreinte par le présent Plan de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement par suite de l'indemnisation reçue par les Créanciers ou les Réclamants conformément au présent Plan; et e) ne constitue pas une Réclamation Visée aux termes du présent Plan. Pour plus de précision et malgré toute autre disposition des présentes, si une Personne, y compris MMAC et MMA, fait valoir une Réclamation contre un Tiers Défendeur qui n'est pas également une Partie Quittancée, tous les droits de ce Tiers Défendeur d'intenter une action récursoire, d'opposer une demande ou de faire ou de poursuivre autrement des droits ou une Réclamation contre l'une des Parties Quittancées à quelque moment que ce soit seront libérés, quittancés et proscrits à jamais selon les modalités du présent Plan et des Ordonnances d'Approbation.

[30] Enfin, le paragraphe 3.3 du plan stipule expressément que certaines réclamations ne sont pas visées par le plan :

> **3.3 Réclamations Non Visées**

Malgré toute disposition contraire aux présentes, le présent Plan ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant :

(a) les droits ou réclamations des Professionnels Canadiens et des Professionnels Américains pour les honoraires et débours engagés ou devant être engagés pour les services rendus dans le Dossier LACC ou le Dossier de Faillite ou s'y rapportant, y compris la mise en œuvre du présent Plan et du Plan Américain.

(b) dans la mesure où il existe ou peut exister une couverture d'assurance pour ces réclamations aux termes d'une police d'assurance émise par Great American ou un membre de son groupe, y compris, notamment, la Police de Great American, et seulement dans le mesure où une telle couverture d'assurance est réellement fournie, laquelle couverture d'assurance est cédée au Syndic et à MMAC, sans que les Parties Rail World ou les Parties A&D n'aient l'obligation de verser un paiement ou d'effectuer une contribution pour accroître ce que le Syndic ou MMAC obtient réellement aux termes de cette police d'assurance : i) les réclamations de MMAC ou du Syndic (et seulement du Syndic, de MMAC, de leur personne désignée ou, dans la mesure applicable, des Patrimoines) contre les Parties Rail World et(ou) les Parties A&D; et ii) les réclamations des détenteurs de Réclamations dans les Cas de Décès contre Rail World, Inc., à condition, de plus, que tout droit ou tout recouvrement par ces détenteurs d'un droit ou de recouvrement par les détenteurs de Réclamations dans les Cas de Décès par suite de la mesure autorisée au présent sous-paragraphe soit, à tous égards, subordonné aux réclamations du Syndic et de MMAC, ainsi que de leurs successeurs aux termes du Plan, aux termes des Polices précitées, et iii) les Réclamations de MMAC ou du Syndic contre les Parties A&D pour toute prétendue violation de l'obligation fiduciaire ou toute réclamation similaire fondée sur l'autorisation, par les Parties A&D, des paiements aux porteurs de billets et de bons de souscription émis conformément à une certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la vente de certains biens de MMA à l'État du Maine.

c) les Réclamations de MMAC et du Syndic en vertu des lois, notamment celles relatives à la faillite et l'insolvabilité, destinées à annuler et(ou) à recouvrer les transferts de MMA, de MMAC ou de MMA Corporation aux porteurs de billets et de bons de souscription émis conformément à cette certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la distribution du produit tiré de la vente de certains biens de MMA à l'État du Maine.

(d) les réclamations ou causes d'action de toute Personne, y compris MMAC, MMA et les Parties Quittancées (sous réserve des limitations contenues dans leur Convention de Règlement respective) contre des tiers autres que les Parties Quittancées (sous réserve du paragraphe 3.3 (e)).

(e) les Réclamations ou les autres droits préservés par l'une ou l'autre des Parties Quittancées, tel qu'il est indiqué à l'annexe A.

(f) les obligations de MMAC aux termes du Plan, des Conventions de Règlement et des Ordonnances d'Approbation;

(g) les Réclamations contre MMAC, sauf les Réclamations des Parties Quittancées autres que le procureur général du Canada. Toutefois, sous réserve du fait que les Ordonnances d'Approbation deviennent des ordonnances finales, le procureur général du Canada i) s'est engagé à retirer irrévocablement la Preuve de Réclamation produite pour le compte du ministère des Transports du Canada et la Preuve de Réclamation produite pour le compte du Department of Public Safety and Emergency Preparedness, ii) a consenti à une réaffectation en faveur des Créanciers de tous les dividendes payables aux termes du présent Plan ou du Plan Américain sur la Preuve de Réclamation produite pour le compte du Développement économique Canada pour les régions du Québec, tel qu'il est indiqué à la clause 4.3, et iii) a convenu de ne pas produire de Preuve de Réclamation additionnelle au dossier LACC ou au Dossier de Faillite;

(h) toute responsabilité ou obligation des Tiers Défendeurs et toute Réclamation contre ceux-ci, pour autant qu'ils ne soient pas des Parties Quittancées, de quelque nature que ce soit à l'égard du Déraillement ou s'y rapportant, y compris, notamment, le Recours Collectif et les Actions dans le Comté de Cook;

(i) toute Personne pour fraude ou des accusations criminelles ou quasi-criminelles qui sont ou peuvent être produites et, pour plus de précision, pour toute amende ou pénalité découlant de telles accusations;

(j) toute Réclamation que l'une des Parties Rail World ou des Parties A&D peut avoir pour tenter de recouvrer auprès de ses assureurs les dépenses, coûts et honoraires d'avocats qu'elle a engagés avant la Date d'Approbation.

(k) les Réclamations qui font partie de celles décrites au paragraphe 5.1 (2) de la LACC.

Tous les droits et Réclamations précités indiqués au présent paragraphe 3.3, inclusivement, sont collectivement appelés les « Réclamations Non Visées » et, individuellement, une « Réclamation Non Visée ».

[nos soulignés]

[31] C'est ce qui est fait dire à CP que :

Le plan « ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant » les réclamations contre MMAC, c'est-à-dire que les réclamations contre MMAC ne sont pas visées par le plan. MMAC ne fait pas l'objet d'une restructuration.

[32] Aussi le CP plaide que :

> a) Les réclamations de toutes les « victimes » et même possiblement des parties quittancées pourront être poursuivies, ou de nouveaux recours pourront être intentés, tant au Canada qu'aux États-Unis, contre les entités non parties au règlement, y compris le CP;
>
> b) Les demandeurs, aux termes du recours collectif peuvent continuer leur action en justice contre les défenderesses CP et World Fuel Services, avec le bénéfice supplémentaire que ces défenderesses « héritent » ainsi de la responsabilité de MMAC, alors que celles-ci se voient empêchées de réclamer toute contribution ou indemnité des parties quittancées!

[33] C'est d'ailleurs là le principal argument du CP. Ce qu'elle reproche au plan d'arrangement est que CP se retrouve maintenant seule poursuivie dans le recours collectif. Elle se plaint également que, puisqu'elle n'est pas quittancée en vertu du plan, elle pourrait être poursuivie par toutes personnes ayant subi des dommages à la suite du déraillement. Elle se plaint également qu'elle devrait supporter la part qui reviendrait à MMA. Nous y reviendrons.

[34] CP résume bien les critères d'exercice du pouvoir discrétionnaire du tribunal dans l'approbation d'un plan, lorsqu'elle mentionne :

> a) Le plan doit être strictement conforme à toutes les exigences prévues par les lois et aux ordonnances antérieures du Tribunal;
>
> b) Tous les documents déposés et les procédures entreprises doivent être examinés pour déterminer si toute mesure prise ou supposée avoir été prise est interdite en vertu de la *LACC*;
>
> c) Le plan doit être juste et équitable.[1]

[35] CP plaide que le plan est illégal et dépasse la portée autorisée par la *LACC*.

[36] Il est vrai qu'au stade de l'audition sur l'homologation, le tribunal doit s'assurer que le processus en vertu de la *LACC* a été suivi sans enfreindre celle-ci et que rien dans le plan proposé n'y soit contraire[2].

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1 *Dairy Corporation of Canada Limited (Re),* (1934) O.R. 436, paragr. 1, 4; *Northland Properties Limited*, (1998) 73 C.B.R. (N.S. 175), paragr. 24 et 29; *Olympia & York Developments Ltd. (Re)*, (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 1; *Canadian Airlines Corp. (Re),* 2000 ABQB 442, paragr. 60; *Uniforêt Inc., Re (Trustee of)*, 2002 CanLII 24468, paragr. 14.

2 *Olympia & York Developments Ltd. (Re)*, (1993) 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 23-26; *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, paragr. 64.

[37] CP plaide qu'une transaction ou un arrangement implique nécessairement la réorganisation des affaires du débiteur.

[38] Or, CP fait abstraction du fait que, comme déjà mentionné, la réorganisation des affaires de la débitrice a eu lieu, il y a déjà plus d'un an.

[39] D'autre part, le CP allègue :

> « Dans tous les cas, au moment de la vente de tous les éléments d'actifs de MMAC à RAH, l'« objectif secondaire » consistant à maximiser la valeur des actifs de MMAC avait été accompli et l'application de la LACC ne pouvait donc plus accomplir un objectif légitime; en effet, toutes les affaires de MMAC, à l'exception de ses passifs, avaient été complètement et définitivement liquidées. »

[40] Encore une fois, CP semble plaider que, puisque les éléments d'actifs sont vendus, le tribunal devrait mettre fin au processus en vertu de la *LACC*.

[41] Cette prétention n'a aucune assise juridique, et a d'ailleurs déjà fait l'objet d'un jugement[3] par le soussigné dans le présent dossier dont personne ne s'est plaint.

[42] Il faut rappeler que les représentants de CP ont participé à toutes les auditions présidées par le soussigné.

[43] CP plaide à titre subsidiaire que le tribunal n'a pas compétence pour sanctionner les quittances et injonctions prévues en faveur des parties quittancées.

[44] En plus d'avoir déjà fait l'objet d'une décision du soussigné dans le présent dossier, le tribunal croit qu'il est maintenant bien établi que les tribunaux peuvent, en vertu de la *LACC*, homologuer des plans d'arrangement qui prévoient des quittances en faveur de tierces parties.

[45] Dans l'affaire *Metcalfe*[4], la Cour d'appel de l'Ontario énonce les critères d'analyse à appliquer afin de déterminer si l'octroi de quittances en faveur de tiers peut être approuvé :

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

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3 Voir jugement du 17 février 2014, p. 22-29, paragr.113-123.

4 *Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587.

> **a) The parties to be released are necessary and essential to the restructuring of the debtor;**
>
> **b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;**
>
> **c) The Plan cannot succeed without the releases;**
>
> **d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;**
>
> **e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;**
>
> **f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,**
>
> **g) The releases are fair and reasonable and not overly broad or offensive to public policy.**

[46] Dans cette affaire, le juge Blair en est venu à la conclusion que les quittances recherchées en faveur des tierces parties sont justifiées. Il conclut également que les quittances doivent être raisonnablement liées au plan :

> [63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. **In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them**. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).
>
> […]
>
> [66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. **The court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51).**
>
> […]

> [69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[47] Dans l'affaire *Muscletech*[5], la Cour supérieure de l'Ontario approuve également l'octroi de quittances à des tiers ayant financé un plan de liquidation. Bien qu'il juge que l'opposition aux quittances envisagées est prématurée (cette opposition devant plutôt se faire lors d'une éventuelle requête pour homologation), l'honorable juge Ground conclut néanmoins que la *LACC* permet ce type de quittances :

> [7] With respect to the relief sought relating to Claims against Third Parties the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
> > "the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."
>
> […]
>
> [9] **It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by**

[5] *Muscletech Research and Development Inc., Re*, 2006 CanLII 34344 (ON SC).

> **the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties.**
>
> […]
>
> [11] In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. **It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed**.

[48] En l'espèce, les quittances recherchées sont une condition essentielle pour la viabilité du plan puisque les parties quittancées sont les seules qui financent celui-ci. Cet élément militant fortement en faveur du caractère juste et raisonnable des quittances recherchées :

> [23] […] As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. **Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided**.[6]

[49] À titre subsidiaire, CP plaide également que le plan ne peut servir d'outil pour régler des différends entre des tiers solvables, sans octroyer une quittance à MMAC. Cet argument subsidiaire rejoint l'argument du CP qui plaide que le plan a une incidence négative sur les droits du CP.

[50] En effet, CP plaide :

> Puisque la responsabilité du CP est, entre autres choses, recherchée sur une base solidaire dans le cadre du recours collectif, et puisque le CP n'est pas une partie quittancée aux termes du plan, ses droits seront directement et considérablement touchés.

[51] CP plaide entre autres que le règlement partiel d'un litige multipartite doit être, à tout le moins, un évènement neutre pour les défendeurs non parties au règlement.

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6 *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146
Voir aussi : *Sino-Forest Corporation (Re)*, 2012 ONSC 7050, paragr. 74 (autorisation d'appeler refusée, 2013 ONCA 456).

[52] Elle plaide que le plan ne confère pas au CP le titre de protection ordinaire qu'elle pourrait recevoir au terme d'un règlement partiel d'un recours collectif en droit civil.

[53] Comme déjà mentionné, rien n'empêchera CP de se défendre à toute action intentée contre elle. Si elle n'est pas responsable, l'action sera rejetée.

[54] Si elle prétend que les dommages ont été causés par la faute d'un tiers, elle peut le plaider sans que ce tiers soit partie aux procédures.

[55] En fait, cela donnera même un avantage au CP, qui pourra continuer de plaider que la tragédie est la faute de tous, sauf elle.

[56] D'ailleurs, la Cour suprême nous rappelait très récemment que[7] :

> [138] À notre avis, la Cour d'appel a aussi eu raison d'intervenir sur la question des dommages. L'analyse de la juge du procès était entachée d'une erreur déterminante. Elle a fait défaut de tenir compte de la solidarité et de fixer les montants accordés en fonction de la responsabilité respective de chacun des débiteurs solidaires. Comme le souligne la Cour d'appel, « dans toute la mesure où des postes de réclamation pouvaient relever de la responsabilité de plus d'un débiteur solidaire, les remises consenties par M. Hinse rendaient nécessaires l'examen des fautes causales et le partage des parts de responsabilité » : par. 189. M. Hinse aurait dû supporter la part des débiteurs solidaires qu'il a libérés : art. 1526 et 1690 *C.c.Q.*
>
> [139] La juge de première instance a abordé la question des dommages comme si le Ministre était le seul fautif et que le préjudice de M. Hinse ne découlait que de son « inertie institutionnelle » : par. 75-77. De fait, au lieu de déterminer les montants des dommages-intérêts précisément imputables au PGC, la juge s'en est simplement remise aux revendications de M. Hinse :
>
> Comme, de plus, à la suite de la transaction conclue entre le PGQ et Hinse, ce dernier a amendé sa procédure afin de ne réclamer au PGC que la portion qu'il lui attribue selon les différents chefs de dommages qu'il invoque, pour les fins du présent débat, respectant les dispositions plus haut citées, le Tribunal n'analysera que les demandes adaptées à cette nouvelle réalité et qui ne concernent que le PGC. [par. 22]
>
> [140] À l'exception des dommages-intérêts punitifs, elle a ainsi accordé les sommes réclamées en supposant que M. Hinse les avait correctement limitées à ce qui concerne le PGC uniquement. Or, la part de responsabilité des divers

[7] *Hinse* c. *Canada (Procureur général)*, 2015 CSC 35.

> codébiteurs de M. Hinse devait s'évaluer en fonction de la gravité de leur faute respective : art. 1478 *C.c.Q.* La juge ne pouvait pas s'en tenir simplement à la répartition suggérée par M. Hinse; son rôle d'arbitre des dommages-intérêts exigeait qu'elle fixe elle-même la part de responsabilité de chacun.
>
> [141] Au-delà de cette erreur déterminante, qui fausse tous les chefs de dommages accordés, les fondements à l'appui de chacun étaient en outre déficients.
>
> (1) Dommages pécuniaires
>
> [142] La juge Poulin a condamné le PGC à verser un total de 855 229,61 $ au titre des dommages pécuniaires. Ce montant paraît démesuré compte tenu de la somme de 1 100 000 $ déjà versée à ce chapitre par le PGQ aux termes de la transaction intervenue entre ce dernier et M. Hinse. Au minimum, il appartenait à M. Hinse de démontrer que les sommes visaient des compensations distinctes. Il ne l'a pas fait. La ventilation des sommes accordées révèle d'ailleurs que rien ne justifiait les montants réclamés.

[57] Bref, si CP n'est pas responsable, l'action sera rejetée contre elle.

[58] Si elle est responsable, et que des tiers également responsables ont été quittancés, CP sera libérée de la part des débiteurs solidaires qui ont été libérés.

[59] En fait, ce qui serait injuste, serait que CP bénéficie d'une quittance alors qu'elle n'a pas contribué financièrement au plan, contrairement aux autres codéfendeurs.

[60] CP plaide également qu'elle devrait être libérée de sa quote-part de la part de responsabilité avec MMA.

[61] Il ne relève certainement pas de la juridiction du juge soussigné d'en décider.

[62] Le juge saisi du recours contre CP en décidera.

[63] Quant à la question constitutionnelle soulevée dans le plan d'argumentation de CP et pour lequel des avis en vertu de l'article 95 *Cpc* ont été expédiés, le tribunal prend acte du peu d'insistance du CP à plaider cet argument lors de l'audition.

[64] Le tribunal fait siens les arguments proposés par le Procureur général du Canada lorsqu'il affirme :

> 4. Le 15 mai 2015, le PGC recevait un avis de la part de la Compagnie de Chemin de fer Canadien Pacifique (CP) en vertu de l'article 95 du *Code de procédure civile* (*Cpc*).

5. CP ne conteste pas la constitutionnalité de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») ni aucune de ses dispositions.

    - *Plan d'argumentation au soutien de la contestation par la Compagnie de Chemin de Fer Canadien Pacifique du Plan de transaction et d'arrangement*, paragr. 110.

6. CP soutient plutôt que l'homologation par le tribunal, sous l'égide de la *LACC*, du Plan de MMAC, empièterait de manière massive et illégitime sur la compétence des législatures provinciales en matière de propriété et de droits civils.

7. En l'absence d'argument de la part de CP quant à l'applicabilité constitutionnelle, la validité ou l'opérabilité de la *LACC*, l'avis en vertu de l'article *CPC* n'était pas requis.

8. Il faut par ailleurs rappeler que la validité constitutionnelle d'une loi est fonction de son caractère véritable et du fait que celui-ci se rattache à une matière relevant de la compétence de la législature qui l'a adoptée. Le caractère véritable de la loi est déterminé en fonction du but de la loi et de ses effets juridiques. Or, la validité constitutionnelle d'une loi ne dépend pas des effets qu'elle peut produire dans un cas en particulier.

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 25-27 (autorités de MMAC, onglet 44).

9. De même, et bien que ce ne soit pas le cas en l'espèce, l'existence d'un conflit entre une loi fédérale et une loi provinciale n'est pas pertinente quant à la validité constitutionnelle de la loi. L'existence d'un conflit de lois pourrait être pertinente en vertu de la doctrine de la prépondérance fédérale – mais cette doctrine aurait pour effet de rendre inopérante la loi provinciale dans la mesure de son incompatibilité avec la loi fédérale.

    - Peter HOGG, *Constitutional Law of Canada*, 5e éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 16-1 - 16-3 (autorités du PGC, onglet 1)

10. La *LACC* porte en son caractère dominant et véritable sur l'insolvabilité. Son objet et ses effets favorisent la conclusion de compromis et d'arrangements justes et raisonnables en tenant compte des intérêts des compagnies débitrices, de leurs créanciers, des autres parties intéressées et de l'intérêt public.

    - *Century Services Inc.* c. *Canada (Attorney General),* [2010] 3 SCR 379, 2010 CSC 60, paragr. 60 (autorités de MMAC, onglet 14)

11. Ainsi, la *LACC* relève manifestement du domaine de la faillite et de l'insolvabilité, un champ de compétence attribué au Parlement par le paragraphe 91(21) de la *Loi constitutionnelle* de 1867.

- *Reference re constitutional validity of the Compagnies Creditors Arrangement Ace* (Dom.) [1934] S.C.R. 659, p. 660 (autorités de MMAC, onglet 46)

12. Il ne fait pas aucun doute que *LACC* n'est pas inconstitutionnelle du seul fait que l'exercice, par les tribunaux, des pouvoirs qui leurs **(sic)** sont conférés produise des effets sur la propriété et les droits civils des parties impliquées, compétence autrement réservée à la législature des provinces

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 28 (autorités de MMAC, onglet 44)

    « Le corollaire fondamental de cette méthode d'analyse constitutionnelle est qu'une législation dont le caractère véritable relève de la compétence du législateur qui l'a adoptée pourra, au moins dans une certaine mesure, toucher les matières qui ne sont pas de la compétence sans nécessairement toucher sa validité constitutionnelle. »

13. Autrement, l'efficacité de la *LACC* serait complètement paralysée.

    - Peter HOGG *Constitutional Law of Canada*, 5e éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 25-3 (autorités de MMAC, onglet 45)

14. La *LACC* est constitutionnelle même dans la mesure où les pouvoirs qu'elle octroie aux tribunaux leur permettent d'approuver des plans accordant des quittances à des tiers.

    - *Metcalfe & Mansfield Alternative Investments II Corp.,* (Re), 2008 ONCA 587, paragr. 104 (autorités de MMAC, onglet 24)

15. Par ailleurs, le Conseil Privé a confirmé la validité constitutionnelle d'une loi du Parlement, découlant de sa compétence en matière de faillite et d'insolvabilité, permettant à des agriculteurs de conclure des plans d'arrangements avec leurs créanciers sans que ces agriculteurs soient pour autant libérés de leurs dettes.

    - *Farmers' Creditors Arrangement Act (FCAA)*, [1937] A.C. 391, p. 403-404 (autorités de MMAC, onglet 49), confirmant *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935,* [1936] S.C.R. 384, p. 398 (autorités de MMAC, onglet 48)

16. Par le fait même, dans la mesure où la *LACC* permet aux tribunaux d'homologuer un plan d'arrangement par lequel la compagnie débitrice n'est pas libérée, cette loi est également *intra vires* du pouvoir du Parlement.

17. La nature réparatrice et flexible de cette loi permet aux tribunaux de rendre des ordonnances innovatrices dans la mesure où elles sont faites en conformité avec la loi, ce qui est le cas en l'espèce.

18. D'ailleurs, un plan d'arrangement octroyant des quittances à des tiers mais non à la débitrice principale a déjà été entériné par la Cour fédérale d'Australie.

    - *Lehman Brother Australia Ltd. In the matter of Lehman Brothers Australia Ltd ((in liq) No2),* [2013] FCA 965, paragr. 34-57 (Australie) (autorités de MMAC, onglet 52)

19. Notons également que les doctrines constitutionnelles reconnaissent que, concrètement, « le maintien de l'équilibre des compétences relève avant tout des gouvernements, et doivent faciliter et non miner ce que la Cour [suprême] a appelé un 'fédéralisme coopératif' ».

    - *Canadian Western Bank* c. *Alberta,* [2007] 2 S.C.R. 3, paragr. 24 (autorités de MMAC, onglet 44)

20. Dans les circonstances, l'avis de question constitutionnelle signifiée par CP aux procureurs généraux, n'a pas sa raison d'être et doit donc être rejeté.

[65] Bref, non seulement le soussigné croit que le plan proposé est juste et raisonnable, mais retenir les arguments présentés par le CP déconsidérait la confiance du public envers les tribunaux.

[66] En effet, depuis plus de deux ans, les victimes de la terrible tragédie de Lac-Mégantic s'en sont remises au processus judiciaire. Depuis deux ans, toutes les actions faites dans le présent dossier étaient orientées vers la présentation du plan d'arrangement qui fut voté à l'unanimité par les créanciers de la débitrice.

[67] Malgré que les ressources judiciaires soient limitées, des ressources considérables ont été mises à contribution pour pouvoir faire en sorte que les victimes de Lac-Mégantic obtiennent justice.

[68] Les procureurs et les justiciables des districts de Mégantic, Saint-François et Bedford étaient conscients que les ressources judiciaires utilisées dans le dossier de Lac-Mégantic ne pouvaient être utilisées par eux.

[69] L'utilisation de ces ressources judiciaires a eu pour effet de retarder d'autres dossiers.

[70] Faire avorter aujourd'hui ce plan d'arrangement pour le seul bénéfice d'un tiers contre qui un recours collectif a été autorisé, alors que ce tiers est partie aux procédures depuis le début, serait injuste et déraisonnable.

[71] Une dernière remarque s'impose. La requérante a déposé sous scellé les quittances et transactions intervenues entre les tiers responsables dans ce dossier. Un jugement du soussigné a été rendu sur la possibilité pour CP de prendre connaissance de ces quittances.

[72] CP a été autorisée à prendre connaissance des quittances caviardées. Elle ne connaît donc pas les montants pour lesquels les tiers responsables ont contribués, sauf en ce qui concerne Irving Oil et World Fuel Services qui ont rendu public le montant de leur contribution.

[73] Le tribunal s'est interrogé, séance tenante, sur la possibilité pour lui de prendre connaissance de la contribution de chaque tiers qui contribue au fonds d'indemnisation sans que le CP en ait connaissance.

[74] En effet, la règle *audi alteram partem* et la règle de la publicité des débats pourraient ne pas être respectées si le tribunal prend en considération une preuve dont n'a pas bénéficié une des parties opposantes.

[75] C'est pourquoi, le tribunal n'a pas pris connaissance de la contribution de chaque partie ayant cotisé au fonds d'indemnisation.

[76] Le tribunal peut apprécier que la contribution totale de 430 M$ est raisonnable en l'espèce.

[77] De plus, le tribunal a été informé tout au long du processus des démarches faites par MMA. Le tribunal a nommé des procureurs pour représenter les victimes de la tragédie de Lac-Mégantic qui ont participé à la négociation pour la constitution du fonds d'indemnisation. Le Gouvernement du Québec a également participé à cette négociation.

[78] Puisque le tribunal connaît la somme finale qui sera payée à même le fonds d'indemnisation, il n'est pas nécessaire de savoir le montant exact de participation de chacune des parties. Le tribunal considère raisonnable le règlement intervenu qui a été voté à l'unanimité par les créanciers.

**POUR CES MOTIFS, LE TRIBUNAL** :

[79] **ACCUEILLE** la requête en approbation du plan d'arrangement amendé;

**DEFINITIONS**

[80] **ORDERS** that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Amended Plan of Compromise and Arrangement of the Petitioner dated June 8, 2015 and filed in the court record on

June 17, 2015, a copy of which is attached hereto as Schedule "**A**" (the "**Plan**") or in the Creditors' Meeting Order granted by the Court on May 5, 2015 (the "**Meeting Order**"), as the case may be;



**SERVICE AND MEETING**

[81] **ORDERS AND DECLARES** that that the Notification Procedures set out in paragraphs 61 to 66 of the Meeting Order have been duly followed and that there has been valid and sufficient notice of the Creditors' Meeting and service, delivery and notice of the Meeting Materials including the Plan and the Monitor's Nineteenth Report dated May 14, 2015, for the purpose of the Creditors' Meeting, which service, delivery and notice was effected by (i) publication on the Monitor's Website, (ii) sending to the Service List, (iii) mailing of the documents set out in paragraph 64 of the Meeting Order to all known Creditors, by prepaid regular mail, courier, fax or email, at the address appearing on a Creditor's Proof of Claim, and (iv) publication of the Notice to Creditors in the Designated Newspapers, and that no other or further notice is or shall be required;

[82] **ORDERS AND DECLARES** that the Creditors' Meeting was duly called, convened, held and conducted in accordance with the CCAA and the Orders of this Court in these proceedings, including without limitation the Meeting Order;

**SANCTION OF THE PLAN**

[83] **ORDERS AND DECLARES** that :

a) the Petitioner is a debtor company to which the CCAA applies, and the Court has jurisdiction to sanction the Plan;

b) the Plan has been approved by the required majority of Creditors with Voting Claims in conformity with the CCAA and the Meeting Order;

c) the Petitioner has complied in all respects with the provisions of the CCAA and all the Orders made by this Court in the CCAA Proceedings;

d) the Court is satisfied that the Petitioner has neither done nor purported to do anything that is not authorized by the CCAA; and

e) the Petitioner, Creditors having Government Claims, the Class Representatives, and the Released Parties have each acted in good faith and with due diligence, and the Plan (and its implementation) is fair and reasonable, and in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan;

[84] **ORDERS AND DECLARES** that the Plan and its implementation, are hereby sanctioned and approved pursuant to Section 6 of the CCAA;

**PLAN IMPLEMENTATION**

[85] **DECLARES** that the Petitioner and the Monitor are hereby authorized and directed to take all steps and actions, and to do all such things, as determined by the Monitor and the Petitioner, respectively, to be necessary or appropriate to implement the Plan in accordance with its terms and as contemplated thereby, and to enter into, adopt, execute, deliver, implement and consummate all of the steps, transactions and agreements, including, without limitation, the Settlement Agreements, as required by the Monitor or the Petitioner, respectively, as contemplated by the Plan, and all such steps, transactions and agreements are hereby approved;

[86] **ORDERS** that as of the Plan Implementation Date, the Petitioner, represented by the Trustee, the sole shareholder of the Petitioner, shall be authorized and directed to issue, execute and deliver any and all agreements, documents, securities and instruments contemplated by the Plan, and to perform its obligations under such agreements, documents, securities and instruments as may be necessary or desirable to implement and effect the Plan, and to take any further actions required in connection therewith;

[87] **ORDERS** that the Plan and all associated steps, compromises, transactions, arrangements, releases, injunctions, offsets and cancellations effected thereby are hereby approved, shall be deemed to be implemented and shall be binding and effective in accordance with the terms of the Plan or at such other time, times or manner as may be set forth in the Plan, in the sequence provided therein, and shall enure to the benefit of and be binding upon the Petitioner, the Released Parties and all Persons affected by the Plan and their respective heirs, administrators, executors, legal personal representatives, successors and assigns;

[88] **ORDERS,** subject to the terms of the Plan, that from and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Petitioner then existing or previously committed by the Petitioner, or caused by the Petitioner, directly or indirectly, or non-compliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, lease, guarantee, agreement for sale, deed, licence, permit or other agreement, written or oral, and any and all amendments or supplements thereto,

existing between such Person and the Petitioner arising directly or indirectly from the filing by the Petitioner under the CCAA and the implementation of the Plan and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Petitioner from performing its obligations under the Plan or be a waiver of defaults by the Petitioner under the Plan and the related documents;

[89] **ORDERS** that from and after the Plan Implementation Date, and for the purposes of the Plan only, if the Petitioner does not have the ability or the capacity pursuant to applicable law to provide its agreement, waiver, consent or approval to any matter requiring its agreement, waiver, consent or approval under the Plan, such agreement, waiver, consent or approval may be provided by the Trustee, or that such agreement, waiver, consent or approval shall be deemed not to be necessary;

[90] **ORDERS** that upon fulfillment or waiver of the conditions precedent to implementation of the Plan as set out and in accordance with Article 6 of the Plan, the Monitor shall deliver the Monitor's Certificate, substantially in the form attached as Schedule "B" to this Order, to the Petitioner in accordance with Article 6.1 of the Plan and shall file with the Court a copy of such certificate as soon as reasonably practicable on or forthwith following the Plan Implementation Date and shall post a copy of same, once filed, on the Monitor's Website;

**DISTRIBUTIONS BY THE MONITOR**

[91] **ORDERS** that on the Plan Implementation Date, the Monitor shall be authorized and directed to administer and finally determine the Affected Claims of Creditors and to manage the distribution of the Funds for Distribution in accordance with the Plan and the Claims Resolution Order;

[92] **ORDERS AND DECLARES** that all distributions to and payments by or at the direction of the Monitor, in each case on behalf of the Petitioner, to the Creditors with Voting Claims under the Plan are for the account of the Petitioner and the fulfillment of its obligations under the Plan including to make distributions to Affected Creditors with Proven Claims;

[93] **ORDERS AND DECLARES** that, notwithstanding :

a) the pendency of these proceedings and the declarations of insolvency made therein;

b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., c. B-3, as amended (the "**BIA**") in respect of the Petitioner and any bankruptcy order issued pursuant to any such application; and

c) any assignment in bankruptcy made in respect of the Petitioner;

the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or after the Filing Date, and any action taken in connection therewith, including, without limitation, under this Order shall not be void or voidable and do not constitute nor shall they be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable transaction under the BIA, article 1631 and following of the Civil Code or any other applicable federal or provincial legislation, and the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or after the Filing Date, and any action taken in connection therewith, do not constitute conduct meriting an oppression remedy under any applicable statute and shall be binding on an interim receiver, receiver, liquidator or trustee in bankruptcy appointed in respect of the Petitioner;

**APPROVAL OF SETTLEMENT AGREEMENTS**

[94] **ORDERS AND DECLARES** that (i) the Petitioner has entered into the Settlement Agreements in exchange for fair and reasonable consideration; (ii) each Settlement Agreement is a good faith compromise, in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan; (iii) each Settlement Agreement is fair, equitable and reasonable and an essential element of the Plan and (iv) each of the Settlement Agreements be and is hereby approved;

[95] **ORDERS** that the Settlement Agreements shall be sealed and shall not form part of the public record, subject to further Order of this Court;

[96] **ORDERS AND DIRECTS** the Monitor to do such things and take such steps as are contemplated to be done and taken by the Monitor under the Plan. Without limitation: (i) the Monitor shall hold the Indemnity Fund to which the Settlement Funds will be deposited; and (ii) hold and distribute

the Funds for Distribution in accordance with the terms of the Plan and the Claims Resolution Order;



**RELEASES AND INJUNCTIONS**

[97] **ORDERS AND DECLARES** that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Released Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan and that all such releases, discharges and injunctions are hereby sanctioned, approved, binding and effective as and from the Effective Time on the Plan Implementation Date. For greater certainty, nothing herein or in the Plan shall release or affect any rights or obligations provided under the Plan;

[98] **ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan, any Claim that any Person (regardless of whether or not such Person is a Creditor or Claimant) holds or asserts or may in the future hold or assert against any of the Released Parties or that could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, arising out of, in connection with and/or in any way related to the Derailment, the Policies, MMA, and/or MMAC, is hereby permanently and automatically released and the enforcement, prosecution, continuation or commencement thereof is permanently and automatically enjoined and forbidden. Any and all Claims against the Released Parties are permanently and automatically compromised, discharged and extinguished, and all Persons and Claimants, whether or not consensually, shall be deemed to have granted full, final, absolute, unconditional, complete and definitive releases of any and all Claims to the Released Parties;

[99] **ORDERS** that all Persons (regardless of whether or not such Persons are Creditors or Claimants) shall be permanently and forever barred, estopped, stayed and enjoined from (i) pursuing any Claim, directly or indirectly, against the Released Parties, (ii) continuing or commencing, directly or indirectly, any action or other proceeding with respect to any Claim against the Released Parties, or with respect to any claim that, with the exception of any claims preserved pursuant to Section 5.3 of the Plan against any Third Party Defendants that are not also Released Parties, could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation

claim, forced intervention or otherwise, (iii) seeking the enforcement, levy, attachment, collection, contribution or recovery of or from any judgment, award, decree, or order against the Released Parties or property of the Released Parties with respect to any Claim, (iv) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or the property of the Released Parties with respect to any Claim, (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Approval Orders to the full extent permitted by applicable law, and (vi) asserting any right of setoff, compensation, subrogation, contribution, indemnity, claim or action in warranty or forced intervention, recoupment or avoidance of any kind against any obligations due to the Released Parties with respect to any Claim or asserting any right of assignment of or subrogation against any obligation due by any of the Released Parties with respect to any Claim; and (vii) taking any actions to interfere with the implementation or consummation of this Plan, provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan;

[100] **ORDERS** that notwithstanding the foregoing, the Plan Releases and Injunctions as provided in this Order (i) shall have no effect on the rights and obligations provided by the "Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic" signed on February 19, 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any Unaffected Claims;

[101] **ORDERS** that, without limitation to the Meeting Order and Claims Procedure Order, any holder of a Claim, including any Creditor, who did not file a Proof of Claim before the applicable Bar Date shall be and is hereby forever barred from making any Claim against the Petitioner and Released Parties and any of their successors and assigns, and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished;

**CHARGES**

[102] **ORDERS** that, subject to paragraphs 25 and 27 hereof, upon the Plan Implementation Date, all CCAA Charges against the Petitioner or its property created by the Initial Order or any subsequent orders (as defined in the Initial Order, the "**CCAA Charges**") shall be terminated, discharged and released;

[103] **ORDERS** that, notwithstanding paragraph 24 hereof, the Canadian Professionals and U.S. Professionals are entitled to the Administration Charge set out in Article 7 of the Plan as security for the payment of the fees and disbursements of the Canadian Professionals and U.S. Professionals;

[104] **DECLARES** that the Canadian Professionals and U.S. Professionals, as security for the professional fees and disbursements owed or to be owed to them in connection with or relating to the CCAA Proceeding including the Plan and its implementation, be entitled to the benefit of and are hereby granted a charge and security in the Settlement Funds, to the exclusion of the XL Indemnity Payment, to the extent of the aggregate amount of $20,000,000.00, plus any applicable sales taxes for the Canadian Professionals (defined in the Plan as the Administration Charge Reserve). The Administration Charge shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances, security or rights of whatever nature or kind or deemed trusts (collectively "**Encumbrances**") affecting the Settlement Funds, to the exclusion of the XL Indemnity Payment, if any;

[105] **ORDERS** that the Petitioner shall not grant any Encumbrances in or against the Settlement Funds that rank in priority to, or *pari passu* with, the Administration Charge unless the Petitioner obtains the prior written consent of the Monitor and the prior approval of the Court.

[106] **DECLARES** that the Administration Charge shall immediately attach to the Settlement Funds, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[107] **DECLARES** that the Administration Charge and the rights and remedies of the beneficiaries of same, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement or other arrangement which binds the Petitioner (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement :

a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Petitioner of any Third Party Agreement to which it is a party; and

b) any of the beneficiaries of the Administration Charge shall not have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the Administration Charge;

[108] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Settlement Funds made by the Monitor pursuant to the Plan and the granting of the Administration Charge, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law;

[109] **DECLARES** that the Administration Charge shall be valid and enforceable as against all Settlement Funds, subject to the Administration Charge Reserve, and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes;

[110] **ORDERS** that, notwithstanding any of the terms of the Plan or this Order, the Petitioner shall not be released or discharged from its obligation in respect of the Unaffected Claims, including, without limitation, to pay the fees and expenses of the Canadian Professionals and the U.S. Professionals;

**STAY OF PROCEEDINGS**

[111] **EXTENDS** the Stay Period (as defined in the Initial Order and as extended from time to time) to and including December 15, 2015;

[112] **ORDERS** that all orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order,

the Meeting Order, the Claims Resolution Order or any further Order of this Court;



**THE MONITOR**

[113] **ORDERS** that all of the actions and conduct of the Monitor disclosed in the Monitor's Reports are hereby approved, and **DECLARES** that the Monitor has satisfied all of its obligations up to and including the date of this Order;

[114] **ORDERS** that, effective upon the Plan Implementation Date, any and all claims against (a) the Monitor in connection with the performance of its duties as Monitor of the Petitioner up to the Plan Implementation Date, (b) the Released Parties in connection with any act or omission relating to the negotiation, drafting or execution of their respective Settlement Agreements, or the negotiation, solicitation or implementation of the Plan, (c) Creditors having Government Claims in connection with the negotiation, solicitation and implementation of the Plan, and (d) the Class Representatives in connection with the negotiation, solicitation and implementation of the Plan shall, in each case, be and are hereby stayed, extinguished and forever barred and neither the Monitor, the Released Parties, Creditors having Government Claims nor the Class Representatives shall have any liability in respect thereof except for any liability arising out of gross negligence or willful misconduct on the part of any of them, provided however that this paragraph shall not release (i) the Monitor of its remaining duties pursuant to the Plan and this Order (the "**Remaining Duties**") or (ii) the Released Parties from their remaining duties pursuant to their respective Settlement Agreements;

[115] **ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court on notice to the Monitor and upon such terms as may be determined by the Court;

[116] **DECLARES** that the protections afforded to Richter Advisory Group Inc., as Monitor and as officer of this Court, pursuant to the terms of the Initial Order and the other Orders made in the CCAA Proceedings shall not expire or terminate on the Plan Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect;

[117] **DECLARES** that the Monitor has been and shall be entitled to rely on the books and records of the Petitioner and any information provided by the

Petitioner without independent investigation and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;

[118] **DECLARES** that any distributions under the Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Petitioner for the purposes of section 14 of the Tax Administration Act (Québec) or any other similar provincial or territorial tax legislation (collectively the "**Tax Statutes**") given that the Monitor is only a disbursing agent of the payments under the Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder or under the Plan, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made or to be made under the Plan or this Order and any claims of this nature are hereby forever barred;

[119] **DECLARES** that the Monitor shall not, under any circumstances, be liable for any of the Petitioner's tax liabilities regardless of how or when such liability may have arisen;

[120] **DECLARES** that neither the Monitor, the Released Parties, Creditors having Governmental Claims nor the Class Representatives shall incur any liability as a result of acting in accordance with the Plan and the Orders, including without limitation, this Order, other than any liability arising out of or in connection with the gross negligence or willful misconduct of any of them;

[121] **ORDERS** that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court the Monitor's Plan Completion Certificate, substantially in the form attached as Schedule "**C**" to this Order (the "**Monitor's Plan Completion Certificate**") stating that all of the Monitor's Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of the Monitor's Plan Completion Certificate, Richter Advisory Group Inc. shall be deemed to be discharged from its duties as Monitor of the Petitioner in the

CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings;

[122] **ORDERS AND DECLARES** that the Monitor and the Petitioner, and their successors and assigns, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable tax withholding and reporting requirements. All amounts withheld on account of taxes shall be treated for all purposes as having been paid to the Affected Creditors in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate governmental authority;

**GENERAL**

[123] **DECLARES** that the Monitor or the Petitioner may, from time to time, apply to this Court for any advice, directions or determinations concerning the exercise of their respective powers, duties and rights hereunder or in respect of resolving any matter or dispute relating to the Plan, the Claims Resolution Order or this Order, or to the subject matter thereof or the rights and benefits thereunder, including, without limitation, regarding the distribution mechanics under the Plan;

[124] **DECLARES** that any other directly affected party that wishes to apply to this Court, including with respect to a dispute relating to the Plan, its implementation or its effects, must proceed by motion presentable before this Court after a 10-day prior notice of the presentation thereof given to the Petitioner and the Monitor in accordance with the Initial Order;

[125] **DECLARES** that the Monitor is authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for an order recognizing the Plan and this Order and confirming that the Plan and this Order are binding and effective in such jurisdiction and that the Monitor is the Petitioner's foreign representative for those purposes;

[126] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public

record by any such court or administrative body or by any Person affected by the Order;

[127] **ORDERS** that Schedule **B** to the Amended Plan and the Settlement agreements included therein, save and except for the XL Settlement Agreement, be filed under seal, the whole subject to further Order of this Court;

[128] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

[129] **LE TOUT** avec dépens contre la compagnie de chemin de fer Canadien Pacifique.

*(S) Gaétan Dumas*

_____

**GAÉTAN DUMAS, J.C.S.**

**Me Patrice Benoit**
**Me Alexander Bayus**
Gowling Lafleur Henderson LLP
**Pour Montréal, Maine & Atlantic Canada Co.**

**Me Sylvain Vauclair**
Woods LLP
**Pour Richter Groupe Conseil inc.**
(Richter Advisory Group inc.)

**Me Alain Riendeau**
**Me Enrico Forlini**
**Me André Durocher**
**Me Brandon Farber**
Fasken Martineau Dumoulin
**Pour Compagnie de chemin de fer Canadien Pacifique**

Date d'audience : 17 juin 2015

**SCHEDULE "B"**

**MONITOR'S PLAN IMPLEMENTATION DATE CERTIFICATE**



**CANADA**

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTRÉAL**

**No. : 500-11-**

**SUPERIOR COURT**

**Commercial Division**
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

**IN THE MATTER OF THE PLAN OF COMPROMISE OF:**

●

**Petitioner**

-and-

●

**Monitor**

---

**CERTIFICATE OF THE MONITOR OF ● (Plan Implementation)**

All capitalized terms not otherwise defined herein have the meanings ascribed thereto in the Plan of Compromise and Arrangement of ● pursuant to the *Companies' Creditors Arrangement Act, R.S.C.* 1985, c. C-36, as amended, dated ● (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "**Plan**").

Pursuant to section ● of the Plan, ● (the "**Monitor**"), in its capacity as Court-appointed Monitor of **[DEBTOR]**, delivers this certificate to **[DEBTOR]** and hereby certifies that all of the conditions precedent to implementation of the Plan as set out in section ● of the Plan have been satisfied or waived by . Pursuant to the Plan, the **[Plan Implementation Date]** has occurred on this day. This Certificate will be filed with the Court and posted on the Monitor's Website.

DATED at the City of Montréal, in the Province of Québec, this ____ day of _____, ●.

●, in its capacity as the Court-appointed Monitor of **[DEBTOR]**

Per:

_____

Name:

Title:

## SCHEDULE "C"

## MONITOR'S PLAN COMPLETION CERTIFICATE

**CANADA**

**PROVINCE OF QUÉBEC**
**DISTRICT OF MONTRÉAL**

**No. : 500-11-**

**SUPERIOR COURT**

**Commercial Division**
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

**IN THE MATTER OF THE PLAN OF COMPROMISE OF:**

●

**Petitioner**

-and-

●

**Monitor**

---

**CERTIFICATE OF THE MONITOR**
**(Plan Completion)**

**RECITALS:**

A. Pursuant to an Order of the Honourable ● of the Québec Superior Court (Commercial Division) (the "**Court**") dated ●, ● was appointed as the Monitor (the "**Monitor**") of **[DEBTOR]**.

B. Pursuant to an Order of the Honourable ● of the Court dated ● (the "**Sanction Order**"), the Court sanctioned and approved the Plan of Compromise of ● pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, dated ● (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "**Plan**").

C. Pursuant to the Sanction Order, the Court ordered that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court a certificate stating that all of the Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of such certificate, ● shall be deemed to be discharged from its duties as Monitor of ● in the CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings.

D. All capitalized terms not otherwise defined herein shall have the meaning set out in the Sanction Order.

Pursuant to paragraph ● of the Sanction Order, ● in its capacity as Court-appointed Monitor of ● (the "**Monitor**") hereby certifies that the Monitor has completed its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties.

DATED at the City of Montréal, in the Province of Québec, this ____ day of _____, ●.

●, in its capacity as the Court-appointed Monitor of ●

Per:

_____

Name:

Title:

2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

# IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 16, 2009
Judgment: August 18, 2009
Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Leanne Williams for Flextronics Inc.
J. Pasquariello for Monitor, Ernst & Young Inc.
B. Wadsworth for CAW-Canada
Thomas McRae for Recently Severed Calgary Employees
A. McKinnon for Former Employees
Mary Arzoymanidis for Bell Canada
Alex MacFarlane for Unsecured Creditors' Committee
Gavin Finlayson for Noteholders
Tina Lie for Superintendent of Financial Services of Ontario
Steven Graff, Ian Aversa for Current and Former Employees

Subject: Insolvency

**Related Abridgment Classifications**

Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.f Removal of stay

**Headnote**

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Removal of stay

Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order

lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

**Table of Authorities**

**Cases considered by *Morawetz J.*:**

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

*Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 2008 CarswellOnt 1427, *(*sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, *(*sub nom. *Slater Steel Inc. (Re))* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

*SNV Group Ltd., Re* (2001), 95 B.C.L.R. (3d) 116, 2001 BCSC 1644, 2001 CarswellBC 2662 (B.C. S.C.) — referred to

*Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.5 [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — referred to

*Employee Retirement Income Security Act, 1974*, 29 U.S.C.

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 21 — referred to

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

***Morawetz J.*:**

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

**Background**

  

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

  

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;

(b) the bulk of documentary discovery issues have been worked out;

(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and

(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

**Analysis**

  

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

  

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

**Disposition**

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

*Motion by applicants granted; motion by moving parties dismissed.*

**COURT FILE NO.:** 06-CL-6241
**DATE:** 20060206

**SUPERIOR COURT OF JUSTICE – ONTARIO**
**(COMMERCIAL LIST)**



**RE:** IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

**BEFORE:** FARLEY J.

**COUNSEL:** J.A. Carfagnini and Caterina Costa, for the Applicants

Derrick Tay, for the Iovate Companies, the DIP Lender and Gardiner personally

Jay Swartz and Natasha MacParland, for the Monitor

Steven Golick, for Zurich Insurance Company

Jeffrey Carhart and A. Sambasivan, for the Ad Hoc Committee of the MuscleTech Tort Claimants

Bill Baldiga and Stephen Smith, U.S. counsel for the Ad Hoc Committee of MuscleTech Tort Claimants

Tom Ringe, U.S. counsel for the Applicants

David Rothwell, Canadian counsel for the Jaramillo plaintiffs

Jere Smith, U.S. counsel for the Jaramillo plaintiffs

**HEARD:** February 6, 2006

## E N D O R S E M E N T

[1] This endorsement should be read in conjunction with my endorsement of January 18, 2006.

[2] The essential aspects of the motion before me today were for an extension of the stay of proceedings to March 15, 2006, the sealing of the unredacted version of the Monitor's Second Report and recognition the U.S. Protective Orders. Allow me to deal with the two non-contentious aspects. Firstly, I note that there has been minimal redaction of the Monitor's Second Repot as to sensitive commercial financial information, all in accordance with the principles *Sierra Club v. Canada* (2002), 211 D.L.R. (4th) 193 (SCC).

The draft order contemplates a sealing of the unredacted version pending further order of the court; thus any interested person could apply to the court for an unsealing on proper grounds. The unredacted version may be made available to any party which executes a suitable confidentiality/non-disclosure agreement. Similarly, with respect to the recognition of the U.S. Protective Orders, this makes common sense and is in general accord with the principles of *Sierra Club*.

[3] That leaves the question of the extension of the protective stay to March 15, 2006. Let me observe that all the parties represented before me today, except for counsel for the Jaramillos, were supportive of this request. Those supportive indicated that very significant progress had been made since the January 18, 2006 Initial Order with respect to the mechanics concerning a global resolution and as to initial discussions concerning substance; in contrast, the Jaramillos were concerned that this CCAA filing was designed to derail their trial scheduled for April 3, 2006 in New Mexico. In defence of the attitude of the Jaramillos in this regard, I would observe that I can understand their frustration and suspicion that, vis-à-vis them, the CCAA filing was a ploy and/or a stall designed to defeat a looming trial date. If that were shown to be the case, then this (Canadian) court would not tolerate such tactical game playing. However, I am satisfied on the evidence before me (and as supported by the other parties represented here today, including the Monitor, being an officer of the court – appointed by the court, with special responsibilities to the court, including neutrality as to all stakeholders (including the Jaramillos)) that the CCAA applicants have been proceeding in good faith with due diligence towards a CCAA resolution (and with the timetable addressed in the material having to be met demonstrating that they are presently proceeding in good faith and with due diligence) that it would be appropriate in these circumstances to extend the stay to March 15, 2006. I pause to note that at any time and from time to time any interested person may employ the comeback clause provision of the Initial Order and in this regard the Jaramillos (or others) are perfectly at liberty to request that the stay be terminated even before the March 15, 2006 date. One would ordinarily assume that that use of the comeback clause would be triggered by some adverse happening or negative result; however, the comeback clause is not so restricted.

[4] Allegations by the Jaramillos of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

[5] It was suggested by U.S. counsel for the Jaramillos (I would observe that US counsel were variously present in the courtroom as shown in the list of counsel) that the CCAA applicants were attempting to pit this (Canadian) court off against the U.S. court (this would include Judge Rakoff's court and the court in New Mexico). I would observe that this court has a long tradition of comity and cooperation with the courts of the U.S. and it will not engage in such an activity. As discussed in Judge Rakoff's hearing transcript of January 25, 2006, he would be calling me and I would confirm that he and I had a very pleasant and productive discussion as to coordination and cooperation – and we will continue with that liaison and endeavour. I know that he is waiting to see how this hearing in Canada goes, before dealing with the matter in New York on February 9.

[6] In that regard, and as I pointed out, I have absolutely no difficulty with the element of Judge Rakoff having to be satisfied as to the appropriateness of how to deal with the Jaramillo litigation in New Mexico. It will be up to him to assess whether that litigation should be carved out, as to which see his previous consideration in this regard. I advised counsel (and Mr. Ringe specifically acknowledged) that they would have to be up to speed re the New Mexico case if Judge Rakoff did not find favour with the process as presently contemplated.

[7] In that regard, I would also advise that I impressed upon all parties/counsel that they would have to continue with the lightning (choice of that word being that of one supportive counsel) progress that had been made to date. I found it very helpful to have the Monitor's interim report as to transactions affecting the CCAA applicants with related parties. That report will have to be finalized forthwith, including all aspects of "reviewable transactions". I was advised by the Monitor that the CCAA applicants and the other Gardiner entities plus Mr. Gardiner personally recognized the importance of this and that the Monitor was receiving full cooperation and candour in this respect. I am certain that the Supplemental Objection to Motion For Temporary Restraining Order and Preliminary Injunction (headed up with the style of proceedings in the CCAA matter, but clearly addressed to the U.S. court) of the Jaramillos will be of assistance in allowing the Monitor to give special attention to the concerns addressed there. Originally, it was thought that the final report could be completed by February 15, 2006, but with the additional workload forthcoming, it was suggested that February 22, 2006 would be a more manageable date. I would therefore expect a draft interim report by February 15, 2006 to demonstrate that real progress is being made in this regard. Given the future dates in question, it would be better to consider February 22, 2006 as an outside date and better to provide same earlier.

[8] I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]

[9] I would reiterate my observations in *Re Grace Canada Inc*., [2005] O.J. No. 4868 (Ont. S.C.J.) at paragraph 5 and 11:

> 5. It would seem to me that the various class proceedings would benefit from cooperation and coordination – using the 3 Cs of the Commercial List (communication, cooperation and common sense). Otherwise, they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.
>
> 11. It would seem to me that the insolvency adjudicative proceedings would, at least under presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

[10] As well, it is helpful to recall what Blair J. (as he then was) said concerning CCAA stays of proceedings against third parties in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraphs 13, 17, 20, 24 and 25:

> 13. The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau action as against it as well, pending the disposition of the C.C.A.A. proceedings. Counsel submits that the factual substratum of the claim against the bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the C.C.A.A. proceedings. He points out also that if the action were to be taken against the bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.
>
> 17. By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangement between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangements with such creditors.
>
> 20. I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.
>
> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with – at least for the purposes of that proceeding – in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York – whose alleged misdeeds are the real focal point of the attack on both sets of defendants – is able to participate.
>
> 25. In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e., the action and the C.C.A.A. proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see Attorney General v. Arthur Andersen & Co. (1988), [1989] E.C.C. 224 (C.A.), cited in Arab Monetary Fund v. Hashim, supra.

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.

3. Pre-judgment interest will compensate the plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the plaintiffs ultimately be successful.

4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where — as is the case here — the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress).

[11] I am satisfied on a balancing of interests, weighing the benefits and the detriments, that it is appropriate to exercise my discretion to extend the stay. Order is to issue as per my fiat.

[12] This endorsement was written over the lunch hour. I directed counsel to have their lunch together usefully discussing how this matter may productively proceed. I then returned to court to give them this endorsement and read it to them. I was advised that counsel (including those for the Jaramillos) had had an open and frank discussion.

J.M. Farley

**DATE:** February 6, 2006

**CITATION:** Re 4519922 Canada Inc. 2015 ONSC 124
**COURT FILE NO.:** CV-1410791-00CL
**DATE:** 20150112

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 4519922 CANADA INC.



**BEFORE:** Newbould J.

**COUNSEL:**

*Robert I. Thornton, John T. Porter, Lee M. Nicholson and Asim Iqbal*, for the Applicant

*Harry M. Fogul*, for 22 former CLCA partners

*Orestes Pasparakis and Evan Cobb*, for the Insurers

*Avram Fishman and Mark Meland*, for the German and Canadian Bank Groups, the Widdrington Estate and the Trustee of Castor Holdings Limited

*James H. Grout*, for 22 former CLCA partners

*Chris Reed*, for 8 former CLCA partners

*Andrew Kent*, for 5 former CLCA partners

*Richard B. Jones*, for one former CLCA partner

*John MacDonald*, for Pricewaterhouse Coopers LLP

*James A. Woods, Sylvain Vauclair, Bogdan Catanu and Neil Peden*, for Chrysler Canada Inc. and CIBC Mellon Trust Company

*Jay A. Swartz*, for the proposed Monitor Ernst & Young Inc.



**HEARD:** December 8, 2014 and January 6, 2015

**ENDORSEMENT**

[1] On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

[2] The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately $220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

[3] I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

[4] Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.



**Structure of Coopers & Lybrand Chartered Accounts**

[5] The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act,* and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

[6] CLCA is a partnership governed by the *Partnerships Act (Ontario*) with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

[7] In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in

September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the Partnerships Act (Ontario) and its registered head office is in Toronto.

[8] In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

[9] Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

**Castor Holdings litigation**

[10] Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately $1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share

valuation letters and certificates for "legal for life" opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

[11] Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of $1.5 billion.

[12] Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of $2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

[13] The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

[14] The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several

share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

[15] On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

[16] The Widdrington action has resulted in a judgment in the amount of $4,978,897.51, inclusive of interest, a cost award in the amount of $15,896,297.26 plus interest, a special fee cost award in the amount of $2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

[17] There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than $1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

[18] The Castor Litigation has given rise to additional related litigation:

(a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is

costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

[19] The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

[20] The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of $70 million. The total spent by all parties already amounts to at least $150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.



**Individual partner defendants**

[21] Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

**Analysis**

**(i) Applicability of the CCAA**

[22] Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed $5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

[23] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Re Stelco Inc*. (2004), 48

C.B.R. (4th) 299 (per Farley J.) ; leave to appeal to the C of A refused 2004 CarswellOnt 2936 (C.A.).

[24] The BIA defines "insolvent person" as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[25] The applicant submits that it is insolvent under all of these tests.

[26] The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

[27] At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately $6.25 million (the "Pre-71 Entitlements"); (ii) $16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of $18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of $2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.

[28] The only asset of the applicant 451 on its balance sheet is its investment of $100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

[29] Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some $39 million in realizable assets against liabilities of some $21 million, leaving some $18 million in what he said were liquid assets. Therefore he concluded that these assets of $18 million are available to take care of the liabilities of 451.

[30] I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some $6.5 million owing to pre-1971 retired partners, and one of some $16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the $6.5 million under the indemnity provided to PWC, nor did he consider that the $16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

[31] This analysis also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Re Stelco, supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Re Muscletech Research & Development Inc.* (2006), 19 C.B.R. (5th) 54 (per Farley J.).

[32] It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining $1.5 billion in

claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately $720 million in total, and the claim of the Trustee of CLCA of approximately $108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.



[33] As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of $100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately $16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

[34] For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of $1.5 billion, it is highly likely that the $100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

[35] I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

**(ii) Should an Initial Order be made and if so should it extend to CLCA?**

[36] The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

[37] I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Re Prizm Income Fund* (2011), 75 C.B.R. (5th) 213 per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Re Lehndorff General Partner Ltd*. (1993), 17 C.B.R. (3d) 24 and has been followed in several cases, including *Canwest Publishing Inc*. (2010) 63 C.B.R. (5th) 115 per Pepall J. (as she then was) and *Re Calpine Energy Canada Ltd*. (2006), 19 C.B.R. (5th) 187 per Romaine J.

[38] The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

[39] Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several

reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.



[40] Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

[41] To cite a few, in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 54 the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Re)*, 2013 QCCS 3777 arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp. (Re)* 2011 ONSC 7701 (Comm. List) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

[42] Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as “a procedural war of attrition” and “scorched earth” strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs

have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

[43] Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership (Re)*, 2014 ABQB 65 in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432 in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

[44] I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

[45] I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57 that it is the good faith of an applicant in the CCAA proceedings that is the issue:

> Allegations … of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

[46] There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

[47] The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

[48] OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

[49] If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the

commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

[50] After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

[51] Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

[52] Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

[53] A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

[54] The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It is also intended to provide a structured environment for the negotiation

of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 per Farley J.



[55] In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Re Montreal, Maine & Atlantique Canada Co.* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

[56] In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

(a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;

(b) contributions from a significant majority of the defendant partners;

(c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;

(d) contributions from CLCA's insurers and other defendants in the outstanding litigation;

(e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and

to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and

(f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

[57] This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

[58] Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

[59] It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to

impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re,* 2007 ABCA 266, at para 38, per O'Brien J.A.

[60] The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

[61] Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

[62] What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

[63] Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

[64] Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

[65] Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

> **1** Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

[66] At the conclusion of her decision, she stated:

> **3637** Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to

> remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

[67] In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.



**(iii) Should the stay be extended to the insurers?**

[68] The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

[69] Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

[70] A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

[71] In *Re Montreal, Maine & Atlantique Canada Co*., Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

> En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

[72] In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.



**(iv) Should a creditors' committee be ordered and its fees paid by CLCA?**

[73] The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

[74] The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

[75] CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, *"Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World"*, in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

[76] Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

[77] Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

[78] The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

[79] So far as the costs of the committee are concerned, I see this as mainly a final cri de couer from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will

work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be $220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order an deny the right of CLCA to pay the costs of the creditors' committee.

[80] Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.



**Conclusion**

[81] The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

Newbould J.

**Date:** January 12, 2015

**CITATION:** Re Green Relief Inc.
**2020 ONSC 6837**
**COURT FILE NO.:** CV-20-00639217-00CL
**DATE:** 20201109



**SUPERIOR COURT OF JUSTICE – ONTARIO**

**(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

**BEFORE:** Koehnen J.

**COUNSEL:** C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

*Peter Osborne, Christopher Yung* for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

*Mark Abradjian* for Tony Battaglia in his capacity as shareholder and creditor

*David Ward* for 2650064 Ontario Inc.

*Alex Henderson* for Susan Basmaji

*Gavin Finlayson* for Auxley Cannabis Group Inc. and Kolab Project Inc.

*Anton Granic* on his own behalf

*Rory McGovern*, for Steve LeBlanc

*Alan Dick and Adrienne Boudreau* for Thomas Saunders

*Steven Weisz and Amanda McInnis* for Lyn Mary Bravo

*Brian Duxbury* for Warren Bravo

*Alex Henderson* for Susan Basmaji

*Robert Kennaley*, *Joshua W. Winter* for Henry Schilthuis and Mark Lloyd

*Danny Nunes*, for the Monitor

**HEARD:** November 2 and 3, 2020

**ENDORSEMENT**

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ( the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

# I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

[5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or distribution on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

[7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

[8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

[9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

## II. The Release

[10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

[11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

[12] The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

### (i) Release as a Condition Precedent

[13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

[14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

[15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.



**(ii) Jurisdiction to Grant Release**

[16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

[17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

[18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

[19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

[20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

[21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

[22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

### (iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

[29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian,* it warrants separate identification on the facts of the case before me.

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

**The Quality of the Claims being Released**

[31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

[32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

[33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

[34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

[35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

[36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

[37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

[38] At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

[39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

[40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

[41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

[42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

[43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

[44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

[45] First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

[46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

[47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

[48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

[49] In the circumstances described above, the quality of the claims released would incline me to approve the release.



**Application of the Lydian Factors**

[50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

[51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

[52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

[53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately $3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

[54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

[55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

[56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

[57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

## Scope of the Releases

[58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

[59] The release is found in paragraph 24 of the proposed order. Its material language provides:

> …the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be … released … from …all … claims …of any nature or

> kind whatsoever … based in whole or in part on any act or omission, … taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, … provided that nothing in this paragraph shall … release… any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

[60] While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

[61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.

[62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors. " Just what that means was the subject of much argument on the motion.

[63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

[64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

[65] This passage would appear to support Mr. Thornton's submission.

[66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

[67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

[68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

[69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

[70] The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

[71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

[72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

[73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

**Relief requested by Susan Basmaji**

[74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

[75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

## Disposition

[76] For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

**Date:** November 9, 2020

**Nº: 500-11-060613-227**

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**SUPERIOR COURT**
(Commercial Division)
**DISTRICT OF MONTREAL**
**PROVINCE OF QUÉBEC**

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**RISING PHOENIX INTERNATIONAL INC. AND AL.**
Debtors
-and-
**RICHTER ADVISORY GROUP INC.**
Monitor

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**MEMORANDUM OF ARGUMENTS OF THE APPLICANTS**

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**TRUE COPY**

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