SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-060613-227

DATE : APRIL 24, 2023

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

IN THE MATTER OF THE ARRANGEMENT OR COMPROMISE OF:

RISING PHOENIX INTERNATIONAL INC.
and
10864285 CANADA INC.
and
11753436 CANADA INC.
and
CDSQ IMMOBILIER INC.
and
COLLEGE 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
MCCARTHY TÉTRAULT LLP, in its capacity as Students' Representative Counsel

Applicant

AND
RICHTER ADVISORY GROUP INC.
Monitor

AND
ATTORNEY GENERAL OF CANADA

AND
ATTORNEY GENERAL OF QUEBEC
Impleaded parties

JUDGMENT
(Application for an Amended and Restated Student Representation Order)

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[1] The Students' Representative Counsel (the "Students' Counsel") seeks authorization to institute an action in damages against the federal and provincial governments alleging their fault in certifying the debtor colleges and requiring foreign students to prepay tuition fees to qualify for study permits and visas. The students' fees were lost when the colleges became insolvent, and they are unlikely to be recovered in full under the debtors' CCAA[1] plan of arrangement.

[2] The Students' Counsel asks that the action, brought in the name of the students, be conducted and adjudicated upon as part of the current CCAA proceedings.

[3] The present application raises the thorny issue of the Court's jurisdiction to make orders affecting third parties under its general power to "make any order that it considers appropriate" (section 11 CCAA).

[4] The present application is made in the following context.

[5] The debtors owned or operated four private colleges that offered professional training to foreign students, mainly from India. In January 2022, the debtors applied for protection under the CCAA. The Court ordered a stay of proceedings, appointed a Monitor, and provided for interim financing. In February 2022, the Court appointed McCarthy Tétrault to represent several hundred students who had paid tuition fees to the colleges but had not yet started or completed their studies.

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[1] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

[6] In March 2022, the Court approved the sale of the debtor colleges to a third party,[2] who undertook to offer courses, or provide refunds, to students registered at the colleges and to applicants who had prepaid tuition fees and would ultimately obtain study permits and visas. Student applicants who had prepaid fees but who do not receive permits or visas are not indemnified under the transaction. These students are expected to file proofs of claim under the CCAA plan of arrangement.

[7] Because the debtor colleges had suspended their activities in late 2021 and early 2022, in April 2022 the Students' Counsel requested the Court to order the provincial and federal governments to extend the students' residency and study permits for a period of four months, and to order the governments to reconsider, on an expedited basis, their decisions rejecting certain permit and visas applications. The Court denied the application, stating that its general power under s. 11 CCAA did not allow it to usurp the governments' administrative authority over matters of education and immigration.[3]

[8] In the present application, the Students' Counsel argues that the governments' faulty conduct has contributed to the students' losses. More specifically, it alleges that the directive issued by *Immigration, Refugees and Citizens Canada* (IRCC) requiring student applicants to prepay their first year's tuition fee is contrary to provincial law and illegal. The Students' Counsel adds that the *Ministère de l'Enseignement supérieure* (MES) was grossly negligent when it renewed the debtor colleges' permits in 2021, despite clear signs that the colleges were in a dire financial situation and lacked the resources necessary to offer educational services to the students.

[9] On behalf of the students, the Students' Counsel wishes to claim pecuniary damages against the defendants of $11 million for lost tuition fees and $6 million in moral damages. The Students' Counsel proposes that its professional fees be paid from a litigation fund to be constituted from a security deposit paid by the colleges to MES, and which would be turned over to McCarthy Tétrault.

[10] The Students' Counsel argues that the Court has the power under s. 11 CCAA to grant the relief requested because (i) the students' losses result from a combination of the debtors' insolvency and the governments' fault, and (ii) authorizing the legal action will further the aims of the CCAA by maximizing creditor recovery.

[11] The Students' Counsel recognizes that its application is "creative", with no direct precedent in the jurisprudence. However, it stresses that the students are vulnerable creditors, living far from Canada and with meagre resources to wage litigation in this country. The Students' Counsel urges the fairness of allowing the students to bring a collective suit that will be managed on an expedited basis by the CCAA court. It argues

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2 6815464 Canada Ltd., which subsequently assigned its rights and obligations to 13901823 Canada Inc.

3 *In the Matter of the Arrangement or Compromise of Rising Phoenix International Inc.*, 2022 QCCS 1670.

that under s. 11 of the CCAA the Court may adopt creative approaches in response to new circumstances.

[12] The Court has sympathy for the students' situation. They are innocent victims of the colleges' insolvency. However, after reviewing the applicable law, the Court concludes that it does not have jurisdiction under the CCAA to grant their requested relief. Since the provincial and federal governments are "strangers" to the present insolvency proceedings, any action against them by the students should be brought in a civil proceeding, not in these CCAA proceedings.

[13] The Court's broad power under s. 11 CCAA allows it to render any order it considers "appropriate" to further the remedial objectives of the CCAA.

> Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from the liquidation of an insolvent company.[4]

[14] The Students' Counsel argues that allowing it to institute the proposed action under the auspices of the CCAA will achieve the remedial objective of the statute "by minimizing the social and economic impacts of the debtors' insolvency on the students".[5]

[15] While it is true that the students' claims against the debtors may be reduced if they recover pecuniary damages from the proposed defendants, that possibility alone is not sufficient to bring the proposed litigation within the purview of the CCAA. There must be a nexus or sufficient connection between the students' proposed recourse against the two governments and the insolvency proceedings being managed under the CCAA.[6] This nexus is required because the two governments are not parties to the CCAA proceedings: they have no connection to the debtors and are not their creditors.

[16] As noted by the Ontario Court of Appeal in *Mundo Media*,[7] the determining factor in deciding whether a party is a stranger to the proceedings is the degree of connection of the claim to the insolvency proceedings.

[17] In *Mundo Media*, a nexus was found to exist between the debtor and the third party against whom the receiver wished to bring a motion to recover property. The court allowed the receiver to bring a motion directing a third party (Spay) to pay sums owed to Mundo, because SPay was Mundo's largest debtor and was asserting a right of

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4 *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60, at para 70.
5 *Application for the Issuance of an Amended and Restated Student Representation Order*, para 22.
6 *Sam Lévy & Associates v Azco Mining Inc.,* 2001 SCC 92; *Mundo Media Ltd*. (Re) 2022 ONCA 607, at paras. 26 and 50.
7 *Supra*, note 5, at para 25.

set-off, thereby effectively becoming its largest creditor also. The court found that in bringing the motion the receiver was seeking to realize on a significant Mundo asset for the benefit of all creditors. Under the circumstances, SPay could not be considered a stranger to the bankruptcy proceedings.

[18] Similarly, in *Sam Lévy*, the Supreme Court held that a Québec bankruptcy trustee could bring a motion against a third party (Azco) in British Columbia to recover property allegedly belonging to the bankrupt, because the trustee's claim related to the assets of the bankrupt and Azco was threatening to bring a counterclaim against the bankrupt estate regarding the same property. The court concluded, "[f]ar from being a 'stranger' to the bankruptcy, Azco is potentially the most significant player in the role of either creditor or debtor, as the case may be".[8]

[19] In coming to this conclusion, the Supreme Court distinguished *In re Morris Lofsky*,[9] where a trustee had sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee. The wife resisted the claim on the basis that the bankrupt never owned the automobile. In *Morris Lofsky* the Ontario Court of Appeal concluded that the issue between the trustee and the bankrupt's wife – who was the true owner of the automobile – was not a matter in bankruptcy but rather one of property and civil rights.[10]

[20] These decisions help to situate the present case as regards the degree of connection between the students' proposed claim and the CCAA proceedings. In the present case, unlike in *Mundo Media* and *Sam Lévy*, the legal proceedings are not being asserted by the Monitor against a third party to recover property allegedly owed to the debtors. The provincial and federal governments are neither the debtors nor the creditors of the debtor colleges. The claim for extracontractual damages belongs only to the students, who alone will benefit from any recovery. It cannot be said that the students' damage claim against the two governments, particularly the claim for moral damages, will in any way "avoid the social and economic costs of liquidating [the colleges'] assets" – the purpose of the CCAA.[11]

[21] The Students' Counsel has pointed to other cases where the CCAA courts have authorized a monitor to sue third parties or have granted releases to third parties who contribute to a plan of arrangement. In all these cases, however, the extension of the CCAA proceedings to third parties was a necessary component of a successful plan of arrangement, such that the third parties could not be considered strangers to the proceedings.

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8 *Sam Lévy*, *supra*, note 5, at para 49.
9 *In re Morris Lofsky* (1947), 28 C.B.R. 164.
10 *Sam Lévy*, *supra*, note 5, at para 169.
11 *Century Services Inc*., *supra*, note 3, at para 15.

[22] In the *Metcalfe & Mansfield*,[12] *Muscletech*[13] and *MMA*[14] cases, third parties contributed to a litigation fund, for distribution to the creditors of the debtor company, and received releases from the CCAA court. Without these voluntary contributions and releases the plans of arrangement would not have been possible. In the *Aquadis* case,[15] the court authorized the monitor to sue third parties to recover amounts due to Aquadis' creditors. The Québec Court of Appeal held that it was appropriate to bring the third-party actions under the aegis of the CCAA because Aquadis' creditors had unanimously voted to authorize the suits and the litigation proceeds would be distributed to all creditors under the plan of arrangement.[16]

[23] In the present case, the students' proposed action does not target the debtors of the colleges. The proceeds will not be distributed to the colleges' creditors, other than the students. The colleges' other creditors have no interest in the students' proposed litigation. The only reasonable conclusion is that there is no connection between the proposed litigation and the CCAA proceeding.

[24] The reasoning of Justice Lebel in *Cry-O-Beef*,[17] supports this view:

> L'exclusion de la compétence de la Cour de faillite, lorsqu'il s'agit de litige entre les créanciers garantis, à l'égard de biens sur lesquels le syndic n'exerce aucune prétention, se comprend. La faillite est étrangère au litige. Le syndic n'exerce aucun droit. On n'en exerce, non plus, contre lui.

[25] Similarly, in *Pacific Coastal Airlines v Air Canada*,[18] the British Columbia Supreme Court stated:

> The purpose of a CCAA proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[26] For these reasons, the Court concludes that it has no jurisdiction to grant the relief requested by the Students' Counsel.

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12 *Metcalfe & Mansfield Alternative Investments II Corp (Re),* 2008 ONCA 587.

13 *Muscletech Research and Development Inc et al (Re),* 2006 CanLII 34344 (ON SC).

14 *Montreal, Maine & Atlantic City Canada Co\Montreal, Maine & Atlantique Canada Cie (Arrangement relative à),* 2015 QCCS 3235.

15 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 5904.

16 2020 QCCA 659, at paras 80-82.

17 *Cry-O-Beef Ltd./Cri-O-Boeuf ltée (Trustee of) v Caisse Populaire de Black-Lakem* [1987] R.J.Q. 1715, 1987 CanLII 761 (QC CA) at p 8, per Lebel J.A., dissenting, but not on this point.

18 *Pacific Coastal Airlines Ltd. v Air Canada*, 2001 BCSC 1721 (CanLII), at para 24. See also: *Stelco Inc, Re,* [2005] OJ No 4814, at para 7, per Farley J. (ONSC).

[27] Furthermore, even if the Court had jurisdiction, it would not have granted the application, for two reasons. First, the Students' Counsel cannot bring an action in the name of the students, since as a basic tenet of law one cannot plead for another (*nul ne peut plaider pour autrui*). What the Students' Counsel is proposing is a sort of class action, without however meeting the procedural criteria of certification, the appointment of a class representative, and an opting-out procedure.

[28] Finally, the Students' Counsel has not advanced a sound legal basis for forcing the MES to remit the surety it is holding in order to constitute a trust account for lawyers' fees.

FOR THESE REASONS, THE COURT :

[29] **DISMISSES** the application of the Students' Representative Counsel;

[30] **THE WHOLE**, without costs, considering the nature of the demand.

David R. Collier

Signature numérique de David R. Collier
Date : 2023.04.24 12:36:54 -04'00'

DAVID R. COLLIER, J.S.C.

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Hearing date : March 27, 2023