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

<u>AMENDED</u> 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

5. 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.

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

II. ISI'S CLAIM

7. 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;

8. 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;

9. 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".

10. 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;

11. 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

12. 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;

13. 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

14. 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.

15. 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].

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

17. 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;

18. 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.

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

20. 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;

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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 *Association des propriétaires de Boisés de la Beauce c. Monde Forestier,* 2009 QCCA 48 [**TAB 2**]

4 *Protection de la jeunesse — 202580,* 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.

5 *Montréal (City) v. Deloitte Restructuring Inc., 2021 SCC 53* [**TAB 4**]

21. 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]

22. 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.

23. This theory had been previously applied in the case of *Paulin v. Paulin*7, where a father was suing his son and asking the Ontario Court of Justice that a debt originating from a previous judgment rendered in his favor by an Arizona court, not be discharge from his son's bankruptcy because the claim stemming from said judgment was based on fraud. The Ontario Court of Justice, who was seized with the case, decided that the fraud alleged in the judgment rendered by the court of Arizona, was not supported by any evidence and hence decided to dismissed the father's action;

24. In view of the fact that ISI's *de bene esse* Application is largely based on the reasoning of the Arbitrator, the Court should scrutinize the Award in order to determine whether or not fraud was committed by the Mastantuonos;

25. 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;

26. A plan of compromise and arrangement can provide for the release of third parties[8], including directors and officers for claims against them that are not of a asserted against them in such capacity[9].

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

7 *Paulin v. Paulin,* 29 C.B.R. (3d) [**TAB 10**]

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

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

27. 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[10].

28. Notwithstanding the conclusions of the Arbitrator, which are not binding upon this honourable Court, the Applicants respectfully submit that ISI's claim against the Mastantuonos stems from their capacity as directors of the Applicants, and as such, is stayed in accordance with paragraph 11 of the *Re-Amended and Restated Initial Order* dated March 14, 2022;

29. In any event, it is now well established that this Court has the necessary authority/discretion under Section 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties (***Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429** at para. 26 [***Pacific Exploration***]) and may exercise such jurisdiction "where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so." (***Tamerlane Ventures Inc.*[11]**);**

30. The Courts have found it "just and reasonable" to extend the stay of proceedings to a non-applicant third party in a number of circumstances, including: (a) where it is important to the reorganization process; (b) relating to any liability or claim in respect of obligations and claims against the debtor company; and (c) where the balance of convenience favours extending the stay to the third party (***Cinram International Inc.*[12]**);

31. In deciding to extend the stay to a non-applicant third party, a CCAA court should consider the following non-exhaustive list of factors (***JTI-Macdonald Corp.*[13]**,):

    (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

    (b) extending the stay to the third party would help maintain stability and value during the CCAA process;

    (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

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

11 *Tamerlane Ventures Inc. Re*, 2013 ONSC 5461 at para. 21 [**TAB 15**]

12 *Cinram International Inc. Re*, 2012 ONSC 3767 at paras. 64-65 [**TAB 12**]

13 *JTI-Macdonald Corp. Re*, 2019 ONSC 1625, at para. 15 [**TAB 13**]

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[Our emphasis]

32. Confirming and Ordering that the such a stay applies to ISI's claim with respect to the Mastantuonos will allow the Applicants to effect a collective solution to adjudicate all claims against them, including ISI's claim which should be determined in one forum to avoid inconsistent outcomes. Without the benefit of a stay, ISI's claim will likely continue against the Mastantuonos, preventing the Applicant's ability to reach a collective solution and will lead to a multiplicity of procedures which would ultimately cause significant economic harm for all stakeholders, only in order to benefit ISI.

- ***Campeau v. Olympia & York Developments Ltd*.[14]:**

  24. […] 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*** *[…]*

  [Our emphasis]

- ***Re 451992 Canada Inc.*[15]:**

14 *Campeau v. Olympia & York Developments Ltd*.,1992 CarswellOnt 185 [**TAB 14**]

15 *Re 451992 Canada Inc.*, 2015 ONSC 124 [**TAB 8**]

> *"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."*
>
> [Our emphasis]

33. Our colleague, Brandon Farber, had the following comments, with which we could not agree more, with respect to the remarks made by the Supreme Court of Canada in the Century Services decision:

> *In the Supreme Court of Canada decision in Century Services, Canada's highest Court stated that the "the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt". In the pursuit of the same efficiency and order praised by the Supreme Court of Canada, it now appears possible to use the CCAA single proceeding model to resolve complex multi-jurisdictional litigation and to avoid this potential chaos and inefficiency even if it requires ignoring the primary purpose of the CCAA.* ***In other words, the word "insolvency" could be removed from the above Supreme Court citation to instead read "the single proceeding model avoids the inefficiency and chaos that would attend... if each creditor initiated proceedings to recover its debt".***[16]

34. In consideration of the above factors, the balance of convenience favours the continued Stay in favour of the Directors and Officers, in connection with ISI's claim.

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16 *Using the CCAA to Achieve a Global Resolution of Complex Litigation, Annual Review of Insolvency Law.* [**TAB 16**]

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>

35. 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.

36. 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;

37. 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**.

38. 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.

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

40. 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

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

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

43. 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.

44. 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.

45. 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.

46. 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.

47. Under the *Bankruptcy and Insolvency Act*, ISI's recourses against the Directors would remain stayed, unless lifted under s. 69.4 BIA. The same concern for ensuring an equitable distribution of debtors' assets would apply, as reiterated by the Court of Appeal in *Léger* c. *Ouellet*[17] :

> *Les principes qui gouvernent l'interprétation et l'application des articles 69.3 et 69.4 LFI sont connus. […] La suspension des procédures s'inscrit dans l'un des objectifs poursuivis par la LFI celui qui préconise une distribution ordonnée et équitable des biens du débiteur. Dans cette optique, la suspension des procédures vise à empêcher qu'un créancier bénéficie d'un avantage indu par rapport aux autres créanciers.*

48. See also *Hébert (syndic de)* c. *Canada (Procureure générale)*[18] :

> *« Lorsque le Tribunal examine la question de l'équité, il doit s'assurer en premier lieu que la levée de la suspension n'a pas pour effet de*

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17 *Léger c. Ouellet*, 2011 QCCA 1858 (CanLII), para. 20 [**TAB 17**]

18 *Hébert (syndic de) c. Canada (Procureure générale)*, [2001] nº AZ-50085766, J.E. 2001-1035, [2001] J.Q. no 2194 (C.S.) (permission d'en appeler refusée, [2001] nº AZ-50098291, J.E. 2001-1341 (C.A) [**TAB 18**]

procurer un avantage au créancier requérant au détriment des autres créanciers : C'est un des objectifs de la loi. » (par. 44 (C.S.))

49. Parallel proceedings in bankruptcy against the Directors would provoke an unwarranted duplication of proceedings which would eat up any possible realizations, where common creditors of both the Applicants and the Directors would have to prove their claims and take proceedings, as the case may be, in both the CCAA filing and the BIA filings.

D. Allow for a claims process to be implemented

50. 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.

51. 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).

52. 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.

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

54. 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?

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

56. 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.

57. 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

58. 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.

59. 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.

60. 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.

61. 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.

62. As noted by Justice Ground, in *Muscletech Research and Development Inc.*, *Re*[19], it is premature to challenge the settlement and release of claims against third parties as part of a restructuring plan prior to the sanction hearing:

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19 *Muscletech Research and Development Inc.*, 2006 CanLII 34344, para. 11 [**TAB 19**]

> "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."

63. 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

64. 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.

65. 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

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

67. The good faith which is required here relates to the conduct of the parties in these proceedings[20];

68. As pointed out by Justice Newbould, in Re 4519922 Canada Inc.[21] , the Court should not focus on the failure of an applicant to have dealt in good faith or with due diligence in the past:

> "[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

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20 *Re: Muscletech Research and Development Inc.*, 2006 CANLII 3282, para. 4. [**TAB 7**]

21 *Re 4519922 Canada Inc.*, 2015 ONSC 124 [**TAB 15**]

> 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".

69. 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.

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

71. 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.

72. 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.

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

74. 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.

75. 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.

76. 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

77. 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 19th, 2022

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CANADA

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EY ADVISORY GROUP INC.

Monitor

APPLICANTS <u>AMENDED</u> 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

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Paulin v. Paulin, 29 C.B.R. (3d)	**10**
Pacific Exploration & Production Corporation (Re), 2016 ONSC 5429	**11**
Cinram International Inc. Re, 2012 ONSC 3767	**12**
JTI-Macdonald Corp. Re, 2019 ONSC 1625	**13**
Campeau v. Olympia & York Developments Ltd.,1992 CarswellOnt 185	**14**
Tamerlane Ventures Inc. Re, 2013 ONSC 5461	**15**
Using the CCAA to Achieve a Global Resolution of Complex Litigation, Annual Review of Insolvency Law.	**16**
Léger c. Ouellet, 2011 QCCA 1858 (CanLII)	**17**
Hébert (syndic de) c. Canada (Procureure générale), [2001] nº AZ-50085766, J.E. 2001-1035, [2001] J.Q. no 2194 (C.S.)	**18**
Re Muscletech Research and Development Inc., 2006 CanLII 34344	**19**

Montréal, April 19, 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

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

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

JUDGMENT
ON THE APPLICATION FOR THE HOMOLOGATION OF AN ARBITRATION AWARD

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

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

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

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

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

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

[INTERVENANTE 1]
Partie appelante - Demanderesse
c.

A
ET B
Partie intimée - Défenderesse

JUGEMENT

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.

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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.*

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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. —

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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

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

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

JUGEMENT RECTIFICATIF

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

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

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

JUGEMENT SUR REQUÊTE
EN APPROBATION DU PLAN D'ARRANGEMENT

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.
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> [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.
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> [28] Selon l'entente d'achat d'actifs, RAH devrait conserver le poste de la majorité des employés actuels de MMA.
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> [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**
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> [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*.
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> [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 :
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> > « 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
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> *(3)* Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :
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> *a*) la justification des circonstances ayant mené au projet de disposition;
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> *b*) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
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> *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".* »
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> [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.*»
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> [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

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ruptcy a levy calculated in ac-
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d?

Order accordingly.

[Indexed as: **Paulin v. Paulin**]

MARVIN PAULIN v. JEFFREY PAULIN

Ontario Court of Justice (General Division)
Trainor J.

Judgment – November 30, 1994.

Discharge of bankrupt – Debts not released – Father suing son and asking for declaration that debt was not released by son's discharge from bankruptcy because claim based on son's fraud – Court assuming that damages for fraud survive bankruptcy but finding no evidence to support allegations of fraud – Action dismissed.

A father and son were engaged in litigation with each other. The father sued the son, claiming $488,067.17 (U.S.), and asked for a declaration that the claim was owed because of fraud. The father's statement of claim stated that the debt survived the son's discharge from bankruptcy because it arose from the son's fraud. The action was brought in Ontario to enforce a judgment made in Arizona by a bankruptcy court. After obtaining the judgment in Arizona, the father made an assignment in bankruptcy. The alleged debt was not shown as an asset in the father's estate in bankruptcy.

Held – The action was dismissed.

For the purposes of the reasons, it was assumed that damages for fraud survive a discharge from bankruptcy. Further, it was noted that even though the Arizona court had jurisdiction to deal with the father's action, the Ontario court was entitled to scrutinize the judgment for manifest error.

The allegations of fraud were not supported by the evidence before the Ontario court, nor was there any reliable evidence to support the fraud allegations in the material before the court in Arizona. Many of the claims made to support the fraud were no more than simple contract debts that should have been filed in the bankruptcy. Further, until bringing this action, the father had never demanded payment of any of the amounts claimed, nor had he ever provided the son with a statement to support the claim.

Cases considered

Boyle v. Victoria Yukon Trading Co. (1902), 9 B.C.R. 213 (C.A.) – referred to.

Cherry v. Ivey (1982), 43 C.B.R. (N.S.) 174, 37 O.R. (2d) 361, 136 D.L.R. (3d) 381 (H.C.) – referred to.

Minkler & Kirschbaum v. Sheppard (1991), 60 B.C.L.R. (2d) 360, 3 C.P.C. (3d) 104 (S.C.) – referred to.

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 46 C.P.C. (3d) 1, 52 B.C.L.R. (2d) 160, [1991] 2 W.W.R. 217, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81 – referred to.

ACTION for payment of debt arising from fraud.

Kenneth H. Page, for plaintiff.
K. Lackner, for defendant.

(Doc. 37783/89)

1 November 30, 1994. TRAINOR J.: – This action was commenced on May 17/89 for the sum of $488,067.17 in U.S. funds. The plaintiff asks, in addition, for a declaration that this debt is owed because of fraud. In essence the claim is to enforce a judgment of the United States Bankruptcy Court for the District of Arizona. The statement of claim alleges that the debt was non-dischargeable in the defendant's bankruptcy because it was based on fraud. The defendant made an assignment in bankruptcy, in Arizona, on 23 October, 1986 and was discharged on 16 March, 1987.

2 The plaintiff made an assignment in bankruptcy, in Arizona, on 12 May, 1989, one month after he obtained the Arizona judgment, dated 27 April, 1989. This debt was not shown as an asset in the plaintiff's bankruptcy. In addition, I am not told whether the trustee's consent was obtained or required under Arizona law in order to bring this action. The statement of defence does not plead the bankruptcy issue. It simply states there is no indebtedness and if there is, it was not as a consequence of fraud.

3 I have assumed for the purpose of these reasons that damages for fraud survive the plaintiff's bankruptcy.

Cherry v. Ivey (1982), 43 C.B.R. (N.S.) 174 (Ont. H.C.)

4 In addition, even though the Bankruptcy Court in Arizona had jurisdiction to entertain the plaintiff's claim based on alleged fraud (*Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.)), when enforcement of that judgment is sought in Ontario I am entitled to scrutinize the judgment for manifest error and not simply "blindly enforce it".

Minkler & Kirschbaum v. Sheppard (1991), 3 C.P.C. (3d) 104 (B.C. S.C.)

Boyle v. Victoria Yukon Trading Co. (1902), 9 B.C.R. 213 (C.A.).

5 In my view, the allegations of fraud are not supported in the evidence before me nor was there any reliable evidence to support the allegations of fraud contained in the material before the Arizona court that gave rise to the substantial award that is the subject of these proceedings.

(Doc. 37783/89)

J.: – This action was com-
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6 This is a case involving a serious falling out between a father and a son that has escalated to the point where revenge became the driving force behind the conduct of their relations with one another and is now the catalyst for this litigation.

7 Additionally, the evidence discloses that the plaintiff was aware that the defendant, his son, had returned to Toronto in 1987. He knew where the defendant resided, as evidenced by service of the pleadings in this action a month after obtaining the Arizona judgment and both he and the court knew that Mr. Hall, the defendant's lawyer in Arizona, was no longer acting and had so advised the plaintiff's counsel and the court a year prior to the default judgment. The plaintiff, nonetheless, had the Arizona process served on the defendant's former solicitor. The process, to have the alleged debts based on fraud, declared exempt from the defendant's bankruptcy, was not commenced until after the discharge and after the defendant departed Arizona. Many of the claims made to support the fraud are, if anything, no more than simple contract debts that should have been filed in the bankruptcy. The plaintiff chose not to file a claim in the bankruptcy or at creditors meetings, where a claim would be scrutinized by other creditors and more importantly by the defendant who was present at the meetings and was a resident of the State of Arizona at that time.

8 In addition, the plaintiff had commenced an action in May, 1986, against his son, in respect of the title to the East Shea property, a family residence in Arizona. In addition, the plaintiff claimed damages and punitive damages for malice, ill-will, intent to injure and breach of fiduciary duty. The action was defended.

9 In the bankruptcy, the plaintiff obtained the court's permission to continue this action against his now bankrupt son in the State Superior Court. For reasons that are not explained, the damages part of the claim remained in the Bankruptcy Court as did another action based on a loan of $6,800, and a claim for advances against commissions in the amount of $50,000. These claims, substantially increased in amount, are now included in the Bankruptcy judgment founded in alleged fraud. A difficulty the plaintiff faces is his attempt to turn ordinary contract debts and disputed property claims into damage actions based on fraud. An additional problem is that many of the debts claimed are in fact corporate claims by M. Paulin Consulting, Inc., a corporation in which the plaintiff was president.

10 During the trial the plaintiff, in his testimony, at a time when he knew his claim was very suspect, changed the claim to a claim in debt and dramatically reduced the quantum. In argument at the end of the case his counsel presented other versions of the claim that I should consider as alternatives, if I was not satisfied that the Arizona judgment could be sustained. I do not wish to be seen as criticizing Mr.

Page. On the contrary he did an admirable job for a most elusive plaintiff. However, in order to succeed, the plaintiff must prove fraud, as his claims, otherwise, belong in the bankruptcy.

11 The issue is, has the plaintiff established fraud to support his claim. I have concluded that he has not. In addition I am not satisfied that he has established any debt owing by his son. I say this because no attempt was made to show me, by forensic accounting or otherwise, the state of accounts between the parties following several years of business dealings. The accounts and accounting, in the speculative business of futures trading that father and son engaged in, from 1983 to 1986, were always in the control of the father.

12 The plaintiff is 60 years of age. He is a commodities broker and president of M. Paulin Consulting Inc. He carries on business and resides in Phoenix, Arizona and has done so since about 1973. His son, the defendant, Jeffrey Paulin, is now 37. He resides in Toronto and is employed at Canada Post. He is now divorced and has 2 children.

13 In late 1983, the defendant resided in Toronto with his wife Doris and their 2 children. He was then employed as a bus driver with the T.T.C. The plaintiff came to Toronto to visit and acquire a seat on the Toronto Futures Exchange. He felt that his son could improve his lot in life by learning the commodities business and becoming associated with the plaintiff in business. The defendant was interested and for the next year worked on the floor of the exchange while continuing his other employment. About the end of 1984, the defendant left the T.T.C. and worked full time in the brokerage business. The financial arrangement was such that all of the defendant's business expenses were taken care of by the father. The defendant and his family lived on his wages and when he left the T.T.C. they lived on U.I.C. payments.

14 In March, 1985, a margin call resulted in a substantial financial loss for the brokerage business, resulting in the Toronto end of the business closing and the 2 families pooling resources to survive. The investment funds that the defendant had generated, including funds from his father-in-law and others and the defendant's pension settlement were lost, in addition to other losses apparently suffered by the plaintiff.

15 A decision was made that the defendant's family would move to Arizona and that the brokerage business would be consolidated. The plan was to acquire a home large enough to accommodate the defendant's family, the plaintiff and an office for the business.

16 In the summer of 1985 the plaintiff, Doris, and one of the children travelled to Arizona to find a home while the defendant remained in Toronto to complete the sale of the family home.

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17 The closing funds of approximately $11,000 and an additional $52,000 borrowed from the defendant's father-in-law went into the brokerage business in Arizona. There is a dispute between the parties as to whether these funds were earmarked for the new home or the business. This dispute escalated into the lawsuit concerning ownership of the family home, the East Shea property, purchased in the fall of 1985, in Arizona. Title to the property was taken in the defendant's name. There was a quit claim signed by Doris and the funds for the deposit were generated from the brokerage company. The battle over ownership did not arise until April, 1986 when the son evicted the father from the home.

18 The defendant arrived in Arizona in September, 1985, and the purchase of East Shea took place in late October. The defendant did not move into the home but the plaintiff, Doris, and the children did. Doris wanted some time alone. The plaintiff became the mediator for these spouses. The plaintiff made all the mortgage and other payments on the home and as well, paid for food, the private schooling for the children, car expenses and other expenses. These payments became part of the Arizona judgment based on fraud.

19 The defendant was licensed in the commodities brokerage business in Arizona but was less than successful in generating investments, which was his primary role in the business. The plaintiff controlled all of the accounting, investing and trading aspects of the company. There is a serious dispute as to whether the plaintiff worked on an advance against commissions or whether he was paid a salary, partly by way of living expense payments and partly by way of monthly income. One of the problems in resolving this issue arises from the lack of financial statements from the business or a forensic accounting and because there is a large credibility issue with respect to the plaintiff's evidence and to a lesser extent the defendant's testimony. The father, for example, did not hesitate to generate documents to support credit and mortgage applications that were clearly designed to mislead the lender.

20 These documents include checks from the trading business, that may or may not have been trust funds, deposited to his son's account to demonstrate financial worth, statements as to income, including a W-2 that showed the defendant earning $72,000 per year in the brokerage firm and others such as the down payment amount on the East Shea home. There is no issue that the down payment was paid from company funds but the question is, were those funds trust funds and were they the funds generated by the defendant and held in deposit certificates. The defendant says that he was to be paid a salary of $72,000. I am left in a state of uncertainty on the question of wages or draws. However, I am satisfied that these kinds of claims, even if debts of the son, do not arise from fraud perpetrated by the son on his father.

21 In March, 1986, Doris and the children returned to Toronto. The plaintiff made the arrangements and escorted them back home. The defendant was not made aware of this move. He became suspicious of the relationship between his father and his wife and learned shortly after the plaintiff returned from Toronto that they had engaged in an adulterous relationship. The defendant vowed to ruin his father. He was involved in a physical altercation with him, evicted him from the family home, changed ownership of an automobile from the company to his name and then after receiving $6,800 from the company to be used to support a mortgage loan application on the home, the proceeds of which were to be used to cover a cash shortage in the brokerage business, he kept the $6,800. The mortgage company did not grant the loan.

22 The plaintiff then commenced several lawsuits that I mentioned at the beginning and the son filed in bankruptcy.

23 I heard some evidence with respect to a number of the items that make up the alleged claim based on fraud. A majority of the claims were not dealt with in any meaningful way and I have no way of knowing or ascertaining the net position of the accounts between the parties. That responsibility rests with the plaintiff. His statement that his son took all of the records when he returned to Toronto is not supported in the evidence. He did take some financial papers, including checks, but there were ample documents remaining, such as check stubs and other books of original entry and tax returns that should have been available to produce an accurate accounting.

24 More importantly, even a cursory glance at the claims, reveals that the items to October 23, 1986 belonged, if valid at all, in the defendant's bankruptcy. Other items claimed were expenses that the plaintiff had undertaken personally, such as the children's schooling. Others related to funds invested in the business and lost or were items of expenses paid on behalf of Doris or for legal fees, and disbursements not chargeable to the defendant. Numerous claims for telephone, insurance and household items are not shown to my satisfaction to be net after a proper accounting, even if I assume they are not part of the defendant's salary.

25 Most importantly the majority of claims do not arise from fraud or even some semblance of fraud or misrepresentation.

26 The single most substantial claim and the claim that, coupled with one other, bears some relationship to fraudulent conduct on the part of the defendant, is the claim for title to and possession of the home on East Shea St. Even if I assume, for the purpose of the argument, that the defendant wrongfully took possession of the home, that action was settled by agreement of counsel. The defendant says he was paid $500 and was to be released from all other claims. Without deciding that issue, I am satisfied that the plaintiff cannot

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succeed in any event as he eventually lost the house because of his own financial situation.

27 The plaintiff says the house was gutted by the defendant before he left for Canada. That fact is not borne out by the appraisal evidence. He says the mortgage payments, taxes, insurance and other bills relating to the house were not paid by his son while in possession and as result he was unable to redeem or refinance the mortgage and as a consequence was unable to redeem the mortgage. He claims the original down payment, the deposit, the arrears and the difference between the appraised value and the mortgage balance as damages arising from fraud. The total claim is in excess of $200,000.

28 The home was lost, the plaintiff says, because he was unable to refinance it. I fail to understand how his financial ability is related to any fraud on the part of the defendant. Assuming the appraisals are accurate, this home had a substantial equity. The problem was that the plaintiff because of a prior bankruptcy lacked a credit rating. This shortcoming, according to the plaintiff, was the reason why the home was placed in his son's name in the first place. The plaintiff lost the home because of this and because of a decline in the real estate market or because the plaintiff was insolvent. The loss claimed is not as a result of fraud on the part of the son.

29 The other claim, that approaches deception on the part of the defendant, is the loan of $6,800. It is rather puzzling that the father and son were even on speaking terms at the time of this transaction and yet it appears the money was placed in the defendant's account to show the mortgage company that the defendant was a good risk. At the time he was anything but a good risk but the parties seem to be oblivious to any wrongdoing when it comes to third parties. The loan proceeds of $50,000 were to go to the plaintiff to give the brokerage business some stability. The $6,800 was to be returned following loan approval. The loan was not forthcoming and the $6,800 was not repaid.

30 The physical altercation, the eviction and change of ownership of a company car, all took place about this time. The car was returned to the company after a hearing. The father regained possession of the home. The $6,800 was wrongfully withheld.

31 In the balance of things, that is not so unfair when one considers the savings the defendant lost and the fact that investments introduced into the business were never accounted for by the plaintiff. For example, the plaintiff says, contrary to his son's evidence, that $52,000 of investment money, for which the defendant remains liable, was not to constitute the down payment on the Arizona home. He says it was placed in treasury bills under the control of M. Paulin Consulting Inc. and was so used, for investment purposes, at the time of the purchase of the home. It was therefore, unavailable and not used in the pur-

chase. The plaintiff produced brokerage statements to support his testimony. On the other hand there is a dearth of evidence to explain where this money is today. The plaintiff's bald testimony is that it was lost in the market.

32 The plaintiff has not, throughout the years of his business relationship with his son, demanded payment of any or all of the amounts now claimed nor has he ever provided his son with a statement to support his claims until this lawsuit.

33 The action is therefore dismissed. There are to be no costs because I am not satisfied that the defendant has acted with complete integrity and diligence throughout.

Action dismissed.

CITATION: Pacific Exploration & Production Corporation (Re), 2016 ONSC 5429
COURT FILE NO.: CV-16-11363-00CL
DATE: 20160829

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	*Tony Reyes*, *Virginie Gauthier*, *Alexander Schmitt*, and *Orestes Pasparakis*, for the Applicants
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PACIFIC EXPLORATION & PRODUCTION CORPORATION, PACIFIC E&P HOLDINGS CORP., META PETROLEUM CORP., PACIFIC STRATUS INTERNATIONAL ENERGY LTD., PACIFIC STRATUS ENERGY COLOMBIA CORP., PACIFIC STRATUS ENERGY S.A., PACIFIC OFF SHORE PERU S.R.L., PACIIFC RUBIALES GUATEMALA S.A., PACIFIC GUATEMALA ENERGY CORP., PRE-PSIE COÖPERATIF U.A., PETROMINERALES COLOMBIA CORP., and GRUPO C&C ENERGIA (BARBADOS) LTD.	*John Finnigan* and *Rebecca Kennedy*, for the Monitor, PricewaterhouseCoopers Inc.
	Scott Bomhof and *Lily Coodin*, for Bank of America, Agent for certain Bank Lenders
	Brendan O'Neill, *Celia Rhea*, and *Ryan Baulke*, for the Ad Hoc Committee
	Timothy Pinos and *Joseph Bellissimo*, for the Shareholder Consortium
	Jennifer Whincup, for BNY Mellon
	Michael Rotsztain, for Wilmington Trust, N.A. & Bank Syndicate
Applicants	*Caitlin Fell* and *Andy Kent*, for the Plan Sponsor, The Catalyst Capital Group Inc.
	Mark Gelowitz, for the Independent Committee
	John Salmas for Blackhill Advisors, CRO
	George Michailopoulos, unrepresented shareholder
	HEARD: August 23, 2016

HAINEY J.

REASONS FOR JUDGMENT

Background

[1] The applicants seek an order (the "Plan Sanction Order")[1]:

> (a) sanctioning the applicants' Plan of Compromise and Arrangement dated June 27, 2016, as amended to August 17, 2016 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"); and
>
> (b) extending the Stay Period to and including October 31, 2016.

[2] According to the applicants, the Plan and the restructuring of Pacific Exploration & Production Corporation ("Pacific") and its subsidiaries ("Pacific Group") to be implemented thereby (the "Restructuring Transaction") results from significant efforts by the applicants to achieve a resolution of their financial condition. If implemented, the Restructuring Transaction will reduce Pacific's indebtedness by approximately US $5.1 billion, reduce its annual interest expense by approximately US $258 million and leave the US $250 million of Exit Notes as the only long-term debt in Pacific's capital structure other than facilities to support letters of credit or oil and gas hedging. The Plan will maintain Pacific Group as a going concern for the benefit of all stakeholders, preserving employment and economic activity in the many communities in which it operates.

[3] The applicants and their boards of directors believe that the Restructuring Transaction achieves the best possible outcome for the Pacific Group and its stakeholders in the circumstances and achieves results that are not attainable under any other scenario.

[4] The Plan is supported by the Catalyst Capital Group Inc., the Plan Sponsor, the Ad Hoc Committee, the Consenting Lenders, the other parties to the Support Agreement (who together with the Ad Hoc Committee and supporting Bank Lenders, hold approximately 84% by value of all Bank Claims and Noteholder Claims) and the Monitor.

[5] At a creditors' meeting held on August 17, 2016, the Plan was approved by 98.4% (by number) and 97.2% (by dollar value) of Affected Creditors voting in person or by proxy at the meeting.

[6] The Monitor supports the sanctioning of the Plan and believes it is fair and reasonable and that it represents the best option available to the Pacific Group and the Affected Creditors.

---

[1] I have used the same defined terms in my reasons for judgment as are contained in the applicants' factum.

[7] For these reasons the applicants submit that the Plan should be sanctioned pursuant to s. 6 of the *CCAA*.

Adjournment Request

[8] On August 16, 2016, one week before the scheduled hearing of this motion, a group of stakeholders (the "Shareholder Consortium") put forward a recapitalization and refinancing proposal (the "Alternative Proposal") which the Shareholder Consortium submits provides the applicants and its stakeholders with a superior alternative to the Plan sought to be sanctioned on this motion.

[9] The applicants disagree that the Alternative Proposal is superior to the Plan and have formally rejected it.

[10] The Shareholder Consortium requested that I adjourn the motion to permit further consideration of the Alternative Proposal.

[11] The applicants and all other interested parties and stakeholders appearing on the motion strongly opposed the adjournment request and characterized it as a "last minute effort to de-rail the Restructuring Transaction".

[12] I agree with this characterization of the Alternative Proposal. There was a process in place to obtain proposals that contained a clear timetable for the submission of proposals which the Shareholder Consortium was well aware of. This last minute Alternative Proposal ignores the timelines that have been in place for many months. Further, the Alternative Proposal has been considered and rejected by the applicants. The adjournment request is denied because I am satisfied that the Plan, which results from extraordinary efforts by the applicants and the other interested parties to arrive at the best result for the Pacific Group and its stakeholders, should not be de-railed at this late stage of the process by the Shareholder Consortium's Alternative Proposal.

Issues

[13] I must decide the following issues:

a) Should the Plan be sanctioned?

b) Should the third party releases be approved?

c) Should there be a stay of proceedings in favour of the other Non-Applicant parties?

d) Should the Stay Period be extended to October 31, 2016?

Should the Plan be sanctioned?

[14] Section 6 of the *CCAA* provides that a compromise or arrangement is binding on a debtor company and all of its creditors if a majority in number, representing two-thirds in value of the creditors present and voting at a meeting of creditors, approve the compromise or arrangement and the compromise or arrangement has been sanctioned by the court.

[15] Pacific's Affected Creditors, in both number and value, voted in favour of the Plan thereby satisfying the first requirement of s. 6 of the *CCAA*. The Monitor has confirmed that 98.4% in number and 97.2% in value of the Affected Creditors voted in favour of the Plan.

[16] As the voting requirement under s. 6 of the *CCAA* has been satisfied, I must determine whether to approve and sanction the Plan.

[17] The criteria I must consider in determining whether to sanction a *CCAA* plan are as follows:

a) There must be strict compliance with all statutory requirements;

b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the *CCAA*; and

c) The plan must be fair and reasonable.

[18] I am satisfied on the record before me that there has been strict compliance with the statutory requirements of the *CCAA*.

[19] I am also satisfied that throughout the course of these proceedings the applicants have acted in good faith and with due diligence and they have strictly complied with the requirements of the *CCAA* and the orders of this Court. This is confirmed in the reports of the Monitor.

[20] I have concluded that the Plan is fair and reasonable because it represents a reasonable and fair balancing of the interests of all parties in light of the other commercial alternatives available. In assessing the Plan's fairness and reasonableness I am guided by the objectives of the *CCAA* which are "to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators". Reorganization, if commercially feasible, is in most cases preferable to liquidation.

[21] The factors that I have considered in concluding that the Plan is fair and reasonable include the following:

a) The claims were properly classified pursuant to s. 22 of the *CCAA*;

b) The Plan received overwhelming support from the applicants' creditors;

c) The Monitor is of the view that the applicants' creditors would be worse off if the Plan is not sanctioned;

d) The Plan appears to be the best alternative available under the current circumstances;

e) There is no oppression of the rights of the applicants' creditors under the Plan;

f) Since the applicants' creditors are not being paid in full there is no unfairness to the applicants' shareholders. Their treatment is consistent with the provisions of the *CCAA*;

g) The Plan is in the public interest as it continues the Pacific Group as a going-concern thereby preserving employment for thousands of people and generating economic activity in the many local communities in which it operates.

[22] For all of these reasons I am satisfied that the Plan should be sanctioned.

Should the third party releases be approved?

[23] It is well established that courts have jurisdiction to sanction plans pursuant to the *CCAA* that contain releases in favour of third parties. Courts will generally approve third party releases in the context of plans of arrangement where the releases are rationally tied to the resolution of the debtor's claims and will benefit creditors generally. I am satisfied in this case that the third party releases should be approved. In arriving at this conclusion I have considered the following factors:

a) Whether the parties to be released from claims are necessary to the Restructuring Transaction;

b) Whether the claims released are rationally connected to the purpose of the Plan and necessary for it to succeed;

c) Whether the Plan would fail without the releases;

d) Whether the third parties being released contributed in a tangible and realistic way to the Plan;

e) Whether the releases benefit the debtors as well as the creditors generally;

f) Whether the creditors who voted on the Plan had knowledge of the nature and effect of the releases; and

g) Whether the releases are fair and reasonable and not overly broad.

[24] The releases were negotiated as part of the overall framework of the compromises contained in the Plan. They facilitate the successful completion of the Plan and the Restructuring Transaction. The releases are a significant part of the various compromises that were required to achieve the Plan and are a necessary element of the global consensual restructuring of the applicants. The releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the applicants. They were also well-publicized and there does not appear to be any objections to them.

[25] For these reasons the third party releases are approved.

Should there be a stay of proceedings of the other Non-Applicant parties?

[26] Section 11 of the *CCAA* provides the court with authority to impose a stay of proceedings with respect to non-applicant parties. In determining whether to grant the Non-Applicant Stay requested I must be satisfied that it is fair and reasonable in the circumstances. I am satisfied that I should grant the Non-Applicant Stay for the following reasons:

a) A significant portion of the value of the Pacific Group is held in the Non-Applicants and their business and operations are significantly intertwined and integrated with those of the applicants.

b) The exercise of the rights stayed by the Non-Applicant Stay which arise out of the applicants' insolvency or the implementation of the Plan would have a negative impact on the applicants' ability to restructure, potentially jeopardizing the success of the Plan and the continuance of the Pacific Group;

c) The granting of the Non-Applicant Stay is a condition of the Plan. If the applicants are prevented from concluding a successful restructuring with their creditors, the economic harm would be far-reaching and significant;

d) Failure of the Plan would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the Non-Applicant Stay; and

e) If the Plan is approved, the applicants will continue to operate for the benefit of all of their stakeholders, and their stakeholders will retain all of their remedies in the event of future breaches by the applicants or breaches that are not related to the released claims.

[27] For these reasons the Non-Applicant Stay is granted.

Should the stay period be extended to October 31, 2016?

[28] The applicants have requested an extension of the stay period until and including October 31, 2016. The applicants anticipate that this extension will give them sufficient time to complete

all of the transactions, documents and steps required to implement the Plan and to emerge successfully from these *CCAA* proceedings.

[29] I am satisfied that under the circumstances the stay extension requested is appropriate. I am prepared to grant the requested stay extension for the following reasons:

a) The applicants have made substantial progress towards completion of the Restructuring Transaction;

b) The applicants require the ongoing benefit of the stay proceedings in order to complete the *CCAA* proceedings including the implementation of the Plan;

c) The applicants intend to implement the Plan as expeditiously as possible;

d) The requested extension is not overly lengthy and avoids the additional time and expense that would be incurred if the applicants are required to return to court in the interim;

e) The applicants' cash flow forecast projects that they will have access to all necessary financing during the extended stay period;

f) The applicants have acted in good faith and with due diligence towards the completion of the Restructuring Transaction and the implementation of the Plan; and

g) The Monitor, the Ad Hoc Committee, the steering committee of Bank Lenders and the Plan Sponsor all support the requested stay extension.

[30] A stay is therefore granted up to and including October 31, 2016.

Conclusion

[31] For the reasons outlined above the applicants' motion is granted.

[32] It should be noted that the parties to the Restructuring Support Agreement reserve whatever rights they may have under that agreement following the sanction of the Plan. Nothing contained in the orders granted today, or s. 6.3 (a) of the Indemnity Agreement approved thereby, is a determination of what those rights may be.

HAINEY J.

Released: August 29, 2016

CITATION: Pacific Exploration & Production Corporation (Re), 2016 ONSC 5429
COURT FILE NO.: CV-16-11363-00CL
DATE: 20160829

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 PACIFIC EXPLORATION & PRODUCTION CORPORATION, PACIFIC E&P HOLDINGS CORP., META PETROLEUM CORP., PACIFIC STRATUS INTERNATIONAL ENERGY LTD., PACIFIC STRATUS ENERGY COLOMBIA CORP., PACIFIC STRATUS ENERGY S.A., PACIFIC OFF SHORE PERU S.R.L., PACIIFC RUBIALES GUATEMALA S.A., PACIFIC GUATEMALA ENERGY CORP., PRE-PSIE COÖPERATIF U.A., PETROMINERALES COLOMBIA CORP., and GRUPO C&C ENERGIA (BARBADOS) LTD.

Applicants

REASONS FOR JUDGMENT

HAINEY J.

Released: August 29, 2016

CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

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 A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A", Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants**

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

HEARD &
ENDORSED: **JUNE 25, 2012**

REASONS: **JUNE 26, 2012**

ENDORSEMENT

[1] Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

[2] Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

[3] The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

[4] Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

[5] Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

(i) to ensure the ongoing operations of the Cinram Group;

(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

[6] Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

[7] The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

[8] Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

[9] Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

[10] The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

[11] Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

[12] Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

[13] Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

[14] Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms

part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

[15] Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

[16] The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

[17] All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

[18] As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

[19] Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

[20] Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

[21] The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their

Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

[27] Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

[28] Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

[29] Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

[30] Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

[31] The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

> Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

[32] Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

[33] The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

[34] Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

[35] The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

[36] In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

[37] As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

[38] The Applicants have also requested that the confidential supplement – which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules – be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

[39] Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

[40] In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally

integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;

(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;

(j) new business development initiatives are centralized and managed from Toronto, Ontario; and

(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

[41] Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

[42] The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court – in this case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

[43] In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

MORAWETZ J.

Date: June 26, 2012

SCHEDULE "A"

ADDITIONAL APPLICANTS

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

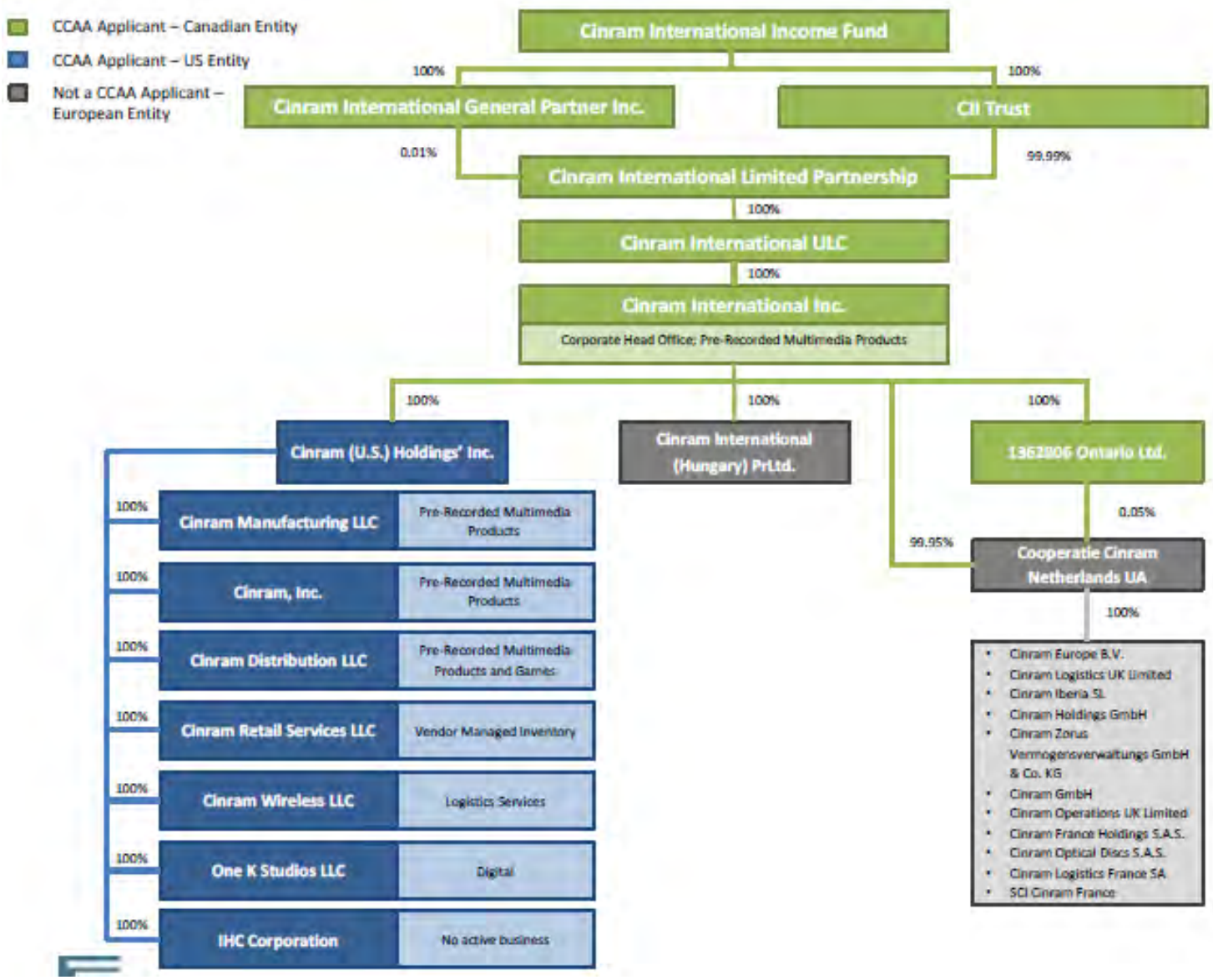
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

SCHEDULE "B"



SCHEDULE "C"

A. THE APPLICANTS ARE "DEBTOR COMPANIES" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

> CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.
>
> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("**Book of Authorities**"), Tab 1.
Re Global Light Telecommunications Ltd. (2004), 2 C.B.R. (5th) 210 (B.C.S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

> *Global Light*, *supra* at para. 17; Book of Authorities, Tab 2.
> *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.
> *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his 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.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.[Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at para. 4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. THE RELIEF IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corp. v. Comiskey, supra at paras. 22 and 56-60; Book of Authorities, Tab 4.
Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Gen. Div. [Commercial List]); Book of Authorities, Tab 6.
Re Chef Ready Foods Ltd; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall

objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

> *Re Sulphur Corporation of Canada Ltd.* (2002), 35 C.B.R. (4th) 304 (Alta Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

> Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

> In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> *Lehndorff General Partner Ltd., Re*, *supra* at para. 5; Book of Authorities, Tab 6.
> *Canwest Global, supra* at para. 27; Book of Authorities, Tab 1.
> CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

> *Lehndorff, supra* at paras. 5 and 16; Book of Authorities, Tab 6.
> *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10.
Lehndorff, supra at para. 21; Book of Authorities, Tab 6.
Canwest Global, supra at paras. 28 and 29; Book of Authorities, Tab 1.
Re Sino-Forest Corp. 2012 ONSC 2063 (Commercial List) at paras. 5, 18, and 31; Book of Authorities, Tab 11.
Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's

practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global supra, at para. 43; Book of Authorities, Tab 1.
Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.
Re Priszm Income Fund (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an

efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

> 11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

> 11.2(2) *Priority* – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Re Timminco Ltd. (2012), 211 A.C.W.S. (3d) 881(Ont. Sup. Ct. J. [Commercial List]) at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) Factors to be considered – In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

> *Re Canwest Publishing Inc./Publications Canwest Inc.* (2010), 63 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

> *Re Catalyst Paper Corporation*, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.
> *Angiotech, supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18
> *Re Fraser Papers Inc.,* Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent,

the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

> 11.52(1) *Court may order security or charge to cover certain costs*
> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate – in respect of the fees and expenses of
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco, Canwest Global* and *Canwest Publishing*.

> *Canwest Global, supra*; Book of Authorities, Tab 1.
> *Canwest Publishing, supra*; Book of Authorities, Tab 16.
> *Re Timminco Ltd.*, 2012 ONSC 106 (Commercial List) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification*
> On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditors of the company
>
> 11.51(3) *Restriction* -- indemnification insurance
> The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault*
> The court shall make an order declaring that the security or charge

> does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global, supra* at paras 46-48; Book of Authorities, Tab 1.
> *Canwest Publishing, supra* at paras. 56-57; Book of Authorities, Tab 16.
> *Timminco, supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.
Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.
Canwest Global supra, at para. 49; Book of Authorities, Tab 1.
Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora

Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate

in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

> *Sino-Forest, supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

> Bell Affidavit, para. 176; Application Record, Tab 2.

CITATION: JTI-Macdonald Corp., Re, 2019 ONSC 1625
COURT FILE NO.: CV-19-615862-00CL
DATE: 2019/03/12

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERIAL 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 A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton*, *Leanne M. Williams*, *Rachel Bengino and Mitch Grossell*, for the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor, Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

Issues

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

Should the requested charges be granted?

Administrative Charge

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

[32] For the reasons set out above the Application is granted.

HAINEY J.

Date Released: March 12, 2019

1992 CarswellOnt 185
Ontario Court of Justice (General Division)

Campeau v. Olympia & York Developments Ltd.

1992 CarswellOnt 185, [1992] O.J. No. 1946, 14 C.B.R. (3d) 303,
14 C.P.C. (3d) 339, 35 A.C.W.S. (3d) 679, 3 W.D.C.P. (2d) 575

ROBERT CAMPEAU, ROBERT CAMPEAU INC., 75090 ONTARIO INC., and ROBERT CAMPEAU INVESTMENTS INC. v. OLYMPIA & YORK DEVELOPMENTS LIMITED, 857408 ONTARIO INC., and NATIONAL BANK OF CANADA

R.A. Blair J.

Judgment: September 21, 1992
Docket: Docs. 92-CQ-19675, B-125/92

Counsel: *Stephen T. Goudge, Q.C.* and *Peter C. Wardle*, for the plaintiffs.
Peter F. C. Howard, for National Bank of Canada.
Yoine Goldstein, for Olympia & York Development Limited and 857408 Ontario Inc.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.c Grounds
XVI.3.c.ii Another proceeding pending
XVI.3.c.ii.E Miscellaneous

Headnote

Practice --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General
Stay of proceedings — Companies' Creditors Arrangement Act — Application for lifting of CCAA stay refused where proposed action being part of "controlled stream" of litigation and best dealt with under CCAA.

The plaintiffs brought an action against the defendant, O & Y, alleging that it breached an obligation to assist in the restructuring of C Corp. The plaintiffs also alleged that O & Y actually frustrated the individual plaintiff's efforts to restructure C Corp.'s Canadian real estate operation. Damages in the amount of $1 billion for breach of contract or, alternatively, for breach of fiduciary duty, plus punitive damages of $250 million were claimed. The plaintiffs also claimed against the defendant bank alleging breach of fiduciary duty, negligence and breach of the provisions of s. 17(1) of the *Personal Property Security Act* (Ont.). Damages in the amount of $1 billion were claimed against the bank. This action was brought two weeks before an order was made extending the protection of the *Companies' Creditors Arrangement Act* ("CCAA") to O & Y.

The plaintiffs brought a motion to lift the stay imposed by the order under the CCAA and to allow them to pursue their action against O & Y. They argued that the claim would be better dealt with in the context of the action than in the context of the CCAA proceedings as it was uniquely complex.

The bank brought a motion opposing the plaintiffs' motion and seeking an order staying the plaintiffs' action against it pending the disposition of the CCAA proceedings. The bank argued that the factual basis of the claim against it was entirely dependent on the success of the allegations against O & Y and that the claim against O & Y would be better addressed within the context of the CCAA proceedings.

Held:

The plaintiffs' motion was dismissed and the bank's motion was allowed.

In considering whether to grant a stay, a court must look at the balance of convenience. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts is something with which the court must not lightly interfere. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay. The onus of satisfying the court is on the party seeking the stay.

The CCAA proceedings in this case involved numerous applicants, claimants and complex issues and could be considered a "controlled stream" of litigation; maintaining the integrity of the flow was an important consideration.

The stay under the CCAA was not lifted, and a stay made under the court's general jurisdiction to order stays was imposed, preventing the continuation of the action against the bank. There was no prejudice to the plaintiffs arising from these decisions, as the processing of their action was not precluded, but merely postponed. Were the CCAA stay lifted, there might be great prejudice to O & Y resulting from the diversion of its attention from the corporate restructuring process in order to defend the complex action proposed. There might not, however, be much prejudice to the bank in allowing the plaintiffs' action to proceed against it; however, such a proceeding could not proceed very far or effectively without the participation of O & Y.

Table of Authorities

Cases considered:

Arab Monetary Fund v. Hashim (June 25, 1992), Doc.34127/88, O'Connell J. (Ont. Gen. Div.), [1992] O.J. No. 1330 — *referred to*

Attorney General v. Arthur Anderson & Co. (1988), [1989] E.C.C. 244 (C.A.) — *referred to*

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) — *applied*

Empire-Universal Films Ltd. v. Rank, [1947] O.R. (H.C.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *applied*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (1972), 10 C.P.R. (2d) 96n, 42 D.L.R. (3d) 320n (Fed. C.A.) — *referred to*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 106

Personal Property Security Act, R.S.O. 1990, c. P.10 —

s. 17(1)

Rules considered:

Ontario, Rules of Civil Procedure —

r. 6.01(1)

Motion to lift stay under Companies' Creditors Arrangement Act; Motion for stay under Courts of Justice Act.

***R.A. Blair J*:**

1 These motions raise questions regarding the court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,

b) the interests of a unliquidated contingent claimant to pursue an action against that debtor *and* an arm's length third party, on the other hand.

2 At issue is whether the court should resort to an interplay between its specific power to grant a stay, under s. 11 of the C.C.A.A., and its general power to do so under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

3 This action was commenced on April 28, 1992, and the statement of claim was served before May 14, 1992, the date on which an order was made extending the protection of the C.C.A.A. to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

4 The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

5 The story begins, according to the statement of claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10 per cent of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichmann (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc. (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as chairman and CEO of Campeau Corporation and that company, itself, had filed for protection under the C.C.A.A. (from which it has since emerged, bearing the new name of Camdev Corp.).

6 In the meantime, in September 1989, the Olympia & York defendants, through Mr. Paul Reichmann, had entered into a shareholders' agreement with the plaintiffs in which, it is further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as chairman and CEO and majority shareholder of Campeau Corporation.

7 Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million are also sought.

The Claim against National Bank of Canada

8 Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the defendant National Bank of Canada, as well. The causes of action against the bank are framed as breach of fiduciary duty, negligence, and breach of the

provisions of s. 17(1) of the *Personal Property Security Act* [R.S.O. 1990, c. P.10]. They arise out of certain alleged acts of misconduct on the part of the bank's representatives on the board of directors of Campeau Corporation.

9 In 1988 the plaintiffs had pledged some of their shares in Campeau Corporation to the bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the plaintiffs defaulted on its obligations under the loan and the bank took control of the pledged shares. Thereafter, the statement of claim alleges, the bank became more active in the management of Campeau, through its nominees on the board.

10 The bank had two such nominees. Olympia & York had three. There were 12 directors in total. What is asserted against the bank is that its directors, in co-operation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

The Motions

11 There are two motions before me.

12 The first motion is by the Campeau plaintiffs to lift the stay imposed by the order of May 14, 1992 under the C.C.A.A. and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present C.C.A.A. proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

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.

The Power to Stay

14 The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

15 Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 34127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

16 Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The

authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the com pany except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of C.C.A.A. Proceedings

17 By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements 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 arrangement with such creditors.

18 In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

19 Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period*.

(emphasis added)

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.

21 I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the court is on the party seeking the stay: see also *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 (Fed. T.D.), appeal allowed by consent without costs (1972), 10 C.P.R. (2d) 96n, 42

D.L.R. (3d) 320n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.) at p.779.

22 *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case-managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the C.C.A.A. do not involve a large number of separate actions, they do involve numerous applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad-sweeping issues. In that sense the C.C.A.A. proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

Disposition

23 I have concluded that the proper way to approach this situation is to continue the stay imposed under the C.C.A.A. prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this court.

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).

Conclusion

26 Accordingly, an order will go as indicated, dismissing the motion of the Campeau plaintiffs and allowing the motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the C.C.A.A. unless extended or otherwise dealt with by the court prior to that time. Costs to the defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

Order accordingly.

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:	)	
	)	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	)	S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants
	)	
	)	Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.	)	
	)	Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc.
	)	
	)	
	)	
	)	
	)	**HEARD:** August 23, 2013

NEWBOULD J.

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

[2] At the time of the application, Tamerlane Ventures Inc. (“Tamerlane”) was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. (“Tamerlane Pine Point”), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

Secured and unsecured debt

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (“Global Resource Fund” or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is

guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc*. (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of

$300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order “that it considers appropriate in the circumstances.” In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379:

> 70. …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 liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

> 71. It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd*. (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

Released: August 28, 2013

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

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 TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

REASONS FOR JUDGMENT

Newbould J.

Released: August 28, 2013

Using the *CCAA* to Achieve a Global Resolution of Complex Litigation "To Infinity and Beyond!" (*Buzz Lightyear, Toy Story*)

Alain Riendeau and Brandon Farber[*]

I. INTRODUCTION

Traditionally, the *Companies' Creditors Arrangement Act (CCAA)*[1] provided a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.[2] The *CCAA* is first and foremost a remedial statute that is intended to benefit the debtor company by keeping the debtor in business, preserving its goodwill, preserving jobs, and maintaining a higher value than if in bankruptcy or liquidation.[3] The *CCAA* proceeding was therefore initially intended to provide a forum in which a debtor is able to continue in business and avoid the devastating social and economic consequences of bankruptcy.[4] A plan of

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*].

2 *Triton Électronique Inc (Arrangement relatif à)*, 2009 QCCS 1202 (CS Que) at paras 22, 24-26.

3 Frank Bennett, *Bennett on Bankruptcy*, 14th ed (Toronto: CCH Canadian Limited, 2012) at 1521.

4 *AbitibiBowater Inc (Arrangement relatif à)*, 2010 QCCS 1261 (CS Que) at para 140; *ATB Financial v Metcalfe & Mansfield Alternative Investment II Corp*, 2008 ONCA 587 (Ont CA) at paras 44-61 [*Metcalfe*]; *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 (BCCA) at paras 27-29; *Chef Ready Foods Ltd v Hongkong Bank of Canada*, 1990 CanLII 529, 51 BCLR (2d)

arrangement or compromise traditionally presupposed that a compromise or arrangement would be proposed by the debtor to its creditors, which would permit the debtor, in some form, to continue as a viable entity.[5]

Over time, the *CCAA* proceeding has evolved and it is now quite common for there to be "liquidating" *CCAA* proceedings in which there is no successful restructuring of the business, but rather, a sale of substantially all of the debtors' assets and a distribution of the proceeds to the creditors of the business.[6] In the *Nortel Networks CCAA* proceeding, Justice Morawetz's rationale for authorizing the sale of substantially all the debtors' assets in the context of the *CCAA* proceeding was the following:

> [47] It seems to me that the foregoing views expressed in Forest and Marine are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.[7]

In the *Nortel Networks* matter, the sale of the debtors' assets was therefore directly in line with the primary objective of the

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84 (BCCA) at para 5; *Re Stelco Inc* (2005), 78 OR (3d) 241, [2005] OJ No 4883 (Ont CA) at para 36; Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Carswell, 2013) at 13.

5 *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 (BCCA) at para 30; *1474-5467 Québec inc v Roynat inc*, JE 94-543 (CS Que) at paras 4-5; *Re Ursel Investments Ltd*, [1990] SJ No 228, 2 CBR (3d) 260 (Sask QB) at paras 9, 18, 19, reversed 1992 CarswellSask 19 (Sask CA) (for other reasons); *Banque commerciale du Canada c Station du Mont-Tremblant Inc*, JE 85-378 (CS Que) at paras 12-15.

6 *Re Nortel Networks Corporation*, 2009 CanLII 39492 (Ont SCJ [Commercial List]) at paras 47-49 [*Nortel Networks* 2009]; *Re Nortel Networks Corporation et al*, 2014 ONSC 4777 (Ont SCJ [Commercial List]) at para 23 [*Nortel Networks* 2014]; *In re Lehndorff General Partners Ltd* (1993), 17 CBR (3d) 24 (Ont Gen Div [Commercial List]) at para 7.

7 *Nortel Networks* 2009, *supra* note 6 at para 47.

CCAA, which is to preserve the debtors' business as a going concern.

In the past few years, the "broad and liberal" and "flexible" interpretation of the *CCAA* has expanded even further. Indeed, the *CCAA* proceeding has become the privileged forum for some insolvency practitioners to settle complex, multi-party and even multi-jurisdictional litigation between the debtor, its creditors and even third parties.[8]

Recently, in the context of the Lac-Mégantic tragedy in Québec, the use of the *CCAA* proceeding to settle complex litigation progressed even further. Indeed, in the Lac-Mégantic case, the *CCAA* plan of arrangement and compromise was used to effect a settlement between creditors and third parties, without having any impact on the insolvent debtor. In other words, the insolvent debtor was unaffected by the plan that it put forward to its creditors. The appropriateness of using the *CCAA* for settling litigation involving solvent parties, without compromising the insolvent debtor's own liabilities, was questioned during the plan of arrangement and compromise sanction hearing before the Superior Court of Québec.

In this article, the outcome of the Lac-Mégantic *CCAA* proceeding is examined due to its impact on both Canadian insolvency and bankruptcy law and generally on complex litigation involving multiple parties and at least one insolvent party. Specifically, the article covers the following topics:

- an overview of the history of releases and discharges in bankruptcy and insolvency law;
- a commentary on the Lac-Mégantic *CCAA* proceeding and its particularities;

8 *Re Muscletech Research and Development Inc*, 2007 CanLII 5146 (Ont SCJ [Commercial List]) [*Muscletech*]; *Re Sino-Forest Corp*, 2012 ONSC 7050 (Ont SCJ [Commercial List]) [*Sino-Forest*]; *Re 4519922 Canada Inc*, 2015 ONSC 4648 (Ont SCJ [Commercial List]) [*Re 4519922 Canada Inc*].

- a discussion of the new paradigm of *CCAA* proceeding established in the Lac-Mégantic case, which may lead to the use of the *CCAA* proceeding as a "one-stop shop" to settle complex multi-party litigation; and

- a discussion of how this new paradigm of *CCAA* proceeding was used to achieve a global resolution of the 20-year litigation in the Castor Holdings matter.

II. HISTORY OF RELEASES AND DISCHARGES IN BANKRUPTCY AND INSOLVENCY LAW

1. Overview

As has often been, and will continue to be, repeated by courts across Canada, the *CCAA* is intended to be flexible and must be given a broad and liberal interpretation.[9] Courts enjoy significant discretionary powers to make orders that help achieve the objectives of the *CCAA*.[10] This broad interpretation of the *CCAA* is what allows insolvency practitioners to explore innovative solutions to crises and financial challenges that may be facing their clients. Indeed, insolvency law is advanced by insolvency practitioners tasked with finding exceptional measures to deal with extraordinary circumstances, particularly in the absence of any specific legislative authority. The *CCAA* has been used to address several high-profile crises.[11]

9 *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, 1998 CanLII 14907 (Ont Gen Div [Commercial List]) at para 45 [*Red Cross*]; *Re Kerr Interior Systems Ltd*, 2011 ABQB 214 (Alta QB) at para 25.

10 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (SCC) at paras 58, 61 and 62 [*Century Services*]; *Re NTW Management Group Ltd*, 1994 CarswellOnt 325 (Ont Bktcy) at para 13; *Re Nortel Networks Corp*, 2010 ONSC 1708 (Ont SCJ [Commercial List]) at paras 66-70; *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078 (Ont SCJ [Commercial List]) at para 44 [*Eastern Forest*].

11 *Re Muscletech Research and Development Inc*, 2006 CarswellOnt

Some examples of exceptional measures that have made their way into *CCAA* practice as a result of extraordinary circumstances include:

- stay of proceedings against non-debtors, including directors, related parties and even insurance companies;
- implementing a claims process with a bar date in order to liquidate creditors' claims against a debtor in a timely manner;
- interim financing, colloquially known as "debtor in possession financings", which grants a super-priority charge to the interim financing lender over the debtor's assets;
- asset sales with a vesting order, which allow for a debtor's assets to be sold free and clear of any charges; and
- third-party releases.

The sanctioning by the courts of arrangements and compromises, which include broad releases in favour of third parties, has been a game changer for the insolvency practice. Much has already been said and written about the use and appropriateness of third-party releases in *CCAA* proceedings. However, since these releases are at the heart of what makes the *CCAA* proceeding such an appealing forum for the settlement of complex multi-party and multi-jurisdictional litigation, it is useful to provide a history of their use in the present article.

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264 (Ont SCJ [Commercial List]); *Muscletech*, *supra* note 8; *Metcalfe, supra* note 4; *Red Cross*, *supra* note 9; *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge*, 2000 CanLII 22488 (Ont SCJ); *Nortel Networks* 2009, *supra* note 6 at paras 47-49; *Nortel Networks* 2014, *supra* note 6.

2. The Evolution of the Release and Discharge Provision in Bankruptcy and Insolvency Law

If, for many, the concept of releasing or discharging an insolvent debtor is obvious, this phenomenon is relatively new in the history of the world. Indeed, the concept of a discharge has been viewed as a privilege granted to rehabilitate an insolvent debtor. Even more fascinating is the remarkable evolution of the privilege granted to an insolvent debtor in certain circumstances to a right that is now granted to solvent third parties, if they are prepared to pay the right price.

i. The Old Testament — the first known release and discharge of debt

The first known "statute" dealing with forgiveness of debt is found in the Bible. In Deuteronomy, it was mandated that debts are to be forgiven every seven years, regardless of a person's circumstances. Indeed, the first verses of Deuteronomy 15 describe the operation of law that ensured that everyone would have a fresh start every seven years:

> 1 At the end of every seven years you shall grant a release of debts.
>
> 2 And this is the form of the release: Every creditor who has lent anything to his neighbor shall release it; he shall not require it of his neighbor or his brother, because it is called the Lord's release.[12]

A release of debt was not only permitted under the Bible, but it was also obligatory and continuously recurring. The principle of forgiveness of debt in biblical times was not a principle that was adopted by the rulers and creditors in classical antiquity and the Middle Ages.

ii. Classical antiquity and the middle ages

This notion of debt forgiveness did not exist in Ancient Greece, where debtors were enslaved to their creditors until

12 Deuteronomy 15:1-2, New King James Version, online: <http://www.biblestudytools.com/nkjv/>.

their debts were paid off.[13] Debt slavery is thought to have eventually been abolished in Athens by the Athenian statesman, lawmaker and poet, Solon.[14]

Ancient Roman times appear to have followed the Ancient Greek models. Debtors were enslaved, imprisoned, abused, tortured, and even executed.[15] Debtors carried their debts with them to the grave.[16]

In the Middle Ages, the phenomenon of debt slavery was extremely rare and likely limited to certain barbaric kingdoms.[17] However, the infamous "debtors' prison" in England came into existence;[18] and in 1641, it was estimated that 10,000 people were imprisoned for debt in England and Wales.[19] Debtors were imprisoned indefinitely, side by side with hardened criminals in horrendous conditions.[20]

It was not until 1869 that debtors' prisons were finally abolished and the *Debtors Act* of 1869 was adopted to address the creditor/debtor relationship.[21]

iii. The origins of the bankruptcy discharge

The concept of the discharge was first introduced by legislation passed in England in 1705.[22] Prior to the introduction of this legislation, a bankrupt remained liable for amount remaining unpaid to the creditors following the

13 A Testart, "The Extent and Significance of Debt Slavery", *Revue française de sociologie* (Supplement: Annual English Edition) 43 (2002): 173-204 [Testart].
14 *Ibid* at 189.
15 *Ibid* at 190.
16 J Dalhuisin, *Roman Law of Creditors Remedies*, in ABA Section of International Law, European Bankruptcy Laws, at 3 (1974).
17 Testart, *supra* note 13 at 191.
18 Lucinda Cory, "A Historical Perspective on Bankruptcy", On the Docket, Volume 2, Issue 2, US Bankruptcy Court, District of Rhode Island, April/May/June 2000.
19 *Ibid.*
20 *Ibid.*
21 *Ibid*, *Debtors Act, 1869* (UK), c 62, Part I, s 4, Part I.
22 *The Bankruptcy Act 1705* (UK), 4 & 5 Anne, c 17.

bankruptcy. The discharge was introduced into bankruptcy law as an incentive for cooperation on the part of the bankrupt.[23] The introduction of the discharge could be considered as one of the most significant features of the practice of bankruptcy and insolvency law as we know it today.

iv. The evolution of the discharge in Canadian bankruptcy law

English bankruptcy law did not immediately take root in Canada. Indeed, the *Insolvency Act of 1875*[24] sought to give creditors increased control over insolvency proceedings and restricted the possibility for a debtor to obtain a discharge, which had been available until 1880 with the consent of creditors.[25] In the 19th century, it was not widely accepted in Canada that bankruptcy should provide a debtor with a fresh start.[26] As a result of the debate over the "morality of the discharge", between 1880 and 1919, no bankruptcy law existed in Canada.[27] Provincial legislation was enacted to fill the void; however, such legislation did not offer the possibility of a discharge.[28]

After 39 years without a bankruptcy law, the First World War, and a significant downturn in the economy, Canada enacted the *Bankruptcy Act* in 1919 ("1919 *Act*") out of necessity.[29] The 1919 *Act* was based heavily on the English *Bankruptcy Act*[30] of 1883. The 1919 *Act* was a "very radical

23 Roderick J Wood *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2015) at 31.
24 *Insolvency Act of 1875,* SC 1875, c 16.
25 *Ibid* at 33.
26 Thomas G W Telfer, "Reconstructing bankruptcy law in Canada, 1867 to 1919, from an evil to a commercial necessity", National Library of Canada/Bibliothèque nationale du Canada, 1999 [Telfer].
27 *Ibid* at 34.
28 *Ibid* at 19.
29 *Bankruptcy Act,* SC 1919, c 36.
30 *Bankruptcy Act 1883* (UK), 46 & 47 Vict, c 52.

change in the relationship of debtors and creditors".[31] It allowed debtors to apply for a discharge and obtain a release of their debts.[32] However, such reform had little to do with the rehabilitation of the debtor, but rather, it was a necessary means for creditors to improve the conduct of the debtor and to increase their collection efforts.[33] Indeed, the prior lack of any discharge forced debtors to attempt to escape from the disastrous and permanent effects of a bankruptcy through deceptive or fraudulent practices, which included changing their names or their companies' names or even leaving the country.[34]

Under the 1919 *Act*, in deciding whether to grant a discharge or a conditional discharge, the courts would ultimately be called on to decide the extent to which the debtor had been responsible for his or her misfortune. Generally, where there was no dishonesty or wilful negligence, it was a matter of public policy that the court would grant a discharge.[35]

It has been said that a discharge is "the very soul of a bankruptcy Act, and in cases where a debtor has been obliged to go through the insolvency courts through misfortune, the law ought to give him the opportunity of obtaining a clean bill of health, without interference by creditors...".[36]

No provision existed for an automatic discharge under the 1919 *Act*. If a debtor did not make an application, he or she remained a bankrupt indefinitely. The automatic procedure was not added until 1949, which provided that an assignment in bankruptcy automatically triggered an application for discharge.[37]

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31 FGT Lucas, "The New 'Bankruptcy Act'" (1920) 40 *Can L T* 668.
32 Telfer, *supra* note 26 at 330.
33 *Ibid* at 331.
34 *Ibid* at 334.
35 *Ibid* at 347.
36 SW Jacobs, "A Canadian Bankruptcy Law — Is It a Necessity?", (1917) 37 *Can L T* 604, 608.
37 *Bankruptcy Act,* SC 1949 (2nd Sess), c 7, s 127; the application for discharge was heard between 3 and 12 months after the assignment.

Eventually, in the 1992 amendments to the *Bankruptcy and Insolvency Act (BIA)*,[38] a provision was added allowing a first time bankrupt to be automatically discharged nine months after the assignment unless, before the expiration of this period, the trustee, the Superintendent in bankruptcy or a creditor filed an objection.[39] The possibility for the automatic discharge remains enshrined in the *BIA* today.

Although the initial purpose of the discharge may have been different, it has now become clear that an important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her re-integration into society — subject to reasonable conditions — by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met.[40]

3. Third-party Releases in *CCAA* and *BIA* Restructurings

Releases and discharges in favour of parties other than the debtor were not contemplated by early bankruptcy legislation, and in Canada, such practice began emerging under the *CCAA* in the 1990s. Indeed, such releases were not contemplated for the simple reason that if a third party is solvent; it should pay its debts in full. In other words, there is no reason to compromise debts of third parties that have the capacity to pay their debts in full.

The inclusion of releases and discharges in favour of third parties in arrangements or compromises was initially met

38 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*].

39 *BIA*, *supra* note 38, s 168(1)(f).

40 *Simone v Daley*, 1999 CanLII 3208 (Ont CA); *Re Newsome* (1927), 32 OWN 292, 8 CBR 279 (Ont SC); *Canadian Bankers' Assn v Saskatchewan (Attorney General)*, 1955 CanLII 78, [1956] SCR 31, 35 CBR 135 (SCC); *Cleve's Sporting Goods Ltd v JG Touchie & Associates Ltd* (1986), 74 NSR (2d) 86, 58 CBR (NS) 304 (NSCA); *Ironwood Investments Joint Venture v Leggett Estate (Trustee of)*, 1996 CanLII 8252, 38 CBR (3d) 256 (Ont Gen Div) at 264; *Jerrard v Peacock*, 1985 CanLII 1148, 57 CBR (NS) 54, 37 Alta LR (2d) 197 (Alta Master).

with skepticism. The practice eventually became acceptable in respect of releases in favour of directors of the debtor. However, a new paradigm was created when releases were stipulated in favour of solvent third parties having no relationship to the insolvent debtors.

i. Third-party releases under the BIA

The courts have previously held that a proposal under the *BIA* can only provide for the compromise of claims against the debtor. It cannot require creditors to compromise their claims against third parties.[41] In the 2010 case of *Re CFG Construction Inc*, the Superior Court of Québec refused to approve a proposal that contained releases in favour of two sureties of the debtor.[42] The Superior Court of Québec held that the *BIA* does not permit third-party releases except those in favour of directors under section 50(13). The court's rationale for its refusal stemmed from a strict interpretation of section 62(3) of the *BIA*, which provides that "the acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor".[43] In other words, only the debtor can be released by a proposal.

This strict approach was not followed in a subsequent judgment rendered in 2012 by the Ontario Superior Court of Justice (Commercial List) in the matter of *Re Kitchener Frame Limited*.[44] In this case, the Court adopted a flexible, purposive interpretation of the *BIA*, stemming from the principle that there is no express prohibition in the *BIA* against third-party releases in a proposal. Since there is no

41 Lloyd W Houlden, Geoffrey B Morawetz and Janis P Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Carswell, 2010) at 238; *Re Cosmic Adventures Halifax Inc* (1999), 13 CBR (4th) 22 (NSSC); *Re Kern Agencies Ltd, (No 2)*, [1931] 2 WWR 633 (Sask CA).

42 *CFG Construction Inc (Proposition de)*, 2010 QCCS 4643 (CS Que).

43 *BIA*, *supra* note 38, s 63(3).

44 *Re Kitchener Frame Limited*, 2012 ONSC 234 (Ont SCJ [Commercial List]).

express prohibition, the Court held that such releases should be permissible as they are under the *CCAA*. In the Court's view, at most, there are limited constraints on the scope of releases, such as in section 179 of the *BIA* and the provision dealing specifically with the release of directors. The *Re CFG Construction Inc* case was distinguished as it dealt with releases of sureties.

ii. Overview of releases of third parties under the CCAA

A successful restructuring under the *CCAA* generally concludes with the emergence of the debtor from the *CCAA* proceeding with a clean bill of health or with a sale of the debtor's assets free and clear of the majority of the claims and encumbrances against them. In order for the debtor to emerge as a viable entity, it requires a "release" from any pre-filing claims and liability through a plan of arrangement or compromise with its creditors.

The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases in favour of third parties, other than to the directors and officers of the debtor.[45] Courts were initially reluctant to sanction third-party releases in the absence of any express legislative authority. Indeed, in *Steinberg Inc c Michaud*,[46] the Québec Court of Appeal refused to sanction a *CCAA* plan because it contained broad releases in favour of directors, officers, employees, and advisors of the debtor company. The Court of Appeal held that the releases were too broad and outside the scope of the *CCAA* plan:

> The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> [...]

45 *Re Bul River Mineral Corporation*, 2015 BCSC 113 (BCSC) at para 77 [*Bul River*].

46 *Steinberg Inc c Michaud* (1993), 42 CBR (5th) 1 (CA Que).

> The Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is.[47]

Subsequent to this decision by the Québec Court of Appeal, section 5.1 of the *CCAA* was enacted in 1997, which expressly allows the release of claims against directors, subject to the express exception in section 5.1(2) of the *CCAA*.

In *Re Canadian Airlines Corp*,[48] the Court of Queen's Bench of Alberta sanctioned a plan containing releases of officers, employees and advisors of the debtor company, despite the fact that only directors were contemplated under section 5.1 of the *CCAA*. Undoubtedly, the logic behind the court's decision to approve these releases is that these individuals were essential to the rehabilitation of the insolvent company and to maintain and create value for all stakeholders, including business partners, employees and suppliers of the insolvent debtor.

iii. The point of no return? Third-party releases in Muscletech

The elastic boundaries of the third-party release were stretched even further in *Re Muscletech Research and Development Inc*.[49] Muscletech Research and Development Inc and its affiliates ("Muscletech") were facing 33 product liability class actions relating to the diet supplement, ephedrine, as well as certain prohormone products alleged to build muscles. In January 2006, Muscletech filed for protection under the *CCAA* in Ontario. The initial *CCAA* order contained a stay of proceedings against Muscletech and certain related and unrelated non-debtor defendants, including retailers who had sold the impugned products. Parallel Chapter 15 United States *Bankruptcy Code* proceedings were instituted in the Bankruptcy Court for the Southern District of New York.[50]

47 *Ibid* at 13 and 14.
48 *Re Canadian Airlines Corp*, [2000] 10 WWR 269 (Alta QB).
49 *Re Muscletech Research and Development Inc* (2006), 25 CBR (5th) 231 (Ont SCJ).
50 *Ibid* at para 3.

CCAA protection was sought principally as a means of achieving a global resolution of the product liability class actions commenced against Muscletech and other non-related third parties. The liability of the third parties, which included marketing affiliates, research entities and independent vendors, was linked to the liability of Muscletech. Ultimately, the Ontario Superior Court of Justice sanctioned a plan that provided broad releases in favour of Muscletech *and* the third party co-defendants. Such co-defendants had no affiliation with Muscletech. Two key factors appear to have influenced the court's decision to approve the plan: (i) the significant financial contributions that the third parties would make to fund the plan and (ii) the third parties would lose their right to seek indemnity from Muscletech as a result of the compromise. Indeed, the Court provided the following rationale:

> 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.
>
> [...]
>
> 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.[51]

Other decisions provided further authority to the effect that the court may approve releases in favour of third parties found in a plan of compromise or arrangement while exercising its statutory jurisdiction under the *CCAA*.[52]

51 *Ibid* at paras 7-9.

52 *Metcalfe, supra* note 4; *Re Canwest Global Communications Corp*,

Third-party releases have therefore become a tool to facilitate the restructuring in many complex *CCAA* matters. However, the use of third-party releases in *CCAA* proceedings is not without controversy. Questions have been raised as to the appropriateness of the inclusion of such releases in a plan[53] and the scope of the releases.[54]

iv. The ABCP case — to infinity?

In the *ABCP* matter, the entire $32 billion asset-backed commercial paper ("ABCP") market experienced an overnight, sudden and complete seizure as a result of a liquidity crisis. This seizure of the ABCP market resulted in the entire ABCP market being frozen pending an attempt to resolve the crisis through a restructuring of the entire market under the *CCAA*. Ultimately, with the collaboration of almost all of the stakeholders in the industry, a plan of compromise and arrangement was put forward. The alternative to sanctioning the plan in *Metcalfe* would likely have been a total and permanent collapse of the ABCP market.

Certain holders of ABCP notes opposed the *Metcalfe* plan primarily on the basis that the third-party releases were impermissible under the *CCAA* and not within the jurisdiction of the Court.

The Court of Appeal for Ontario upheld the decision of the motion judge, which found that the proposed plan in *Metcalfe* affected the entire segment of the ABCP market and the financial markets as a whole. The restructuring in the

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2010 ONSC 4209 (Ont SCJ [Commercial List]) [*Canwest*]; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403 (CA Que) [*SIDO*]; *Re Cline Mining Corp*, 2015 ONSC 622, [2015] OJ No 1202 (Ont SCJ) [*Cline Mining*]; *Sino-Forest*, *supra* note 8.

53 *Montreal, Maine & Atlantic Canada Co/(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235 (Que Bktcy) [*MM&A*].

54 *Metcalfe, supra* note 4.

Metcalfe case was essential to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. The beneficiaries of the releases were essential to the restructuring of the debtors in particular and the ABCP market as a whole. As emphasized in the *Canwest* matter, "[t]he Metcalfe case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring."[55]

v. The ABCP test

The inclusion and sanctioning of third-party releases in a *CCAA* plan are the exception, and are not granted as a matter of course.[56] However, in certain cases, the court may exercise its discretion to sanction third-party releases, but only if there is "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."[57] This "required nexus" test was applied by the Court of Appeal for Ontario in the ABCP *CCAA* proceeding, and subsequently in every other *CCAA* matter dealing with third-party releases.[58]

In the *ABCP* matter, the Court of Appeal for Ontario set out the factors to be considered by the court to justify the inclusion of third-party releases in a plan:

- the parties to be released are necessary and essential to the restructuring of the debtor;
- the claims to be released are rationally related to the purpose of the plan and necessary for it;
- the plan cannot succeed without the releases;

55 *Canwest, supra* note 52 at para 28.
56 *Ibid* at paras 28-29; *Bul River, supra* note 45 at para 78.
57 *Metcalfe, supra* note 4 at para 70.
58 *SIDO, supra* note 52 at paras 37-39; *Bul River, supra* note 45 at para 77; *Cline Mining, supra* note 52 at paras 22-24; *Eastern Forest, supra* note 10 at para 68.

- the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan; and

- the plan will benefit not only the debtor companies but creditors generally.[59]

III. THE LAC-MÉGANTIC CASE — BEYOND INFINITY?

In the recent Lac-Mégantic *CCAA* proceeding, releases in favour of potentially liable third parties were sanctioned by the Superior Court of Québec in the absence of any release or discharge of the insolvent debtor. The Lac-Mégantic case is likely to trigger a new paradigm of *CCAA* proceedings across Canada. In this new era, it would hardly be surprising to see the *CCAA* proceeding become a preferred forum for settling litigation that involves at least one insolvent party. To fully understand the potential implications of the Lac-Mégantic *CCAA* proceeding, a thorough examination of the case is required.

1. The Tragedy

On 6 July 2013, a train carrying crude oil operated by Montreal Maine and Atlantic Railway ("MMAR") and/or its subsidiary Montreal, Maine and Atlantic Canada Co ("MMAC") derailed and exploded in Lac-Mégantic, Québec ("the derailment") on a section of railway line owned by MMAC. The derailment was one of the worst railway accidents in Canadian history. Forty-seven people lost their lives as a result of this terrible tragedy. Damage to the downtown core of the city of Lac-Mégantic's downtown was also extensive, with over 30 buildings burned to the ground.

59 *Metcalfe, supra* note 4 at para 71.

2. The Legal Proceedings

The derailment triggered a plethora of legal proceedings and a flood of claims involving multiple parties, in multiple jurisdictions, including:

- a motion for the authorization to institute a class action was filed before the Superior Court of Québec one week after the derailment on behalf of a class of persons and entities residing in, owning or leasing property in, operating a business in or physically present in Lac-Mégantic against 37 defendants for alleged damages caused by the derailment including for wrongful deaths, personal injuries, and property damages ("the Québec class action");[60]

- wrongful death, personal injury and property damage lawsuits were instituted in Texas, Illinois and Maine;

- the Minister of Sustainable Development, Environment, Wildlife and Parks of Québec issued an order directing certain named parties to recover the contaminants and to clean up and decontaminate the derailment site, the order being contested before the *Tribunal adminstratif du Québec*;

- a lawsuit instituted by the Province of Québec before the Superior Court of Québec to recover cleanup costs in which it is claiming $409 million;

- subrogated insurers have also instituted proceedings before the Superior Court of Québec to recover insurance indemnities that they paid out following the derailment;

60 The Québec class action was eventually authorized by the Superior Court of Québec in a judgment rendered on 8 May 2015; see *Ouellet c Rail World Inc*, 2015 QCCS 2002 (CS Que).

- MMAC filed for *CCAA* protection in Canada;
- MMAR filed for Chapter 11 *Bankruptcy Code* ("Chapter 11") bankruptcy protection in the United States ("US");[61] and
- in the context of the *CCAA* and Chapter 11 bankruptcy, more than 5,000 claims were filed.[62]

3. The *CCAA* Proceeding

Against the backdrop of the derailment and in the face of a plethora of litigation, on 8 August 2013, the Superior Court of Québec granted MMAC's motion for protection from its creditors under the *CCAA*.[63] In parallel to the *CCAA*, MMAR filed for protection under Chapter 11 of the US *Bankruptcy Code* in Maine ("the Chapter 11 proceedings").

i. The stay of proceedings

In the context of its initial order application, MMAC also sought a stay of proceedings, which extended to its liability insurer, a non-filing and solvent third party. While it had previously been recognized that a stay of proceedings could extend to third parties if important to the process or reasonable,[64] often such parties have been related to the debtor, such as its directors or affiliate. The novelty in the MMAC *CCAA* proceeding is that the stay of proceedings extended to a non-related third party. Justice Castonguay found that allowing the stay to extend to the liability insurer was

61 *In re Montreal Maine & Atlantic Railway, Ltd*, Bk No 13-10670, Chapter 11, US Bankruptcy Court District of Maine.

62 Twenty-First Report of the Monitor, dated 24 November 2015, SCJ No 450-11-000167-134.

63 It should be noted that *CCAA* protection was granted notwithstanding the specific exclusion of "railway companies" in the definition of "company" provided for in s 2 of the *CCAA*.

64 *Re Tamerlane Ventures Inc and Pine Point Holding Corp*, 2013 ONSC 5461 (Ont SCJ [Commercial List]).

necessary in order to avoid "judicial chaos" that would result from the onslaught of claims against the liability insurer.[65] The liability insurer had also agreed to tender the entire amount of its insurance policy into the *CCAA* proceeding.

In retrospect, this unique stay of proceedings was the first brick of the structure that would ultimately be built into the plan of compromise and arrangement put forward by MMAC.

ii. The liquidation of MMAC's assets

One of the primary purposes of both the *CCAA* proceeding and the Chapter 11 proceedings was to facilitate the sale of MMAC and MMAR. This objective was achieved on 23 January 2014 when the courts in both Québec and Maine authorized the sale of MMAR and MMAC to Railroad Acquisition Holdings LLC ("the purchaser") for a total purchase price of US $14,250,000.[66] The sale closed on 15 May 2014 in respect of MMAR's assets and 30 June 2014 in respect of MMAC's assets. The proceeds of the sale were used to pay certain professional fees and employees, and were designated for the eventual distribution to MMAC's and MMAR's secured creditors, the US Federal Railroad Administration and the Government of Québec.

At that point, it appeared that the *CCAA* could no longer serve any proper purpose — all of MMAC's affairs, with the exception of its liabilities, had been fully and finally wound up. In other words, from the moment MMAC's assets were sold and there was no longer any value to extract therefrom, it could be argued that the Court exhausted its jurisdiction to sanction a potential plan of arrangement or compromise. Indeed, under no circumstances could MMAC ever continue as a going concern, restructure and, as evidenced by the eventual plan,

65 *Montréal, Maine & Atlantique Canada Co (Arrangement relatif à)*, 2013 QCCS 4039 (CS Que) at paras 55, 60 and 66.

66 Approval and Vesting Order, dated 23 January 2014, CS 450-11-000167-134; Motion for issuance of (i) an order authorizing the sale of the assets of the Petitioner and of (ii) vesting order, dated 19 January 2014, CS 450-11-000167-134.

even compromise its own liabilities. As stated by at least one author and as argued during the plan sanction hearing, "if there remains nothing to be restructured, the propriety of the *CCAA* proceedings is questionable":[67]

> The *CCAA* in intended to provide for a disciplined, court-supervised process, for a limited period of time, permitting the stakeholders to negotiate and address their interests with the ultimate goal to restructure the business and enable it to continue as a going concern. If there remains nothing to be restructured, the propriety of *CCAA* proceedings is questionable. If the primary goal is liquidation, other insolvency proceedings outside of the *CCAA* may offer a fairer or more efficient solution. If the focus of a *CCAA* proceeding becomes the pursuit of damages for contingent liabilities while certain defendants are shielded or some claimants are positioned in a more advantageous position than others, the purposes of the *CCAA* will be defeated.
>
> The ultimate goal of a *CCAA* proceeding is properly to produce a negotiated plan of arrangement and compromise. If a *CCAA* plan is unworkable, or it cannot address all pending claims, the respective claimants should be allowed to pursue their claims in the appropriate fora. The stay of proceedings and the potential for providing releases are tools that may be employed in furtherance of an amicable resolution that is agreeable to all affected stakeholders. There tools are not intended to be used as a bar to the pursuit of otherwise viable and meritorious claims.[68]

iii. The claims process

On 4 April 2014, the Superior Court of Québec issued a claims procedure order, which established the procedure for the filing of claims in the *CCAA* proceeding and a bar date.[69] The process for review and determination of the claims was only

67 Dimitri Lascaris, Sajjard Nematollahi and Serge Kalloghlian, "The Interaction between Class Actions and Proceedings under the *Companies' Creditors Arrangement Act*; Recent Developments and Questions for the Future", Colloque national sur les recours collectifs - développements récents au Québec, au Canada et aux États-Unis, Service de la Formation Continue Barreau du Québec, (Montréal: Édition Yvon Blais, 2015) at 134.

68 *Ibid.*

69 Claims Procedure Order, dated 4 April 2014, CS 450-11-000167-134.

established through a subsequent order issued almost one year later.[70]

Given the varied nature and scope of the claims, which obviously extended far beyond the trade claims that often make up the majority of unsecured claims, the claims process provided the following categories of claims:

- claims for economic material or other damages resulting from the death of a person;
- claims for economic, material or other damages resulting from bodily injuries suffered by the creditor;
- claim for economic, material or other damages resulting from bodily injuries (not resulting in death) of another person;
- claim for economic, material or other damages suffered by an individual (not a business) not resulting from bodily injuries or death of a person;
- claim for economic, material or other damages suffered by a business not resulting from bodily injuries or death of a person;
- subrogated insurer claims directly related to damages sustained as a result of the derailment;
- contribution or indemnity claim; and
- non-derailments claims.[71]

These categories of claims ultimately became the categories for distribution under the plan of arrangement.

70 Claims Resolution Order, 15 April 2015, CS 450-11-000167-134.

71 MMAC's *Motion for an order approving a process to solicit claims and for the establishment of a claims bar date*, dated 13 December 2013, CS 450-11-000167-134; proof of claim forms used in the MMAC *CCAA* proceeding.

In the context of the claims process, the *CCAA* monitor received approximately 5,000 claims with a value in excess of $1.8 billion.[72] Eventually, the value of the claims filed in the *CCAA* proceeding was reduced to $900 million to account for duplication among the claims filed.[73]

4. The Plan of Arrangement and Compromise

i. The settlement fund

Initially, it appeared that the only funds available for distribution to the victims of the derailment were the $25 million insurance indemnity that had been deposited by MMAC's liability insurer.[74] In *obiter* in a judgment rendered on 17 February 2014 in respect of the joint status conference, Justice Dumas questioned the viability of a plan of arrangement without contributions from third parties.[75] Justice Dumas characterized the chances that a plan of arrangement would be proposed as "slim" if nothing happened in the short term.[76] In this same judgment, Justice Dumas set the table for what would ultimately become the plan of arrangement: "The only practical, economical and legal way to settle the present matter is for third parties to participate in an arrangement that would be submitted to the creditors" [translation].[77]

At first, very few parties believed that there was any reasonable chance of reaching a global settlement of the

72 Eleventh Report of the Monitor on the State of Petitioner's Financial Affairs, dated 27 June 2014, CS 450-11-000167-134.

73 Sixteenth Report of the Monitor on the State of Petitioner's Financial Affairs, dated 13 April 2015, CS 450-11-000167-134.

74 The proceeds of the sale to Railroad Acquisition Holdings were earmarked for payment of certain professional fees, employee wages and secured creditors.

75 *Montréal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co (MMA)) (Arrangement relatif à)*, 2014 QCCS 737 (Que Bktcy).

76 *Ibid* at paras 53 and 56.

77 *Ibid* at para 121.

claims related to the derailment. Recognizing that the only possibility for proposing a viable plan to the creditors lay in the hands of third parties, the insolvency professionals in both Canada and the US began a large scale solicitation process. The insolvency professionals began engaging confidential settlement discussions with third parties, namely those parties that were named defendants in the numerous lawsuits filed in connection with the derailment. Discussions were also held with the major stakeholders, namely, the Province of Québec, the class representatives in the Québec class action, and the wrongful death victims. Since each of these major stakeholders would ultimately hold a veto right in any plan of arrangement, no settlement could be reached without their approval.[78]

The settlement discussions with third parties were reported by MMAC for the first time in February 2014. These discussions intensified following the holding of the joint status conference between the stakeholders in the MMAC and the stakeholders in the Chapter 11 proceedings in Bangor, Maine. Finally, on 19 September 2014, a plan term sheet was filed in support of MMAC's motion for a ninth extension of the stay period.[79] At that time, MMAC indicated that it had received $16,500,000 in commitments from third parties, in addition to the $25,000,000 from its liability insurer.[80]

The plan term sheet set out the structure of the eventual plan of arrangement that would ultimately be proposed to the creditors.[81] The basis for the eventual plan was clear: the plan would be funded by potentially liable third parties in exchange of releases barring any litigation against such third parties arising from the derailment.

78 Each of the major stakeholders potentially controlled at least one of the two *CCAA* statutory majorities for plan approval.

79 Exhibit R-1 filed in support of MMAC'S *Motion for Ninth Order extending the Stay Period*, dated 19 September 2014, CS 450-11-000167-134 [Exhibit R-1, *Ninth Order*].

80 MMAC'S *Motion for Ninth Order extending the Stay Period*, dated 19 September 2014, CS 450-11-000167-134 at para 15.

81 Exhibit R-1, *Ninth Order, supra* note 79.

After further negotiations with third parties in the fall of 2014, MMAC had received firm commitments in an amount totalling $207,800,000.[82] A draft plan was filed by MMAC on 9 January 2015.[83] On 31 March 2015, MMAC filed a plan of compromise and arrangement, the purpose of which was to achieve a global resolution of all claims related to the derailment. On 8 June 2015, MMAC filed an amended plan ("the amended plan"), with a settlement fund totalling approximately $430 million.[84] The settlement fund would ultimately reach the impressive amount of $452 million as a result of the settlements being reached in US dollars.[85]

The amended plan was approved unanimously by the creditors at a meeting held on 9 June 2015.[86] The amended plan was sanctioned by the Superior Court of Québec in July 2015 ("the *CCAA* sanction order").[87]

Pursuant to the amended plan, MMAC reached settlements with 25 distinct entities or groups of affiliated entities. Indeed, all third parties with a connection to the derailment participated in the amended plan, with the exception of Canadian Pacific Railway ("CP").[88]

The *CCAA* sanction order was also recognized by the US Bankruptcy Court sitting in the District of Maine by way of a Chapter 15 proceeding.[89] A plan of liquidation filed in the

82 MMAC's *Motion for an Eleventh Order extending the Stay Period*, dated 9 January 2015, CS 450-11-000167-134 at para 13.

83 Exhibit R-1 filed in support of MMAC's *Motion for an Eleventh Order extending the Stay Period*, dated 9 January 2015, CS 450-11-000167-134.

84 MMAC's Amended Plan of Compromise and Arrangement, dated 8 June 2015, CS 450-11-000167-134 [.

85 MMAC's *Motion for the Approval of Professional Fees*, dated 25 November 2015, CS 450-11-000167-134 at para 78.

86 MMAC's *Motion for the Approval of the Amended Plan of Compromise and Arrangement*, 11 June 2015, CS 450-11-000167-134 at para 22.

87 *MM&A, supra* note 53.

88 MMAC, *Approval of Professional Fees*, *supra* note 85 at paras 42 and 45.

89 Order recognizing and enforcing the plan sanction order of the

Chapter 11 proceedings was also approved by the creditors in the US and sanctioned by the US Bankruptcy Court sitting in the District of Maine.[90] The Chapter 11 plan of liquidation mirrors the features of the amended plan, namely the release and injunction provisions.

ii. The releases and injunctions provided for under the amended plan

The amended plan provides for broadly worded third-party releases and injunctions that prevent all claims of any kind whatsoever and in any jurisdiction against settling parties. Specifically, section 5.1 of the amended plan provides for the execution of (i) very broad releases in favour of the settling parties and (ii) injunctions barring any future claims against the settling parties.[91]

Québec Superior Court, dated 26 August 2015, US Bankruptcy Court, District of Maine, Case No 15-10518; Order supplementing order recognizing and enforcing the plan sanction order of the Québec Superior Court - dated 21 October 2015, US Bankruptcy Court, District of Maine, Case No 15-10518.

90 Order confirming the trustee's revised first amended plan of liquidation dated 15 July 2015 and authorizing and directing certain actions in connection therewith, dated 11 October 2015.

91 The amended plan of compromise and arrangement, dated 8 June 2015, CS 450-11-000167-134 at s 5.1:

> Releases and Injunctions
>
> All affected claims shall be fully, finally, absolutely, unconditionally, completely, irrevocably and forever compromised, remised, released, discharged, cancelled and barred on the plan implementation date as against the released parties.
>
> 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 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

As stipulated in section 5.1 of the amended plan, the releases and injunctions do not extend to "unaffected claims". The amended plan specifically provides that claims against MMAC are deemed to be "unaffected claims".[92] Claims against non-settling parties were also deemed unaffected by the amended plan.[93]

The effects of the amended plan can be summarized as follows:

- in exchange for contributions to the settlement fund, the settling parties received full and final releases from *all litigation* relating to the derailment in Canada and the US;

- the amended plan does not "compromise, release, discharge, cancel, bar or otherwise affect" claims against MMAC, *ie*, claims against MMAC are unaffected by the plan;

- all persons are forever barred from asserting any claims against the settling parties;

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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, (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.

Notwithstanding the foregoing, the plan releases and injunctions as provided in this section 5.1 (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 19 February 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any unaffected claims.

92 *Ibid*, s 3.3.

93 *Ibid*.

- contractual indemnity rights between third parties are extinguished.

iii. CP's contestation of the amended plan

CP, a non-settling defendant, contested the sanctioning of the amended plan by the Court at the sanction hearing, on the basis that the plan unfairly prejudiced non-settling parties. CP's contestation was based on the following:

- the *CCAA* court sitting under the *CCAA* does not have the jurisdiction to sanction a "plan" that does not propose a compromise or arrangement between a *CCAA* debtor and its creditors;

- alternatively, the *CCAA* court does not have jurisdiction under the *CCAA* to sanction a release in favour of a solvent third party that is not "reasonably related to the restructuring" of the *CCAA* debtor;

- alternatively, the *CCAA* court does not have jurisdiction to sanction a "plan" containing releases in favour of third parties not related to the resolution of claims against the insolvent debtor, *ie* claims against the debtor are not contemplated by the plan, and such plan confers no benefit to the debtor;

- the amended plan is unreasonable, unfair and inequitable to non-settling parties, namely that non-settling parties' substantive rights would be stripped by the amended plan. Indeed, the amended plan would extinguish contractual rights between solvent third parties who have nothing to do with the insolvent debtor.[94]

94 Argumentation Plan pursuant to the Objection of Canadian Pacific Railway Company to the Plan of Arrangement, 5 June 2015, SC 450-11-000167-134; certain arguments were also raised separately at the sanction hearing.

At the heart of CP's arguments was the fact that MMAC, the insolvent debtor, was unaffected by the amended plan. Indeed, the *CCAA* was used to settle litigation related to the derailment and to issue injunctions, which were in no way related to the restructuring of MMAC. It was argued that the third-party releases included in the amended plan did not satisfy the required nexus test that had been applied by every Canadian *CCAA* court since the *ABCP* decision.

In CP's view, sanctioning such a plan would have constituted an improper use of the *CCAA* to settle disputes between third parties and MMAC's creditors, which are not "inextricably connected to the restructuring process". In other words, CP argued that the release in favour of the third party must be a *means* to the *end* purpose of a compromise or arrangement between the insolvent *CCAA* debtor and its creditors. The Court was called upon to ask itself the following question: to what plan are the releases contributing? In order to sanction such releases, it was argued that the court would have to answer that the plan would either allow the business activities to continue or its value to be maintained through an asset sale.

With the amended plan, if the releases and injunctions were removed, what would be left? It was argued that the releases must necessarily be a means to an end and not an end in itself.

iv. The plan sanction judgment

In a 53-page ruling dated 13 July 2015, Justice Dumas sanctioned the amended plan ("the plan sanction judgment").[95] Overall, the judgment deals briefly with the arguments raised in CP's contestation. There is little direct analysis dealing with the requirement for a *CCAA* plan of arrangement to provide a release for the insolvent debtor.

A significant portion of the plan sanction judgment focuses on the possibility of using the *CCAA* exclusively to liquidate a company. The appropriateness of using the *CCAA* to liquidate

95 *MM&A, supra* note 53.

a business was not, however, contested. Instead, it had been argued that it was not proper to use a plan to settle disputes between solvent parties, notably when the liquidation of MMAC had already been completed. At paragraphs 21 and 22 of the plan sanction judgment, Justice Dumas dismissed this argument, stating that "it is often the case that the restructuring is completed prior to the approval of the plan by the creditors."

Apart from stating that the amended plan provides for "very broad releases", the plan sanction judgment does not specifically address whether such broad releases are fair and reasonable. On the issue of the releases, the Court found that it has jurisdiction to grant such releases. However, there is little detail on how the releases in question are "reasonably related to the restructuring" of MMAC.

The crux of the plan sanction judgment lays at paragraphs 65 to 70, which reads as follows:

> [65] In short, not only does the undersigned believe that the proposed plan is fair and reasonable, but retaining the arguments presented by CP would disrepute the public's confidence towards the courts.
>
> [66] In effect, for more than two years, the victims of the terrible Lac-Mégantic tragedy have deferred to the judicial process. For two years, all of the actions taken in the present file have been oriented towards the presentation of a plan of arrangement, which has been unanimously voted by the debtor's creditors.
>
> [67] Despite the limited judicial resources available, considerable resources were put to use in order to ensure that the victims of Lac-Mégantic obtain justice.
>
> [68] The attorneys and the citizens of the districts of Mégantic, Saint-François and Bedford were aware of the judicial resources used in the Lac-Mégantic file could not be used by them.
>
> [69] The use of these judicial resources had the effect of delaying other files.
>
> [70] To frustrate the plan of arrangement today, for the sole benefit of a third party against which a class action has been authorized, while such

> third party has been a part of the proceedings since the beginning, would be unfair and unreasonable.[96]

v. The motion for leave to appeal

On 27 July 2015, CP filed a *Motion for leave to appeal* ("the leave motion") from the plan sanction judgment.[97] In the leave motion, the following questions were raised as being central to the appeal:

- To what extent can the *CCAA* be used for the primary purpose of extinguishing the civil liability of solvent persons? The first question raises two subsidiary questions:
  - Can the court approve an arrangement that does not propose a "compromise or arrangement" between the debtor company and its creditors within the meaning of sections 4 and 5 of the *CCAA*?
  - Can the court approve an arrangement that releases third parties from civil and contractual liabilities without that release being necessary or even related to the restructuring of the "debtor company" within the meaning of the *CCAA*?
- To what extent can an arrangement under the *CCAA* affect the contractual rights between two solvent persons, and more specifically the obligation of one of those persons to indemnify the other person?[98]

The following grounds were raised in the leave motion:

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96 *Ibid* at paras 65-70.

97 *Motion for leave to appeal the Judgment of the Superior Court approving the Plan of Compromise and Arrangement*, dated 27 July 2015, CAM 500-09-025480-153.

98 *Ibid* at 58.

- The *CCAA* court does not have jurisdiction to sanction a plan that does not propose a compromise or an arrangement between an insolvent person and its creditors.

- The *CCAA* court does not have jurisdiction to grant third-party releases that are not reasonably connected to the restructuring of the insolvent debtor.

- Releases and injunctions cannot extinguish the contractual rights between solvent third parties that have nothing to do with the debtor.[99]

Subsequent to the filing of the leave motion, discussions took place between the interested parties. These discussions ultimately culminated in the withdrawal of the leave motion prior to it being heard by the Court of Appeal, in exchange for a variation of the plan sanction judgment. MMAC filed a *Motion to vary the Order approving the amended Plan of Compromise and Arrangement*, which was granted by the Justice Dumas.[100] Specifically, a number of judgment reduction provisions were inserted into the plan sanction judgment in order to neutralize the prejudice suffered by non-settling parties as a result of the releases and injunctions contained in the amended plan.[101]

vi. The judgment reduction provisions

In exchange for the withdrawal of the leave motion and CP's contestation in general, MMAC and the trustee in the Chapter 11 proceedings agreed to insert judgment reduction provisions into both the *CCAA* plan sanction judgment and the Chapter 11 plan of liquidation sanction order. The judgment reduction

99 *Ibid* at 57.

100 *Motion to vary the Order approving the amended Plan of Compromise and Arrangement*, dated 6 October 2015, CS 450-11-000167-134; *Order varying the Order approving the amended Plan of Compromise and Arrangement*, 9 October 2015, SC 450-11-000167-134 at paras 101.1 to 101.8.

101 *Ibid.*

provisions minimize the prejudicial effects that the plans may have on non-settling third parties' substantive rights.

Pursuant to these provisions, in the event of a judgment against a non-settling party in a case arising from the derailment, a non-settling party would receive a credit for the greater of:

- the settlement monies received by the plaintiff(s) for the claim; or

- the amount which, but for the third party non-debtor injunctions, a non-settling party would have been entitled to obtain from third parties other than MMAR and MMAC through contribution or indemnification.

The judgment reduction provisions were sanctioned by the Superior Court of Québec on 9 October 2015 in an *Order varying the Order approving the amended Plan of Compromise and Arrangement*.

5. The Takeaway

The MMAC *CCAA* proceeding will surely have an impact on how complex litigation involving multiple parties, proceedings, fora, and jurisdictions are dealt with by insolvency practitioners and the courts exercising their jurisdiction under the *CCAA*.

A direct consequence of the MMAC *CCAA* proceeding is that the *CCAA* may become a one-stop shop, offering all the tools to resolve complex litigation efficiently in a single forum. This "newfangled" characterization of the *CCAA* proceeding may be particularly true considering that the insolvency of the *CCAA* debtor is seemingly irrelevant and has taken a back-seat to maximizing recovery for creditors. Indeed, it now appears that a plan of arrangement or compromise need not actually procure any benefit to the insolvent debtor.

It is clear that the flexible nature of the *CCAA* and the broad discretion of the *CCAA* courts offer many advantages that are simply unavailable in other fora.

IV. BENEFITS OF CHOOSING THE *CCAA* AS A ONE-STOP SHOP

The recovery achieved by insolvency professionals for creditors in the MMAC *CCAA* proceeding is unprecedented. This result almost certainly could not have been achieved outside of an insolvency context. Indeed, the flexibility of the *CCAA* and the tools available are simply not available in any other forum. These tools include: (i) broad releases; (ii) injunctions and bar orders; (iii) stay of proceedings in favour of third parties; (iv) claims process with a bar date; and, (v) no opt-outs, *ie*, the ability to impose a settlement of all claims if the required voting threshold is attained and to impose a settlement on parties that would not be included in the defined class of plaintiffs.

1. Broad Releases in Favour of Third Parties

As evidenced by the MMAC plan of arrangement, as well as other arrangements across Canada, the scope of releases in favour of third parties can be extremely broad. In the MMAC matter, settling third parties have been released from all claims of any kind whatsoever, in any jurisdiction, which are related to a specific event, the derailment. This release was also granted and sanctioned in the context of the US Chapter 11 proceedings and the Chapter 15 proceedings.

Concretely, the release contained in the *CCAA* plan simultaneously released a settling party from any potential liability stemming from (i) the Québec class action; (ii) all litigation in the US related to the derailment; and, (iii) any cost recovery claim by the Québec government in respect to the clean-up of the derailment. Therefore, instead of having to settle multiple proceedings in multiple jurisdictions, the *CCAA*

plan allowed for the matter to be settled in a single forum. As discussed above, the scope of the release included in the amended plan is so broad that it even extends to contractual indemnities between solvent third parties. To achieve the same result through traditional litigation avenues, a settling party would be required to reach settlements in various fora with multiple parties.

The extensive releases available in the *CCAA* are simply not available in other fora. For example, the release granted in the context of a class action would only include a release from the members of the class. Therefore, any "opt-outs" from the settlement or non-members of the class could potentially assert claims against the settling party following a settlement reached in the class action context.

The broad, singular and all-encompassing release available in the context of the *CCAA* proceeding will surely be attractive to many insolvency and dispute resolution professionals seeking to achieve a global resolution to complex litigation.

2. Injunction/Bar Orders

The Lac-Mégantic *CCAA* proceeding appears, at least until the question is put before an appellate court, to quell any concern that a bar order cannot be granted in Québec. Bar orders have now become part of regular practice in the *CCAA* proceedings that involve the settlement of litigation. Indeed, in addition to the broad releases, the amended plan also features injunctions or bar orders that prohibit any present and future claims relating in any way whatsoever from being made against third parties benefitting from a release under the amended plan. These injunctions or bar orders are indispensable to the settling parties as they immediately eliminate the threat of any future litigation stemming from claims for which they received a release. In the MMAC matter, all future litigation related in any way whatsoever to the derailment was prohibited by the injunctions contained in the amended plan.

There are two major advantages to the injunctions available in the *CCAA*, when compared to those available in the context of a class action: (i) the scope of the injunctions and (ii) the availability of the injunctions in Québec.

The concept of a bar order stems from the type of order typically issued in the context of the settlement of a multi-party class action in which a partial settlement is reached between the plaintiff and one or several co-defendants.[102] The purpose of the bar order for the settling party is to ensure that it will not be sued again in the context of the same class action.[103] The bar order is usually a necessary consideration for settling party, otherwise there would be no interest in settling.[104]

However, the current state of the law in Québec in civil proceedings is that bar orders, at least to the same extent that they are issued in the common law provinces,[105] are not permitted.[106] The legal basis for this difference in Québec is that the Québec *Code of Civil Procedure*[107] specifically prohibits the granting of an injunction (or bar order) to restrain legal proceedings:

> 513. An injunction cannot be granted to restrain judicial proceedings or the exercise of an office within a legal person established in the public interest or for a private interest, except in the cases described in article 329 of the *Civil Code*.

The Québec cases[108] that stand for the proposition that bar orders are not permitted seem to indicate, however, that bar orders in Québec may not always be needed given the provisions contained in the *Civil Code of Québec* that deal

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102 *Roy c Cadbury Adams Inc*, 2010 QCCS 4454 (CS Que) at para 46 [*Cadbury*].
103 *Ibid* at para 47.
104 *Ibid*.
105 *Osmun v Cadbury Adams Canada Inc*, 2010 ONCA 841 (Ont CA); *Main v The Hershey Company*, 2011 BCCA 21 (BCCA).
106 *Cadbury, supra* note 102; *Johnson c Bayer Inc*, 2008 QCCS 4957 (CS Que).
107 *Code of Civil Procedure*, CQLR, c C-25.01.
108 *Supra* note 108.

with joint and several liability, which have been interpreted as precluding plaintiffs from claiming from the non-settling defendants damages that are attributable to the settling defendants' conduct.

The Court in the *Cadbury* matter actually accepted a *quasi* bar order in its approval of the partial settlement, which included the following conclusion: "DECLARES that any action in warranty or impleaded action, for contribution or indemnity from the Defendant Cadbury or Cadbury Releases, or relating to the Released Claims, is inadmissible and void under this class action" [translation].[109]

These conclusions do not *per se* prohibit any action against the settling defendants, but instead, provide for the outcome of any future action that may be instituted against them in the context of the class action, *ie*, dismissal of such an action. The rationale is that these conclusions simply are declaratory of the existing legal rights of the parties as provided for under Québec law.

In light of the injunctions contained in the amended plan, which were subsequently sanctioned in the plan sanction judgment, the "bar order" appears to be permissible in the context of *CCAA* proceedings in Québec.

3. Stay of Proceedings Can Be Extended to Third Parties

A key feature of the Lac-Mégantic *CCAA* proceeding was the extension of the stay of proceedings to MMAC's liability insurer. The stay was granted in order to avoid judicial chaos that could result from claimants potentially asserting individual claims against the liability insurer. A stay of this nature is simply not available outside of the insolvency context.

109 *Cadbury, supra* note 102 at para 36: "*DÉCLARE que tout recours en garantie ou autre mise en cause pour obtenir une contribution ou une indemnité de l'intimée Cadbury ou des parties Cadbury Quittancées/ Cadbury Releasees, ou se rapportant aux Réclamations quittancées/ Released Claims, est irrecevable et non avenu dans le cadre du présent recours collectif*."

Relying on the Lac-Mégantic *CCAA* precedent, the Court in the Castor Holdings *CCAA* proceeding also extended the stay of proceedings to third party liability insurers.[110]

4. Claims Process with a Bar Date

Another considerable advantage to resolving a complex dispute through the *CCAA* is the implementation of a claims process with a bar date. Indeed, the claims process is a powerful tool that allows a debtor to put in place an efficient mechanism to ascertain the nature, extent and scope of the claims against it in a timely manner.

A "drop-dead" date, otherwise known as a bar date, forces creditors to come forward immediately and assert their claims. The *CCAA* therefore allows for the drastic shortening of prescribed limitation or prescription periods under various provincial laws. Such limitation or prescription periods may range between one and ten years.

5. No Opt-Outs

Finally, maybe the most significant advantage of the *CCAA* is that all creditors must participate. In other words, there are no "opt-outs" in the *CCAA*. In the Sino-Forest case, Justice Morawetz of the Superior Court of Justice of Ontario confirmed that no opt-outs are available under the *CCAA*:

> [36] The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.[111]

A settlement or global resolution can therefore be forced on all creditors as long as the statutory majority of votes are

110 *Re 4519922 Canada Inc*, 2015 ONSC 124 (Ont SCJ [Commercial List]) at paras 71-72 [*4519922 Canada*].

111 *Eastern Forest, supra* note 10 at para 36.

obtained. A creditor who votes "no" in the context of a plan that is approved by the statutory majority of creditors remains bound by the plan.

The "no opt-out" in the *CCAA* contrasts greatly with the opt-out or "opt-in" provisions in the context of class action proceedings in Canada.[112] Indeed, claimants in the context of class actions are never forced to remain part of a class and can elect to be excluded from a settlement.

The new paradigm established by the Lac-Mégantic *CCAA* matter is already reverberating throughout the insolvency world. Indeed, the Lac-Mégantic settlement model was used by insolvency practitioners to bring a swift end to the litigation relating to Castor Holdings Limited ("Castor") that embroiled Coopers & Lybrand Chartered Accountants ("CLCA") and individual partners for over 20 years ("the Castor litigation"). In the CLCA *CCAA* matter, the ability to "force" a settlement upon dissenting creditors was front and centre. Ultimately, like in the Lac-Mégantic *CCAA* matter, the dissenting voices of individual creditors were simply not enough to overcome the collective economic and social benefits resulting from a global resolution of over 20 years' worth of litigation.

V. THE NEW PARADIGM — THE END TO THE CASTOR HOLDINGS SAGA

1. Overview of the Castor Litigation

The Castor litigation dated back to 1993, when 96 plaintiffs commenced negligence actions against CLCA and 311 individual partners, claiming approximately CAD $1 billion in damages.[113] The claims stemmed from financial statements prepared and audited by CLCA, as well as certain share

112 See for example: *Code of Civil Procedure* (Québec), C-25.01, article 580; *Class Proceedings Act* (British Columbia), RSBC 1996, c 50, s 16(1)(2); *Class Proceedings Act* (Ontario), 1992, SO 1992, c 6, s 6; *Class Proceedings Act* (Alberta), SA 2003, C 16.5, s 17 and s 17.1.

113 *4519922 Canada, supra* note 109 at para 10.

valuation letters and certificates for "legal for life" opinions.[114] The claims were for losses relating to investments in or loans made to Castor in the period 1988 to 1991.[115] A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

As a result of the commonality of the negligence issues raised in the various actions, it was decided that a single test case, the action brought by Peter Widdrington ("the Widdrington action"), would proceed to trial and all other actions in the Castor litigation would be stayed pending the outcome of the trial.[116] The determination of the issues of negligence and applicable law in the Widdrington action was to be binding on all other cases.[117]

In April 2011, Madam Justice St-Pierre of the Superior Court of Québec ruled 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.[118] Madam Justice St-Pierre found that the overwhelmingly majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.[119]

The Québec Court of Appeal upheld the Superior Court ruling in large part, except in respect of the nature of CLCA's individual partners' potential liability. The Québec Court of Appeal held that under Québec law, the individual partners were severally liable.[120]

The Widdrington action resulted in a judgment in the amount of $4,978,897.51, inclusive of interest, a cost award in

114 *Ibid* at para 12.
115 *Ibid.*
116 *Ibid.*
117 *Ibid.*
118 *Ibid* at para 13.
119 *Ibid.*
120 *Ibid.*

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.[121]

Following the ruling on the Widdrington action, 26 separate actions representing 40 claims remained outstanding, which were claiming more than $1.5 billion in damages.[122] The Castor litigation also gave rise to the following proceedings:[123]

- a challenge by Castor's trustee in bankruptcy to the transfer of CLCA's business to PwC;
- action brought against 51 insurers of CLCA; and
- eight Paulian actions brought in Québec, challenging transactions made by certain partners with related parties.

The fees incurred in defence of the Widdrington action exceeded CAD $70 million and the total spent by all parties amounted to at least CAD $150 million.[124]

2. The Mediation

As a result of the ruling by Québec Court of Appeal, the potential liability of partners of CLCA became a real possibility.[125] Between September and October 2014, various parties involved in the Castor litigation attended mediation sessions.[126] While a settlement was not reached during the mediation, the negotiations with certain parties were fruitful.[127] The table was therefore set for what would

121 *Ibid* at para 16.
122 *Ibid* at para 17.
123 *Ibid* at para 18.
124 *Ibid* at para 20.
125 *Ibid* at para 50.
126 *Ibid* at para 51.
127 *Ibid* at para 52.

become the *CCAA* proceeding aimed at achieving a global resolution of the Castor litigation.

3. The *CCAA* Proceedings

On 7 January 2015, Justice Newbould of the Superior Court of Justice of Ontario, Commercial List, granted 4519922 Canada Inc's ("451") application for an initial order under the *CCAA*.[128] CLCA is a partnership governed by the *Partnerships Act* (Ontario) and 451 is one of two partners of CLCA.[129] Pursuant to the initial order, a stay of the Castor litigation was ordered, which extended to 451's partner, CLCA and to CLCA's insurers.[130] The requested relief under the *CCAA* was supported by Canadian and German banks, which were plaintiffs in the Québec proceedings, by the Widdrington estate, by the insurers of CLCA, and by 22 former CLCA partners.

There was little doubt in respect of the exclusive purpose of the *CCAA* proceeding: a global resolution of all the outstanding Castor litigation. Indeed, a plan of arrangement term sheet filed in support of the application for an initial order stipulated that a settlement fund would be funded by potentially liable third parties and, in exchange for their contributions, such third parties would receive a court-approved full and final release from and bar order against any and all claims related to the Castor litigation. It was also clear from the outset that this "pre-packaged" *CCAA* proceeding had the required statutory majorities of creditor approval.

As in the Lac-Mégantic case, the intended use of the *CCAA* plan of arrangement was as a tool to achieve the global

128 It should be noted that the judgment granting the initial order predates the plan sanction judgment in the Lac-Mégantic *CCAA* proceeding.

129 *4519922 Canada, supra* note 109 at para 5.

130 *4519922 Canada, supra* note 109 at para 71. Justice Newbould relied on precedent established in the Lac-Mégantic *CCAA* matter.

resolution of the complex litigation involving multiple parties in multiple fora.[131]

Chrysler Canada ("Chrysler"), a significant creditor of CLCA, opposed the requested relief and was provided with an opportunity to make submissions in support of its contestation. Chrysler argued that 451 had not established that it was insolvent. Chrysler also argued that even if the technical requirements of the *CCAA* were met, the Court should have refused the application since neither 451 nor CLCA were carrying on any business and there was no need for a *CCAA* proceeding to effect a sale of any assets as a going concern.[132] As was argued by CP in the Lac-Mégantic case, Chrysler argued that the *CCAA* was being used for an improper purpose as there would be no restructuring of a business. In rejecting the arguments raised by Chrysler, Justice Newbould stated the following:

> [40] Cases under the *CCAA* have progressed since the earlier cases such as *Hongkong Bank v Chef Ready Foods* (1990), 1990 CanLII 529 (BC CA), 4 CBR (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 (CanLII) 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), 2006 CanLII 1020 (ON SC), 19 CBR (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 (CanLII) arising out of the Lac-Mégantic 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.*

131 One significant difference between the Lac-Mégantic *CCAA* plan is that the debtor 451 did, in fact, benefit from a release in the context of the plan.

132 *4519922 Canada, supra* note 109 at para 39.

(Re) 2011 ONSC 7701 (CanLII), 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.

[...]

[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 CBR (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*.

[...]

[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 Québec 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.[133]

Ultimately, the plan of arrangement and compromise was approved by the creditors and sanctioned by Justice Newbould, thereby bringing an end to the Castor Holdings saga.[134]

VI. CONCLUSION

The most important takeaway from the present article is that it is now abundantly clear that new paradigm is available in the use of *CCAA* proceedings, which has allowed for some proceedings that have little connection with the insolvency of the *CCAA* debtor. Instead, the *CCAA* proceeding is being used as a forum and the plan of arrangement or compromise as a tool to achieve global resolutions of litigation involving multiple parties, in multiple fora and across various jurisdictions.

The *CCAA* proceeding may become the preferred forum because it offers advantages and protections that do not exist or are illegal in other, more traditional fora. Such advantages are available for both plaintiff/creditors and potentially liable third-party defendants. Indeed, as long as one group of creditors can garner enough support to attain the statutory majorities, it can "force" a settlement on those creditors that are opposed to such a settlement. In other words, a creditor cannot opt-out of the settlement in the *CCAA* forum. As explained hereinabove, defendants notably benefit from the comprehensive releases and all-encompassing bar orders.

Sitting at the cross-roads between the interests of individual stakeholders and the collective interests of a majority of

133 *Ibid* at paras 40, 41, 54, 55, 66, and 67.
134 *Re 4519922 Canada Inc, supra* note 8.

stakeholders, courts sitting under the *CCAA* have almost universally favoured the interests of the latter group. Courts are certainly cognizant that achieving a similar global resolution outside of the *CCAA* proceeding is simply not possible. Until there is another forum or tool available that could deliver similar, immediate and all-encompassing collective, economic and social advantages to the majority of stakeholders, without the consent of all stakeholders involved, it is likely that courts across the country will continue to sanction *CCAA* plans, which bring an immediate global resolution to complex multi-party litigation.

In the Supreme Court of Canada decision in *Century Services*, Canada's highest Court stated that the "the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt".[135] In the pursuit of the same efficiency and order praised by the Supreme Court of Canada, it now appears possible to use the *CCAA* single proceeding model to resolve complex multi-jurisdictional litigation and to avoid this potential chaos and inefficiency even if it requires ignoring

135 *Century Services*, *supra* note 10 at para 22:

> [22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in Bankruptcy and Insolvency Law: "They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors." The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

the primary purpose of the *CCAA*. In other words, the word "insolvency" could be removed from the above Supreme Court citation to instead read "the single proceeding model avoids the inefficiency and chaos that would attend... if each creditor initiated proceedings to recover its debt".

Without any intervention from either the courts or Parliament, it would not be surprising to see *CCAA* proceedings continue to replace the traditional methods of settlements of major class actions involving multiple defendants. The tools available and the discretion of the courts in the traditional fora simply cannot compete with those available under the *CCAA*. It appears that the only downside to proceeding by way of the *CCAA* is the additional delays and costs that may be involved. However, such an investment in time and costs will likely be worth it given the broad protection a settling defendant will receive from a settlement reached in the *CCAA* context.

Given the current state of the law, in the context of significant or "bet the farm" litigation that involves at least one insolvent party, the new *CCAA* resolution paradigm will most likely be the low-hanging fruit on the insolvency practitioner's decision tree.[136] The creativity of insolvency professionals in recent *CCAA* proceedings and the overwhelmingly approval of such creativity by *CCAA* courts

136 The authors of this article are currently involved in the settlement of a significant class action in Québec in which the pre-packaged *CCAA* settlement method is being used. Indeed, on 1 December 2016, Justice Jean-François Buffoni issued (i) an initial order under the *CCAA*, (ii) an order approving the filing of a plan of arrangement, and (iii) a representation order in *In the Matter of the Plan of Compromise or Arrangement of Mount Real Corporation et al*, SC 500-11-0517410169. The sole purpose of the *CCAA* proceeding in this matter was to effect a settlement of all potential claims against potentially liable third parties stemming from a Ponzi scheme perpetrated by the *CCAA* debtors, including claims in the class action instituted in the Superior Court of Québec, file no 500-06-000453-080.

across Canada indicate that the use of the *CCAA* has already and will likely continue to extend "beyond infinity".

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-021557-111
(760-11-004868-101)

DATE : LE 11 OCTOBRE 2011

CORAM : LES HONORABLES FRANCE THIBAULT, J.C.A.
FRANÇOIS DOYON, J.C.A.
LORNE GIROUX, J.C.A.

HÉLÈNE LÉGER
APPELANTE – Requérante
c.

ANNIE OUELLET
INTIMÉE – Débitrice-faillie

et
RAYMOND CHABOT INC.
MISE EN CAUSE – Mise en cause

ARRÊT

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[1] L'appelante se pourvoit contre un jugement rendu le 18 mars 2011 par la Cour supérieure du district de Beauharnois (l'honorable Catherine Mandeville), qui a rejeté sa requête fondée sur l'article 69.4 de la *Loi sur la faillite et l'insolvabilité*[1] par laquelle elle cherchait à être autorisée à continuer une action en inopposabilité et en dommages contre l'intimée.

[2] Pour les motifs de la juge Thibault, auxquels souscrivent les juges Doyon et Giroux, **LA COUR** :

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[1] L.R.C. (1985), ch. B-3.

[3] **ACCUEILLE** l'appel, avec dépens;

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

[5] **ACCUEILLE** la requête de l'appelante fondée sur l'article 69.4 *LFI*, avec dépens;

[6] **AUTORISE** l'appelante à continuer son action dans le dossier de la Cour du Québec portant le numéro 760-22-005897-080.

FRANCE THIBAULT, J.C.A.

FRANÇOIS DOYON, J.C.A.

LORNE GIROUX, J.C.A.

M^e^ Sébastien Matte
Dufour Mottet avocats
Pour l'appelante

M^e^ Martin Couillard
Perras Couillard Avocats
Pour l'intimée

Date d'audience : 22 septembre 2011

MOTIFS DE LA JUGE THIBAULT

[7] L'appelante se pourvoit contre un jugement rendu le 18 mars 2011 par la Cour supérieure du district de Beauharnois (l'honorable Catherine Mandeville), qui a rejeté sa requête fondée sur l'article 69.4 de la *Loi sur la faillite et l'insolvabilité*[1] par laquelle elle cherchait à être autorisée à continuer une action en inopposabilité et en dommages contre l'intimée.

1- Les faits

[8] Le 10 avril 2002, à la suite du décès de sa sœur, l'appelante reçoit 30 000 $ représentant le produit d'une assurance-vie. Le 13 mai 2002, elle prête cette somme à M. Bryan Robson, qui avait été le conjoint de sa sœur. Elle lui remet un chèque certifié dont il est le bénéficiaire. Le même jour, M. Robson endosse le chèque au bénéfice de l'intimée avec qui il entretient une relation intime[2].

[9] Le 14 mars 2003, l'appelante institue une action en remboursement de prêt contre M. Robson et l'intimée. Elle allègue qu'elle a prêté 30 000 $ à M. Robson en lui remettant un chèque, que le même jour M. Robson a endossé le chèque en faveur de l'intimée, que cette dernière a agi comme prête-nom pour M. Robson en encaissant le chèque, que ce dernier se sert de ce moyen pour se soustraire à ses obligations envers ses créanciers et que M. Robson et l'intimée refusent de lui remettre la somme réclamée :

> 3. le ou vers le 13 mai 2002, la demanderesse prêtait cette somme de 30 000 $ au défendeur, tel qu'il appert d'une copie de chèque certifié émis au nom du défendeur en date du 13 mai 2002, émis au défendeur, le tout tel qu'il appert d'une copie du chèque certifié communiquée au soutien de la présente requête et remise comme **pièce P-1**;
>
> 4. Le même jour, le défendeur endossait ledit chèque, pièce P-1, à sa nouvelle conjointe, la défenderesse Annie Ouellet, tel qu'il appert d'une copie de l'endos du chèque, communiquée au soutien de la présente requête et remise comme pièce **P-2**;
>
> 5. La défenderesse n'est que le prête-nom du défendeur, lequel se sert d'elle pour se soustraire à ses obligations envers ses créanciers;

---

1 L.R.C. (1985), ch. B-3.

2 M. Robson affirme que l'intimée est sa conjointe, mais celle-ci déclare plutôt qu'il est l'un de ses amants.

> 6. Bien que dûment mis en demeure par lettre des procureurs soussignés, les défendeurs refusent et/ou négligent de rembourser la somme réclamée, tel qu'il appert d'une copie de la mise en demeure datée du 4 février 2003 et de sa preuve de livraison, communiquées au soutien de la présente requête et remise comme **pièce P-3, en liasse**;

[10] Le 10 juin 2003, un juge de la Cour du Québec accueille une requête en irrecevabilité présentée par l'intimée dans laquelle cette dernière invoque qu'elle n'a jamais contracté avec l'appelante et qu'il n'y a aucun lien de droit entre elles. Le juge lui donne raison et conclut qu'il y a « absence de lien juridique manifeste » entre elle et l'appelante. Il rejette l'action en ce qui concerne l'intimée[3].

[11] Le 21 mars 2005, le juge Claude Montpetit accueille l'action contre M. Robson et le condamne à rembourser le prêt de 30 000 $ avec les intérêts et l'indemnité additionnelle. Il critique sévèrement la crédibilité de M. Robson qui a nié avoir contracté un prêt auprès de l'appelante pour plutôt prétendre que le chèque remis par cette dernière constituait le remboursement d'un prêt qu'il aurait lui-même fait à cette dernière :

> [23] Quant au défendeur, sa crédibilité est apparue douteuse au Tribunal. S'il avait réellement prêté 30 000,00 $ à la défenderesse [sic] au mois d'octobre 2001, pourquoi ne pas avoir exigé le remboursement immédiat de cette dette en mars 2002 lors de la réception du chèque d'assurance?
>
> [24] De plus, le défendeur, qui reconnaît avoir un casier judiciaire chargé (contrebande de cigarettes, possession de stupéfiants), témoigne qu'il disposait de fortes sommes « d'argent caché » au moment où il aurait fait un prêt à la demanderesse en 2001.
>
> [25] Ses hésitations, sa mémoire sélective, son comportement devant le Tribunal et ses réticences à parler de l'utilisation du 30 000,00 $ font en sorte que le Tribunal ne croit pas son témoignage. Dans l'évaluation de sa crédibilité, le Tribunal tient à souligner l'attitude belliqueuse et de mauvaise foi du défendeur qui a admis avoir entrepris des procédures contre la demanderesse à la Régie du logement en réclamation de loyer. Ces procédures ont été entreprises de l'aveu du défendeur, afin de répliquer aux procédures intentées par la demanderesse auprès de la Commission des Normes du Travail et aux présentes procédures. Le défendeur savait que la demanderesse ne lui devait aucun loyer mais a quand même entrepris cette poursuite devant la Régie du logement à l'encontre des règles de bonne foi édictées par les articles 6 et 7 du Code civil du Québec pour ensuite se désister.[4]

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3 *Léger c. Ouellet*, C.Q. Beauharnois, nº 760-22-003114-033, 10 juin 2003, j. Massol.

4 *Léger c. Robson*, C.Q. Beauharnois, nº 760-22-003114-033, 21 mars 2005, j. Montpetit, paragr. 23 à 25.

[12] Le 18 août 2005, l'appelante assigne M. Robson à comparaître le 26 août 2005 pour être interrogé après jugement sur tous les biens qu'il possède ainsi que sur ses sources de revenu, conformément à l'article 543 *C.p.c.* Celui-ci fait défaut de comparaître. Le 9 mai 2006, il est finalement interrogé. Durant l'interrogatoire, on apprend qu'il n'a aucun bien et qu'il vit de prestations provenant de la Régie des rentes du Québec.

[13] L'appelante se tourne alors vers l'intimée pour l'interroger au même effet. Le 13 juin 2006, la juge Marie-Andrée Villeneuve rejette une requête pour interroger l'intimée après jugement[5]. Ce jugement est infirmé par un arrêt de la Cour, rendu le 28 novembre 2007, qui permet à l'appelante d'interroger l'intimée sur les revenus et l'actif de M. Robson[6]. L'interrogatoire après jugement de l'intimée se tient le 1er février 2008. Cette dernière affirme qu'elle n'a jamais habité avec M. Robson, qu'il est l'un de ses amants et qu'elle ne connaît pas son actif ni ses revenus. Elle confirme que M. Robson lui a donné la somme de 30 000 $ en endossant le chèque fait par l'appelante.

[14] À la suite de l'interrogatoire, l'appelante intente, le 31 mars 2008, une action en inopposabilité et en dommages contre l'intimée. M. Robson est mis en cause. L'appelante cherche à rendre inopposable à son égard la donation de 30 000 $ faite par M. Robson à l'intimée et dont elle allègue le caractère frauduleux. Plus particulièrement, l'appelante expose que l'intimée savait, en acceptant le don, qu'elle renforçait l'état d'insolvabilité de M. Robson, d'une part, et que cette démarche s'inscrivait dans un *modus operandi* bien établi qui visait à soustraire les biens de M. Robson d'une éventuelle saisie de ses créanciers. L'appelante invoque que M. Robson n'est pas propriétaire d'une automobile, ni d'une motoneige, mais qu'il utilise une automobile et une motoneige de l'intimée qui en possède plusieurs, que l'intimée offre à M. Robson des voyages au Mexique, etc. Les conclusions de l'action sont énoncées de la façon suivante :

> **CONSTATER** le caractère frauduleux de la donation de 30 000 $ intervenue entre la défenderesse et le mis en cause le ou vers le 13 mai 2002;
>
> **DÉCLARER** inopposable à l'égard de la demanderesse la donation de 30 000 $ intervenue entre la défenderesse et le mis en cause le ou vers le 13 mai 2002;
>
> **CONDAMNER** la défenderesse ANNIE OUELLET, à payer à la demanderesse HÉLÈNE LÉGER, la somme de 30 000 $, avec intérêts au taux légal de même que l'indemnité additionnelle prévue à l'article 1619 du C.c.Q. à compter du 4 février 2003;

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5 *Léger c. Robson*, C.Q. Beauharnois, nº 760-22-003114-033, 13 juin 2006, j. Villeneuve.

6 *Léger c. Robson*, C.A. Montréal, nº 500-09-016874-067, 28 novembre 2008, jj. Gendreau, Rayle et Côté.

> **SUBSIDIAIREMENT, CONDAMNER** la défenderesse ANNIE OUELLET à payer à la demanderesse HÉLÈNE LÉGER la somme de 36 331,25 $ à titre de dommages avec intérêts au taux légal de même que l'indemnité additionnelle prévue à l'article 1619 du C.c.Q. à compter du 4 février 2003;
>
> **LE TOUT** avec dépens.

[15] Alors que la cause devait être entendue le 24 septembre 2009, l'intimée fait cession de ses biens quelques jours avant, le 17 septembre 2009. Le même jour, la mise en cause est nommée syndic de l'actif de l'intimée. Dans ce contexte, l'appelante dépose une requête pour être autorisée à continuer les procédures selon l'article 69.4 de la *Loi sur la faillite et l'insolvabilité* (ci-après *LFI*).

[16] Le 18 mars 2011, la juge de première instance rejette la requête de l'appelante.

2- Le jugement de première instance

[17] Le jugement de première instance a été rendu oralement. Il a été consigné au procès-verbal d'audience :

> **CONSIDÉRANT** que selon l'article 69.4 de la Loi sur la faillite, bien que la partie n'ait pas à prouver prima facie que son recours pourrait être accueilli ni qu'elle serait en mesure d'exécuter un jugement en sa faveur;
>
> **CONSIDÉRANT** qu'elle doit cependant démontrer que l'action qu'elle compte voir se poursuivre appartient à une des catégories d'actions pour lesquelles les tribunaux ont généralement accordé la permission de poursuivre;
>
> **CONSIDÉRANT** que le recours en opposabilité ne répond pas au type de cause visée par l'article 178 de la Loi sur la faillite;
>
> **LE TRIBUNAL :**
>
> **REJETTE** la demande de continuation des procédures, avec dépens.

3- Les questions en litige

[18] Dans son mémoire d'appel, l'appelante propose d'étudier les deux questions suivantes :

1. La poursuite de l'action intentée par l'appelante aurait-elle dû être autorisée ?

2. La créance de l'appelante est-elle visée par l'article 178 de la *LFI* ?

4- L'analyse

La continuation des procédures

[19] Selon l'article 69.3(1) *LFI*, le créancier d'une personne qui fait cession de ses biens ne peut continuer aucune procédure en vue du recouvrement de sa créance jusqu'à la libération du syndic. Dans certaines circonstances, un créancier peut toutefois être autorisé à poursuivre son recours contre un failli :

> **69.4** Tout créancier touché par l'application des articles 69 à 69.31 ou toute personne touchée par celle de l'article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu'il estime indiquées, donner suite à la demande s'il est convaincu que la continuation d'application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu'il serait, pour d'autres motifs, équitable de rendre pareille décision.
>
> [Je souligne]

[20] Les principes qui gouvernent l'interprétation et l'application des articles 69.3 et 69.4 *LFI* sont connus. D'abord, l'article 69.3 *LFI* impose une suspension des procédures judiciaires contre un débiteur à compter de la date de sa faillite, et cela, sans l'intervention du tribunal. La suspension des procédures s'inscrit dans l'un des objectifs poursuivis par la *LFI,* celui qui préconise une distribution ordonnée et équitable des biens du débiteur. Dans cette optique, la suspension des procédures vise à empêcher qu'un créancier bénéficie d'un avantage indu par rapport aux autres créanciers.

[21] Selon les termes de l'article 69.4 *LFI*, le tribunal peut autoriser un créancier à poursuivre ses procédures dans deux situations : lorsqu'il est convaincu que l'application de la suspension causera vraisemblablement un préjudice au créancier ou lorsque, pour d'autres raisons, cela est équitable. La jurisprudence enseigne que la décision de permettre ou non la poursuite des procédures est de nature discrétionnaire. Cette discrétion doit être exercée de façon judiciaire c'est-à-dire qu'elle doit reposer sur des motifs d'ordre juridique.

[22] La jurisprudence reconnaît que, lorsque l'action vise à obtenir une condamnation dont le failli ne sera pas libéré et donc qui survivra à la faillite, la poursuite des procédures est autorisée si le créancier démontre que les allégations de sa procédure visent l'un des cas prévus à l'article 178 *LFI* et qu'elle présente des chances raisonnables de succès[7].

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[7] *MG Electric Ltd. v. (CSE) Control Systems Inc.* (2004), 2004 CarswellMan 24, (*sub nom. Evancion Estate (Bankrupt*), *Re*) 185 Man. R. (2d) 310, 37 C.L.R. (3d) 126, 4 C.B.R. (5th) 50, 2004 MBQB 145 (Man. Q.B.), affirmed (2004), 2004 CarswellMan 487, 9 C.B.R. (5th) 254, 2004 MBCA 178 (Man. C.A.).

[23] Dans le présent dossier, l'appelante cherche à obtenir l'autorisation de poursuivre ses procédures contre l'intimée parce qu'il s'agit d'une situation visée à l'article 178 *LFI*. Elle allègue que sa créance peut survivre à la libération de cette dernière conformément à l'article 178 *LFI.* Cet article prévoit les catégories de créances à l'égard desquelles une ordonnance de libération n'a pas d'effet libératoire.

[24] Dans sa *Requête amendée afin d'être autorisée à continuer les procédures*, l'appelante invoque que l'intimée, par sa conduite frauduleuse, s'est approprié 30 000 $ qu'elle refuse de lui rembourser et que sa créance survivra à la faillite puisqu'elle satisfait les conditions de l'article 178 *LFI.* La juge de première instance aurait commis une erreur en refusant d'autoriser l'appelante à continuer une action. Cette situation n'était pas inéquitable pour l'ensemble des créanciers, vu l'absence de libération d'un débiteur en pareille situation. À l'inverse, la décision de la juge de refuser à un créancier l'autorisation sollicitée était susceptible de lui causer un préjudice puisque, pour faire échec à la libération d'un failli, ce dernier doit établir l'existence de sa créance et aussi que celle-ci satisfait aux exigences de l'article 178 *LFI*.

[25] Examinons maintenant si la dette de l'intimée est visée par l'article 178 *LFI*.

L'application de l'article 178 *LFI*

[26] La juge de première instance déclare que l'action en inopposabilité « ne répond pas au type de cause visée par l'article 178 de la *Loi sur la faillite* ».

[27] L'appelante soutient que la juge a commis une erreur en lui refusant la permission de continuer son action contre l'intimée, car son recours vise à récupérer une somme d'argent que cette dernière s'est appropriée en s'associant à un dol. Selon elle, le recours entrepris contre l'intimée recherche le recouvrement d'une créance qui satisfait les conditions de l'article 178 *LFI* et dont cette dernière ne sera pas libérée par l'ordonnance de libération.

[28] Pour l'intimée, le jugement de première instance est bien fondé. Le prêt de 30 000 $ a été obtenu sans aucune présentation erronée et frauduleuse de faits que ce soit de la part de M. Robson ou de la sienne. Selon elle, la créance de l'appelante n'en est pas une qui est visée par l'article 178 *LFI* et la juge a eu raison de ne pas permettre la poursuite du recours de l'appelante.

[29] L'article 178 *LFI* prescrit que :

> **178.** (1) Une ordonnance de libération ne libère pas le failli :
>
> […]
>
> e) de toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation qui découle d'une réclamation relative à des capitaux propres;
>
> […]
>
> (2) Une ordonnance de libération libère le failli de toutes autres réclamations prouvables en matière de faillite.

[30] Suivant les termes de cette disposition, pour éviter que son débiteur soit libéré de sa dette, le créancier doit établir :

1) que son débiteur lui a fait une représentation;

2) que celle-ci était fausse;

3) que son débiteur savait que sa représentation était fausse;

4) que la représentation fausse a été faite dans le but d'obtenir un bien ou un service.

[31] Selon l'article 1631 *C.c.Q.*, l'action en inopposabilité intentée par un créancier contre son débiteur et un tiers a pour objet de faire déclarer sans effet à son égard l'acte juridique que fait son débiteur en fraude de ses droits et qui lui cause préjudice :

> 1631. Le créancier, s'il en subit un préjudice, peut faire déclarer inopposable à son égard l'acte juridique que fait son débiteur en fraude de ses droits, notamment l'acte par lequel il se rend ou cherche à se rendre insolvable ou accorde, alors qu'il est insolvable, une préférence à un autre créancier.

[32] D'après les termes de l'article précité, l'acte juridique préjudiciable comprend celui qui a pour effet de rendre le débiteur insolvable. Il doit avoir été fait en fraude des droits du créancier. Comme l'énoncent les auteurs Didier Lluelles et Benoît Moore, « l'action en inopposabilité a pour objet de neutraliser tout stratagème frauduleux auquel le débiteur pourrait recourir afin de contourner ses obligations »[8]. Selon les mêmes auteurs, pour réussir dans son recours, le créancier doit prouver : « que le débiteur avait conscience du préjudice que son acte allait causer au créancier »[9]. La

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8 Didier Lluelles et Benoît Moore, *Droit des obligations*, Montréal, Éditions Thémis, 2006, p.1696.

9 *Ibid.*

preuve de l'intention malicieuse peut se faire par tous les moyens y compris par présomption de faits. À cet égard, le *Code civil* a créé certaines présomptions notamment dans le cas où un acte est fait à titre gratuit. Celui-ci est réputé fait avec l'intention de frauder. Je rappelle que l'emploi par le législateur du terme « réputé » signifie que la présomption est absolue, c'est-à-dire qu'elle ne peut pas être repoussée par une preuve tendant à établir l'absence de dessein frauduleux :

> 1633. Un contrat à titre gratuit ou un paiement fait en exécution d'un tel contrat est réputé fait avec l'intention de frauder, même si le cocontractant ou le créancier ignorait ces faits, dès lors que le débiteur est insolvable ou le devient au moment où le contrat est conclu ou le paiement effectué.

[33] Comme je l'ai déjà écrit, l'objet de l'action en inopposabilité est de rendre l'acte juridique intervenu entre le débiteur et un tiers inopposable au créancier. Cela signifie que dans le cas de l'aliénation d'un bien, que ce soit par donation, par une vente simulée, par une vente à vil prix etc., le créancier peut saisir le bien entre les mains de ce tiers, même si ce dernier en est devenu le propriétaire et qu'il est de bonne foi. Dans ce cas, le tiers est tenu de remettre le bien saisi, ou encore, il peut désintéresser le créancier.

[34] Comme la juge de première instance, je suis d'avis que l'action en inopposabilité intentée par un créancier contre le tiers partie à un acte juridique avec son débiteur n'est pas nécessairement visée par l'article 178 *LFI*. L'action en inopposabilité n'a pas pour effet de transformer ce tiers en débiteur du créancier lésé par l'acte juridique lésionnaire, mais elle vise uniquement à priver l'acte juridique intervenu de tout effet à l'endroit du créancier.

[35] Dans le présent dossier, les allégations de l'action en inopposabilité et en dommages ainsi que ses conclusions font voir que le recours a une portée beaucoup plus large qu'une action en inopposabilité. L'appelante demande, en plus des conclusions usuelles d'une telle action, une condamnation personnelle de l'intimée, et cela, en invoquant la complicité de cette dernière avec les agissements frauduleux de M. Robson.

[36] L'intimée plaide que la dette, si elle existe, ne satisfait pas les critères de l'article 178 *LFI* parce qu'elle ne résulte pas de faux-semblants ni de la présentation erronée ou frauduleuse de faits.

[37] Je ne suis pas d'accord.

[38] Selon les allégations de l'action, M. Robson a obtenu 30 000 $ de l'appelante en reconnaissant qu'il s'agissait d'un prêt et en lui représentant, de façon implicite, qu'il la rembourserait. C'est à ces seules conditions que le prêt a été consenti à M. Robson. Or, les représentations expresses et implicites faites par M. Robson à l'appelante étaient fausses. D'une part, M. Robson a refusé de reconnaître l'emprunt allant même jusqu'à prétendre que les 30 000 $ remis par l'appelante constituaient un remboursement de

sommes qu'il lui avait lui-même prêtées. D'autre part, M. Robson, qui était déjà insolvable au moment du prêt, s'est départi de la somme reçue rendant impossible toute procédure de recouvrement de la somme prêtée. Je n'ai aucune hésitation à conclure que la dette de M. Robson résulte de ses déclarations mensongères.

[39] L'appelante reproche à l'intimée d'avoir participé aux agissements fautifs de M. Robson en s'appropriant les 30 000 $ prêtés par celle-ci à ce dernier et en contribuant, en toute connaissance de cause, à l'insolvabilité de ce dernier. Elle conclut, en définitive, que c'est l'intimée qui a obtenu les 30 000 $ soutirés de l'appelante par une présentation frauduleuse des faits.

[40] À mon avis, les allégations de l'action justifient les conclusions recherchées. L'intimée, de même que M. Robson, sont débiteurs de l'appelante et leur dette résulte de leur conduite frauduleuse. En conséquence, l'intimée n'en sera pas libérée si l'appelante établit les faits qu'elle allègue.

[41] L'un des objectifs de la *LFI* vise à permettre à un débiteur malchanceux ou malhabile de prendre un nouveau départ en le libérant de ses dettes. La *LFI* ne permet cependant pas à un débiteur d'échapper à ses responsabilités envers ses créanciers lorsque sa dette résulte d'une situation frauduleuse selon les termes de l'article 178 *LFI*.

[42] Avant de conclure et pour éviter tout questionnement, je tiens à préciser qu'il n'y a pas chose jugée entre le jugement rendu le 10 juin 2003 rejetant l'action intentée par l'appelante contre l'intimée et le présent recours. La cause d'action n'est pas la même dans les deux actions. Le recours intenté en 2003 alléguait que l'intimée agissait comme prête-nom de M. Robson. La présente action allègue un dol de la part de M. Robson ainsi que la participation consciente de l'intimée à celui-ci et qu'elle a agi comme prêt-nom de M. Robson. Il n'y a pas de chose jugée à l'égard de la portion fondée sur l'obtention de biens par une présentation frauduleuse des faits.

[43] Pour ces motifs, je propose d'accueillir l'appel avec dépens, d'infirmer le jugement de première instance et d'accueillir la requête de l'appelante fondée sur l'article 69.4 *LFI*, avec dépens.

FRANCE THIBAULT, J.C.A.

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS
<En matière de faillite>

N° : 450-11-000037-014
(450-05-004155-004)

DATE: Le 30 avril 2001

EN PRÉSENCE DE : L'HONORABLE JACQUES BLANCHARD, J.C.S. (JB2192)

DENIS HÉBERT, domicilié et résidant au 5682, rue Héroux, Rock Forest, J1N 3R7, district de Saint-François,

Failli;

-et-

PRIMEAU, PROULX, PIGEON & ASSOCIÉS INC., ès qualités de syndic à la faillite , ayant une place d'affaires à la Place Montérégie, 101, boulevard Roland-Therrien, bureau 120, Longueuil, J4H 4B9, district de Longueuil,

Syndic;

-et-

LA PROCUREURE GÉNÉRALE DU CANADA, au nom et pour le compte de Sa Majesté la Reine du chef du Canada (Ministre du Revenu National), ayant son bureau au Complexe Guy-Favreau, 200, boul. René-Lévesque Ouest, Tour Est, 9ième étage, Montréal, H2Z 1X4, district de Montréal,

Requérante;

-et-

3103-6569 QUÉBEC INC., personne morale de droit privé, légalement constituée, ayant une place d'affaires au 95, rue Camirand, bureau 210, Sherbrooke, J1H 4J6, district de Saint-François,

-et-

LES ENTREPRISES DONAT CHARTIER INC., personne morale de droit privé, légalement constituée, ayant une place d'affaires au 2000, rue Prospect, Sherbrooke, J1J 3Y1, district de Saint-François,

-et-

LES INVESTISSEMENTS RENÉ ST-PIERRE LTÉE, personne morale de droit privé, légalement constituée, ayant une place d'affaires au 2365, boulevard Queen Nord, Sherbrooke, J1H 5N8, district de Saint-François,

-et-

R. MORIN CONSULTANT INC., personne morale de droit privé, légalement constituée, ayant une place d'affaires au 95, rue Camirand, bureau 210, Sherbrooke, J1H 4J6, district de Saint-François,
-et-
BANQUE NATIONALE DU CANADA, personne morale, légalement constituée, ayant son siège social et une place d'affaires au 600, rue de la Gauchetière Ouest, Montréal, H3B 4L2, district de Montréal,
Mises en cause.

JUGEMENT

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[1] Le Tribunal est saisi d'une requête pour déclaration de non-application et permission de continuer des procédures déjà instituées fondée sur l'article 69.4 de la Loi sur la faillite et l'insolvabilité[1] (L.F.I.).

[2] La Procureure générale du Canada désire la non-application des articles 69 à 69.31 L.F.I. et l'autorisation de poursuivre les procédures déjà commencées dans les dossiers ITA-5053-99 de la Cour fédérale du Canada et 450-05-003822-000 de la Cour supérieure du Québec, district de Saint-François.

[3] Aux fins d'enquête, le présent dossier a été réuni au dossier numéro 450-05-004155-004 de la Cour supérieure du Québec, district de Saint-François, mais jugement est rendu dans chaque dossier.

Faits

[4] Le 11 janvier 1994, Denis Hébert (Hébert) et 3103-6569 Québec inc. (Québec inc.) signent une convention en vertu de laquelle Hébert mandate Québec inc. à se porter acquéreur d'un immeuble et d'en détenir les titres de propriété à titre de prête-nom (Pièce R-5).

[5] Cette convention n'est pas publiée.

[6] Aux termes de cette dernière, Québec inc. doit se comporter comme le véritable propriétaire aux yeux des tiers et ayant tous les pouvoirs, sujet à ratification par Hébert.

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[1] L.R.C. (1985), c. B-3

[7] L'immeuble visé porte, au moment de la signature de la convention, la désignation suivante :

> « Un immeuble connu et désigné comme étant le lot TROIS CENT SOIXANTE-DOUZE (372) aux plan et livre de renvoi officiels de la Ville de Sherbrooke (Quartier Centre) ;
>
> Ledit immeuble est situé dans la ville de Sherbrooke (Québec) au 65 rue Meadow et 124 et 132 rue Wellington Nord, J1H 5X8. »

[8] Suite à une rénovation cadastrale, l'immeuble en question porte maintenant la désignation ainsi décrite :

> « Un certain terrain connu et désigné comme étant le lot UN MILLION TRENTE MILLE HUIT CENT SOIXANTE (1 030 860) du cadastre du Québec, circonscription foncière de Sherbrooke.
>
> Avec bâtisses dessus construites, circonstances et dépendances, portant le numéro civique 124, rue Wellington Nord, ville de Sherbrooke, province de Québec, avec tout ce qui y est et sera incorporé, attaché, réuni ou uni par accession à cet immeuble et qui est considéré être un immeuble en vertu de la loi. »

[9] Cet immeuble est connu sous le nom de «Édifice Place Wellington».

[10] Le 11 janvier 1994, Québec inc. acquiert l'immeuble désigné au mandat aux termes d'un acte de vente passé devant le notaire Gaston Savard à Sherbrooke et portant le numéro 21181 de ses minutes.

[11] Cet acte de vente est enregistré la même journée au Bureau de la publicité des droits de la circonscription foncière de Sherbrooke sous le numéro 434 019.

[12] Québec inc. apparaît comme propriétaire et aucune mention n'est faite du mandat préalablement signé.

[13] Le 9 juin 1998, Québec inc. consent une hypothèque sur l'immeuble qu'elle détient pour Hébert à Les Entreprises Donat Chartier inc., Les Investissements René St-Pierre Ltée et R. Morin Consultant inc.

[14] Cette hypothèque au montant de 1 030 000$ est enregistrée au Bureau de la publicité des droits de la circonscription foncière de Sherbrooke sous le numéro 478 366 et vise à garantir un prêt du même montant.

[15] Suite à une demande de paiement présentée par Les Entreprises Donat Chartier inc., Les Investissements René St-Pierre Ltée et R. Morin Consultant inc., à Québec inc., cette dernière fait suivre la demande à Hébert.

[16] C'est alors que Hébert et Québec inc. signent, le 28 juillet 1998, une convention d'annulation d'un mandat et de rétrocession de droits (Pièce R-7).

[17] Par cette nouvelle convention, Hébert annule celle signée en janvier 1994 et transfert à Québec inc. ses droits et titres de propriété dans l'immeuble acquis en exécution du mandat précisé à cette convention.

[18] Cette convention d'annulation d'un mandat et de rétrocession de droits n'est pas publiée.

[19] Le 7 juin 1999, le ministre du Revenu national dépose un certificat à la Cour fédérale du Canada en vertu de la *Loi de l'impôt sur le revenu*[2] (ci-après désignée L.I.R.), pour un montant de 316 913,58 $ dû par Hébert (Pièce R-3).

[20] Ce certificat a la même valeur qu'un jugement rendu par la Cour fédérale du Canada (Cour fédérale) et est donc exécutoire comme tel (art. 223 L.I.R.). Le dossier de la Cour fédérale porte le numéro ITA-5053-99.

[21] Suite au dépôt du certificat mentionné précédemment, le ministre du Revenu national obtient, le 20 août 1999, un bref de saisie-exécution à l'encontre des biens meubles et immeubles de Hébert (Pièce R-4).

[22] Se fondant sur la convention du 11 janvier 1994 à l'effet que Hébert est en réalité propriétaire de l'immeuble décrit ci-haut, et fort du bref de saisie-exécution émis le 20 août 1999, le ministre du Revenu national enregistre, le 14 septembre 1999, une saisie sur l'immeuble Édifice Place Wellington pour un montant de 316 913,58 $. Édifice Place Wellington est alors évalué à 2 083 100 $.

[23] L'avis de saisie est enregistré sous le numéro 3470 au Bureau de la publicité des droits de la circonscription foncière de Sherbrooke.

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2 L.R.C. (1985), c. 1 (5^{e} suppl.)

[24] Le 1er novembre 1999, Québec inc. produit une opposition à la saisie au dossier de la Cour fédérale (ITA-5053-99). Québec inc. invoque alors la seconde convention à l'effet qu'elle serait redevenue propriétaire de Édifice Place Wellington.

[25] Le 10 novembre 1999, le ministre du Revenu national réitère sa saisie et enregistre un nouvel avis de saisie sur l'immeuble, sous le numéro 3474. À cette même date, la Banque nationale du Canada (Banque) présente une requête en intervention à l'opposition à la saisie dans le dossier de la Cour fédérale.

[26] La Banque se fonde alors sur une hypothèque qu'elle détient sur cet immeuble et préalablement enregistrée le 11 juillet 1994. Cette hypothèque porte le numéro 439 659 du Bureau de la publicité des droits de la circonscription foncière de Sherbrooke.

[27] La Cour fédérale accueille l'intervention de la Banque le 13 décembre 1999.

[28] Hébert fait cession de ses biens le 5 octobre 2000 et, le 6 novembre suivant, le syndic à la faillite dépose un avis de suspension des procédures au dossier de la Cour fédérale, le tout en vertu de l'article 69 de la *Loi sur la faillite et l'insolvabilité*[3].

[29] Parallèlement à ce dernier dossier, le 13 juin 2000, la Procureure générale du Canada intente une action en inopposabilité à l'encontre de Hébert. Québec inc., Les Entreprises Donat Chartier inc., Les Investissements René St-Pierre Ltée et R. Morin Consultant inc. sont toutes mises en cause.

[30] Cette action vise à faire déclarer inopposable à la Procureure générale du Canada l'hypothèque du 9 juin 1998 inscrite sous le numéro 478 366. Le dossier de la Cour supérieure du Québec porte le numéro 450-05-003822-000, district de Saint-François (R-10).

[31] Le 28 juin 2000, la Procureure générale du Canada enregistre sur l'immeuble un avis de pré-inscription d'une action en inopposabilité de l'hypothèque. Cet avis est enregistré au numéro 497 468 du Bureau de la publicité des droits de la circonscription foncière de Sherbrooke.

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[3] L.R.C. (1985), c. B-3

[32] Le 17 novembre 2000, le syndic à la faillite de Hébert dépose un avis de suspension des procédures au dossier de la Cour supérieure du Québec (450-05-003822-000, district de Saint-François) conformément aux dispositions de l'article 69 L.F.I.

[33] Par la présente requête, la Procureure générale du Canada cherche à mettre de côté les deux avis de suspension des procédures mentionnés ci-haut de sorte qu'elle puisse obtenir jugement dans ces deux dossiers.

Question en litige

[34] La requérante a-t-elle des motifs pouvant justifier le Tribunal de lui déclarer inapplicables les articles 69 à 69.31 L.F.I. et l'autoriser à poursuivre les procédures déjà commencées contre le failli Hébert?

Droit

[35] Il est bien connu que la suspension des procédures prévue aux articles 69 à 69.31 L.F.I. est la règle. Elle survient automatiquement dès qu'un avis d'intention, une proposition ou une cession de biens sont déposés conformément à ces dispositions.

[36] Le but ultime de cette suspension est exposé comme suit par la Cour suprême du Canada :

> « …permettre la distribution ordonnée et équitable des biens du failli entre ses créanciers, pari passu. L'article a pour objet d'éviter la multiplication des procédures et d'empêcher qu'un seul créancier non garanti n'obtienne une priorité de rang sur les autres créanciers non garantis en intentant une action au débiteur ou en exécutant un jugement contre lui. Cet objet est réalisé par la disposition qui prescrit que nul recours ou action ne peut être exercé sans l'autorisation du tribunal de faillite et alors seulement aux conditions établies par le tribunal.[4] »

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[4] R. c. Fitzgibbon, [1990] 1 R.C.S. 1005, 1015-1016 ; voir aussi Abramyk c. Abramyk, [2000] S.J. no 705 (Sask. Q.B.) ; 158514 Canada inc. (Place du Saguenay) c. 176767 Canada inc. (Trustee of), C.S. Montréal, 500-11-000005-948, 31 janvier 1996, juge Gomery

[37] Il est cependant possible pour un créancier, d'obtenir l'autorisation du tribunal de faillite afin de poursuivre une action déjà commencée. C'est l'article 69.4 L.F.I. qui y pourvoit. Il s'agit cependant d'une disposition exceptionnelle[5].

[38] Cet article se lit ainsi :

> « 69.4 **Déclaration de non-application** – Tout créancier touché par l'application des articles 69 à 69.31 ou toute personne touchée par celle de l'article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu'il estime indiquées, donner suite à la demande s'il est convaincu que la continuation d'application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu'il serait, pour d'autres motifs, équitable de rendre pareille décision. »

[39] Il ressort de cette disposition que le tribunal peut lever la suspension des procédures et autoriser un créancier à poursuivre une action contre le débiteur pour deux motifs : le créancier requérant subira un préjudice sérieux si la suspension est maintenue ou il serait équitable que la suspension soit levée.

[40] En ce qui concerne le préjudice sérieux, le Tribunal se limite à souligner qu'il s'agit d'un préjudice évalué objectivement par rapport à la totalité de l'endettement du débiteur et non d'un préjudice subjectif au créancier requérant. C'est ce qui a été décidé dans l'affaire Cumberland Trading inc., Re[6] et suivi depuis par l'ensemble de la jurisprudence.

[41] Le Tribunal n'élabore pas davantage sur le motif de préjudice sérieux, celui-ci n'ayant pas été allégué ni plaidé par la requérante.

[42] Qu'en est-il maintenant de la raison qu'il serait équitable, pour d'autres motifs, d'ordonner la non-application des articles 69 à 69.3 et d'autoriser la continuation des procédures ?

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[5] Morissette c. Jutras, C.S. Montréal, 500-05-002817-938, 28 avril 1995, juge Jean Guibault (J.E. 95-1031)

[6] (1994) 23 C.B.R. (3d) 225 (Ont. Gen.Div.)

[43] L'autorisation de poursuivre des procédures suivant l'article 69.4 est une question laissée à la discrétion du tribunal. Cette discrétion n'est soumise qu'au respect des paramètres de l'article 69.4 et de l'esprit de la L.F.I.[7].

[44] Lorsque le Tribunal examine la question de l'équité, il doit s'assurer en premier lieu que la levée de la suspension n'a pas pour effet de procurer un avantage au créancier requérant au détriment des autres créanciers : C'est un des objectifs de la loi[8].

[45] Le juge Maczko dans Ingles (Re)[9] parle de l'expression «il serait, pour d'autres motifs, équitable» en ces termes :

> « 24. The alternative is for ICBC to show that it is « equitable on other grounds » to make such a declaration. The word « equitable » is not defined. I must interpret the term in the context of the Bankruptcy and Insolvency Act. The only case which attempts to interpret « equitable » in this context is Schroeder v. Schroeder where the court found it was blatantly unfair that a husband should be permitted to defeat his wife's entitlement to her portion of a property settlement. The court found in essence that the husband was acting unfairly because he would deprive his wife of her share of the matrimonial property while he retains his.
>
> 25. In my view, the Schroeder v. Schroeder case is an example of the circumstances in which the court should exercise its discretion to allow an action to be taken against the bankrupt. The question is whether equity would require this court to exercise its discretion with a view to enforcing the government policy objective. I do not think that the Bankruptcy and Insolvency Act contemplated this. »

[46] Bien que l'exercice de sa discrétion par le tribunal suivant l'application de l'article 69.4 L.F.I. doit être appréciée à la lumière des faits particuliers de chaque cas[10], la Cour suprême de l'Ontario, dans l'affaire Re Advocate Mines Ltd.[11], élabore une liste de situations ayant justifié la levée de la suspension des procédures.

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7 Wychreschuk c. Sellors (Trustee of), (1988) 71 C.B.R. (N.S.) 37 (Man. Q.B.), confirmé par (1989) 73 C.B.R. (N.S.) 267 (C.A.)

8 Leslie MacIntyre Maritime Associates inc. c. Zutphen Bros. Construction Ltd., [1993] N.S.J. n. 642 (N.S. S.C.) ; Sirois c. Cutting Limited (syndic), C.S. Montréal, 500-11-004073-967, 10 juillet 1996, registraire Daoust

9 (1997) 46 C.B.R. (3d) 202 (B.C. S.C.)

10 149022 Canada Inc. c. Peetz, [1999] R.J.Q. 2197 (C.A.)

11 (1984) 52 C.B.R. (N.S.) 277 (Ont. S.C.)

> « The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances :
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
>
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
>
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
>
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
>
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.
>
> The authority given by the court to an applicant creditor to commence or continue proceedings in the circumstances referred to in items 2 to 5 is invariably limited to restrict or prohibit execution of any judgment obtained against the bankrupt. »

[47] Il faut cependant remarquer que cette énumération n'est ni exhaustive ni limitative[12].

[48] En fait, afin de déterminer s'il doit autoriser la levée de la suspension et la poursuite des procédures, le tribunal ne doit pas examiner le mérite de l'action à être poursuivie, mais bien si cette action fait partie du genre d'action qui doit être poursuivie.

> « 29. I am of the view that the correct test to be applied on a s. 69.4 motion is whether the type of claim which the creditor seeks to advance against the bankrupt is of the type that should be allowed to proceed. I agree with counsel for the TD Bank that it is not the function of this court to embark on a scrutiny of the merits of the proposed action. In my opinion, to do so would put the creditor/proposed plaintiff at a significant disadvantage in the sense that it may not know the full facts giving rise to the claim. It can be seen as putting the cart before the horse. The TD Bank will, if leave is granted, be required to establish its case in the civil proceeding and the TD Bank would have its rights of discovery to assist in that regard. This test also avoids the requirement for a summary determination of the proposed action. Such an exercise, I think, is inappropriate at this early stage.

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[12] Re Francisco, (1995) 32 C.B.R. (3d) 29 (Ont. Gen.Div.)

> 30. I come to this conclusion on the basis of the decision of Master Ferron in Re Cravit (1984), 54 C.B.R. (NS) 214 (Ont. S.C.). In this case, the learned Master states at p. 215 :
>
> « That is, in order to come to a conclusion that the plaintiffs should not be permitted to proceed I would have to conclude that the plaintiffs could either not succeed in the action in question or that if they succeeded they could not recover against the negligent solicitor's insurer.
>
> The function of the bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued but rather to be assured that such an action, falling within the s. 49(1) stay, should continue for the reasons which I detailed in Re Advocate Mines Limited. »[13]

[49] Ainsi, pour permettre au tribunal de lever la suspension, le requérant doit avoir de solides raisons à lui soumettre. C'est ce que précise la Cour d'appel de l'Ontario lorsqu'elle confirme la décision de première instance dans l'affaire Ma (Re) précitée :

> « 3. As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in Re Francisco, the role of the court is to ensure that there are « sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act » to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are « sound reasons » for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.[14] »

[50] Le Tribunal doit aussi accorder une grande importance au fait que l'action qui sera continuée si la suspension est levée n'affectera pas les biens du débiteur, qu'il soit en sa possession ou en la possession du syndic. Ainsi en est-il par exemple lorsque le but du créancier requérant est d'obtenir un jugement afin de pouvoir produire une réclamation auprès de l'assureur du débiteur.[15]

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13 Ma (Re), (2000) 19 C.B.R. (4th) 117 (Ont. S.C.) ; voir aussi Re Cravit, (1984) 54 C.B.R. (N.S.) 214 (Ont. S.C.) ; Transworld Leather inc. c. Correia (syndic), C.S.Montréal, 500-11-009308-988, 8 janvier 1998, registraire Pierre Pellerin (B.E. 99BE-269)

14 Ma (Re), [2000] O.J. no 1189 (Ont. C.A.)

15 149022 Canada Inc. c. Peetz, précitée note 9 ; Société Trust Royal du Canada c. Stevenson, (1998) 14 C.B.R. (4th) 282 (N.-B. B.R.) ; 158514 Canada Inc.(Place du Saguenay) c. 176767 Canada Inc. (Trustee of), précitée note 3

[51] Pour résumer les règles applicables, voici ce que le juge Smith de la Cour suprême de Colombie-Britannique dit, dans sa décision Maple Homes Canada Ltd. (Re)[16] :

> « 29. It was common ground that the burden is on the applicant of a declaration under s. 69.4 to satisfy the court that one or more of those grounds is present and that the applicant is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration.
>
> 30. The authorities establish that it is not for the court to inquire into the merits of the action the applicant wishes to bring. In Re Francisco (1995), 32 C.B.R. (3d) 29 (Ont. Gen. Div.) the court stated the position thus (at p. 34) :
>
> > Without intending to usurp the role of the trial judge to decide otherwise on the facts established before him, I am satisfied BPCO has pleaded sufficient allegations to bring its claim, at least arguably, within s. 178(1)(d).
>
> Mr. Sullivan cited Wychreschuk v. Sellors (1988), 71 C.B.R. (N.S.) 37 (Man. Q.B.), appeal dismissed (1989), 73 C.B.R. (N.S.) 267 (C.A.) where Monnin J. observed that the granting of leave is a discretionary matter, and wrote at p. 39 :
>
> > In order for leave to be granted, an applicant must demonstrate to the court that there exist compelling reasons to permit an action either to commence or to proceed.
>
> However, as Master Tokarek observed in Re Bond, [1993] B.C.J. No. 1175 (S.C.), there is little available guidance as to what may be considered a « compelling reason ».
>
> …
>
> 33. The principles that emerge from the jurisprudence may be summarized :
>
> (1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person ; exemptions are to be made only where there are « compelling reasons ». This flows from one of the major purposes of the Bankruptcy and Insolvency Act, which is to permit the rehabilitation of the bankrupt unfettered by past debts.
>
> (2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.

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16 [2000] B.C.J. no 1958

(3) The existence of one or more of the factors listed in Re Advocate Mines will be an important consideration, but is not determinative.

(4) The court is not to attempt to determine the proposed claim on its merits.

(5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants.

34. The standard appears to be somewhat more stringent than that for permitting a cause of action to continue under a rule such as Supreme Court Rules, B.C. Reg. 221/90, Rule 19(24), where a proceeding may be struck as disclosing no reasonable claim or defence only if the pleading itself makes it plain and obvious there is none. Given the purpose of bankruptcy legislation and the fact that continuing an action is the exceptional situation, I think that generally there must be more than pleadings or proposed pleadings disclosing a claim. There must also be some evidence supporting the conclusion that there is a fair issue to be tried. However, to expect more than that would be inconsistent with the statutory scheme. The legislation contemplates that claims of fraud or breach of fiduciary duty may survive bankruptcy or insolvency, and it will seldom be possible to prove such cases on a balance of probabilities at an early stage and without discovery. »

Discussion

[52] Qu'en est-il de la requête de la Procureure générale du Canada à la lumière des principes dégagés de la jurisprudence?

[53] La requérante allègue qu'il est dans l'intérêt des parties, de la justice et équitable de lui accorder la permission de poursuivre les actions déjà intentées, soit en Cour fédérale (ITA-5053-99) et en Cour supérieure du Québec, district de Saint-François (450-05-003822-000), en soulevant plusieurs arguments.

[54] D'abord, l'état avancé des procédures dans ces dossiers qui en sont à toutes fins pratiques à la contestation liée. Ensuite, le syndic à la faillite de Hébert a avisé la requérante qu'il n'avait pas l'intention de s'opposer et d'intervenir aux procédures. Le syndic précise aussi qu'il n'entrevoit aucun intérêt garanti pour la masse des créanciers et autorise même la requérante à se prévaloir des dispositions de l'article 38 L.F.I.

[55] Le Tribunal constate également que les procédures visées par la présente requête ne touchent pas que Hébert. En effet, dans l'action en Cour fédérale, la Banque y est intervenante. Quant à l'action en inopposabilité en Cour supérieure du Québec, Québec inc., Les Entreprises Donat Chartier inc., Les Investissements René St-Pierre Ltée et R. Morin Consultant inc. sont toutes mises en cause.

[56] Finalement, le Tribunal observe, sans vouloir se prononcer sur la propriété de cet immeuble ou sur le bien-fondé des recours, que les deux actions pendantes et suspendues concernent un bien immeuble dont le syndic n'a pas la saisine et qui ne fait pas partie du patrimoine de la faillite à l'heure actuelle.

[57] Comme le Tribunal l'a spécifié précédemment, il n'est pas de son attribution d'apprécier les actions en Cour fédérale et en Cour supérieure du Québec à leur mérite.

[58] Ainsi, étant donné l'état avancé des procédures et la position du syndic face à celles-ci et considérant que la levée de la suspension n'aurait pas pour effet de procurer un avantage à un créancier au détriment des autres puisque les biens du patrimoine de la faillite ne sont pas susceptibles d'être touchés par les procédures, le Tribunal estime qu'il est équitable de déclarer la non-application des articles 69 à 69.31 L.F.I.

POUR CES MOTIFS, LE TRIBUNAL :

[59] **ACCUEILLE** la requête;

[60] **DÉCLARE** que les articles 69 à 69.31 de la Loi sur la faillite et l'insolvabilité ne sont plus applicables à la Procureure générale du Canada aux fins des procédures ci-après décrites;

[61] **AUTORISE** la Procureure générale du Canada à continuer les procédures ci-après décrites jusqu'à jugement final passé en force de chose jugée, à savoir :

1. La saisie, la contestation d'une opposition à la saisie par la compagnie 3103-6569 Québec inc. et la contestation d'une intervention par la Banque Nationale du Canada, concernant un immeuble portant le numéro de lot 1 030 860 du cadastre du Québec et situé au 124, rue Wellington Nord, à Sherbrooke, entreprise dans le dossier de la Cour fédérale du Canada portant le numéro ITA-5053-99;

2. L'action en inopposabilité entreprise dans le dossier de la Cour supérieure du Québec, district de Saint-François, portant le numéro 450-05-003822-000;

[62] **ORDONNE** que dans l'éventualité où le syndic Primeau, Proulx, Pigeon & Associés ou tout autre syndic en substitution le cas échéant, décide de ne pas intervenir dans les causes ci-haut mentionnées, en reprise d'instance pour la défense des droits de Denis Hébert ou autrement, le syndic, non plus que la masse des créanciers devront être tenus à aucuns dépens pouvant résulter desdites causes;

[63] **ORDONNE** à la Procureure générale du Canada de signifier au syndic à la faillite de Denis Hébert, Primeau, Proulx, Pigeon & Associés inc. ou à tout autre syndic en substitution le cas échéant, une copie du jugement final passé en force de chose jugée à être rendu par la Cour fédérale du Canada et la Cour supérieure du Québec dans les causes ci-haut mentionnées dans les trente (30) jours où ils seront rendus et ce, afin que ledit syndic décide, conformément aux dispositions contenues à la Loi sur la faillite et l'insolvabilité, de l'opportunité d'entreprendre des procédures d'exécution à l'encontre de l'immeuble ci-haut désigné, pour réalisation et distribution à la masse des créanciers à la faillite de Denis Hébert, conformément au schème de distribution prévu par ladite Loi, après paiement en priorité des frais et honoraires encourus par la Procureure générale du Canada dans lesdites causes et, en cas de refus ou négligence du syndic d'agir,

[64] **RÉSERVE** à la Procureure générale du Canada les droits résultant de l'article 38 de la Loi sur la faillite et l'insolvabilité;

[65] **Sans frais.**

_____

JACQUES BLANCHARD, j.c.s.

M^{e} PIERRE LAMOTHE, avocat
Côté Marcoux & Joyal
Procureurs de la requérante

M^{e} SYLVAIN DESLAURIERS, avocat
Procureur de la Banque nationale du Canada

M^{e} LOUIS PANNETON, avocat
Fontaine, Désy
Procureurs de la mise en cause 3103-6569 Québec inc.

Date d'audience : 19 février 2001
Domaine du droit: : Loi sur la faillite et l'insolvabillité, art. 69.4
Permission de continuer les procédures

COURT FILE NO.: 06-CL-6241
DATE: 20061013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Muscletech Research and Development Inc. et al

BEFORE: Ground J.

COUNSEL:
Fred Myers
David Bish
for the Applicants, Muscletech Research and Development Inc. et al

Natasha MacParland
Jay Swartz
for the Monitor, RSM Richter Inc.

Justin Fogarty
Fraser Hughes
Chris Robertson
for Ishman, McLaughlin and Jaramillo Claimants

Jeff Carhart
for the Ad Hoc Tort Claimants Committee

Sara J. Erskine
for Ward et al

Alan Mark
Suzanne Wood
for Iovate Companies and Paul Gardiner

A. Kauffman
for GNC Oldco Inc.

Tony Kurian
for HVL Incorporated

Steven Golick
for Zurich Insurance Company

MOTIONS HEARD: September 29, 2006

E N D O R S E M E N T

[1] This is a somewhat unique proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. (1985) Ch. c.36 as amended ("CCAA"). The Applicants have also commenced ancillary proceedings under Chapter 15 of the U.S. Bankruptcy Code and are now before the United States District Court for the Southern District of New York ("U.S. Court"). All of the assets of the Applicants have been disposed of and no proceeds of such disposition remain in the estate. The Applicants no longer carry on business and have no employees. The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants against the Applicants and others (the "Third Parties") in the United States. In addition to the Applicants, the Third Parties, which include affiliated and non-affiliated parties, were named as defendants or otherwise involved in some 33 Product Liability Actions. The liability of the Third Parties in the Product Liability Actions is linked to the liability of the Applicants, as the Product Liability Actions relate to products formerly sold by the Applicants.

[2] Certain of the Third Parties have agreed to provide funding for settlement of the Product Liability Actions and an ad hoc committee of tort claimants (the "Committee") has been formed to represent the Plaintiffs in such Products Liability Actions (the "Claimants"). Through its participation in a court-ordered mediation (the "Mediation Process") that included the Applicants and the Third Parties, the Committee played a fundamental role in the settlement of 30 of the 33 Product Liability Actions being the Product Liability Claims of all of those Product Liability Claimants represented in the Mediation Process by the Committee.

[3] The Moving Parties in the motions now before this court, being the Claimants in the three Product Liability Actions which have not been settled (the "Objecting Claimants"), elected not to be represented by the Committee in the Mediation Process and mediated their cases individually. Such mediations were not successful and the Product Liability Actions of the Moving Parties remain unresolved.

[4] Pursuant to a Call for a Claims Order issued by this court on March 3, 2006, and approved by the U.S. court on March 22, 2006, each of the Objecting Claimants filed Proofs of Claim providing details of their claims against the Applicants and Third Parties. The Call for Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, the Applicants engaged in a process of extensive discussions and negotiations. With the input of various key players, including the Committee, the Applicants established a claims resolution process (the "Claims Resolution Process"). The Committee negotiated numerous protections in the Claims Resolution Process for the benefit of its members and consented to the Claims Resolution Order issued by this court on August 1, 2006, and approved by the U.S. court on August 11, 2006.

[5] The Claims Resolution Order appoints the Honourable Edward Saunders as Claims Officer. The Claims Resolution Order also sets out the Claims Resolution Process including the

delivery of a Notice of Objection to Claimants for any claims not accepted by the Monitor, the provision for a Notice of Dispute to be delivered by the Claimants who do not accept the objection of the Monitor, the holding of a hearing by the Claims Officer to resolve Disputed Claims and an appeal therefrom to this court. The definition of "Product Liability Claims" in the Claims Resolution Order provides in part:

> "Product Liability Claim" means any right or claim, including any action, proceeding or class action in respect of any such right or claim, other than a Claim, Related Claim or an Excluded Claim, of any Person which alleges, arises out of or is in any way related to wrongful death or personal injury (whether physical, economic, emotional or otherwise), whether or not asserted and however acquired, against any of the Subject Parties arising from, based on or in connection with the development, advertising and marketing, and sale of health supplements, weight-loss and sports nutrition or other products by the Applicants of any of them.
> …

Nature of the Motions

[6] The motions now before this court emanate from Notices of Motion originally returnable August 22, 2006 seeking:

> 1. An Order providing for joint hearings before Canadian and U.S. Courts and the establishment of a cross-border insolvency protocol in this CCAA proceeding, to determine the application or conflict of Canadian and U.S. law in respect of the relief requested herein.
>
> 2. An Order amending the June 8, 2006 Claims Resolution Claim to remove any portions that purport to determine the liabilities of third party non-debtors who have not properly applied for CCAA relief.
>
> ….
>
> 3. An Order requiring the Monitor and the Applicants herein,
>
> (a) to provide an investigator, funded by the Claimants (the "Investigator"), with access to all books and records relied upon by the Monitor in preparing its Sixth Report, including all documents listed at Appendix "2" to that report;
>
> (b) to provide the Investigator with copies of or access to documents relevant to the investigation of the impugned transactions as the Investigator may request, and

(c) providing that the Investigator shall report back to this Honourable Court as to its findings, and a Notice of Motion returnable September 29, 2006 seeking.

4. An Order finding that the Notices of Objection sent by the Monitor/Applicants do not properly object to the Claimants' claims against non-debtor third parties;

5. An Order that the Claimants' Product Liability Claims against non-debtor third parties are deemed to be accepted by the Applicants pursuant to paragraph 14 of the Claims Resolution Order;

6. In the alternative, an Order that the Monitor, on behalf of the Applicants, provide further and better Notices of Objection properly objecting to claims against non-debtor third parties so that the Claimants may know the case they are to meet and may respond appropriately.

Analysis

[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 *Re Canadian Airlines Corp.* (2000) 20 C.B.R. (4th) 1, 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.

[10] I do not regard the motions before this court with respect to claims against Third Parties as being made pursuant to paragraph 37 of the Claims Resolution Order which provides that a party may move before this court "to seek advice and directions or such other relief in respect of this Order and the Claims Resolution Process." The relief sought by the Objecting Creditors with respect to claims against Third Parties is an attack upon the substance of the Claims Resolution Order and of the whole structure of this CCAA proceeding which is to resolve claims against the Applicants and against Third Parties as part of a global settlement of the litigation in the United States arising out of the distribution and sale of the offending products by the Applicants. What the Objecting Claimants are, in essence, attempting to do is to vary or set aside the Claims Resolution Order. The courts have been loathe to vary or set aside an order unless it is established that there was:

(a) fraud in obtaining the order in question;

(b) a fundamental change in circumstances since the granting of the order making the order no longer appropriate;

(c) an overriding lack of fairness; or

(d) the discovery of additional evidence between the original hearing and the time when a review is sought that was not known at the time of the original hearing and the time when a review is sought that was not known at the time of the original hearing and that could have led to a different result.

None of such circumstances can be established in the case at bar.

[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.

[12] The Objecting Claimants also seek an order of this court that their claims against Third Parties are deemed to be accepted pursuant to paragraph 14 of the Claims Resolution Order. Section 14 of the Claims Resolution Order provides in part as follows:

> This Court Orders that, subject to further order of this Court, in respect of any Claim or Product Liability Claim set out in a Proof of Claim for which a Notice of Objection has not been sent by the Monitor in accordance with paragraph 12(b) above on or before 5:00 p.m. (Eastern Standard Time) on August 11, 2006, such Claim or Product Liability Claim is and shall be deemed to be accepted by the Applicants.

[13] The submission of the Objecting Claimants appears to be based on the fact that, at least in one case, the Notice of Objection appears to be an objection solely on behalf of the Applicants in that Exhibit 1 to the Notice states "the Applicants hereby object to each and all of the Ishman Plaintiffs' allegations and claims." The Objecting Claimants also point out that none of the Notices of Objection provide particulars of the objections to the Objecting Claimants' direct claims against third parties. I have some difficulty with this submission. The structure of the Claims Resolution Order is that a claimant files a single Proof of Claim setting out its Claims or Product Liability Claims and that if the Applicants dispute the validity or quantum of any Claim or Product Liability Claim, they shall instruct the Monitor to send a single Notice of Objection to the Claimant. Paragraph 12 of the Claims Resolution Order states that the Applicants, with the assistance of the Monitor, may "dispute the validity and/or quantum or in whole on in part of a Claims or a Product Liability Claim as set out in a Proof of Claim." The Notices of Objection filed with the court do, in my view, make reference to certain Product Liability Claims against Third Parties and, in some cases, in detail. More importantly, the Notices of Objection clearly state that the Applicants, with the assistance of the Monitor, have reviewed the Proof of Claim and have valued the amount claimed at zero dollars for voting purposes and zero dollars for distribution purposes. I fail to understand how anyone could read the Notices of Objection as not applying to Product Liability Claims against Third Parties as set out in the Proof of Claim. The Objecting Claimants must have read the Notices of Objection that way initially as their Dispute Notices all appear to refer to all claims contained in their Proofs of Claim. Accordingly, I find no basis on which to conclude that the Product Liability Claims against the Third Parties are deemed to have been accepted.

[14] The Objecting Claimants seek, in the alternative, an order that the Monitor provide further and better Notices of Objection with respect to the claims against the Third Parties so that the Objecting Claimants may know the case they have to meet and may respond appropriately. I have some difficulty with this position. In the context of the Claims Resolution Process, I view the Objecting Claimants as analogous to plaintiffs and it is the Applicants who need to know the case they have to meet. The Proofs of Claim set out in detail the nature of the claims of the Objecting Claimants against the Applicants and Third Parties and, to the extent that the Notices of Objection do not fully set out in detail the basis of the objection with respect to each particular claim, it appears to me that this is a procedural matter, which should be dealt with by the Claims

Officer and then, if the Objecting Claimants remain dissatisfied, be appealed to this court. Section 25 of the Claims Resolution Order provides:

> This Court Orders that, subject to paragraph 29 hereof, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him by the parties, as well as any other procedural or evidentiary matters that may arise in respect of the hearing of a Disputed Claim, including, without limitation, the production of documentation by any of the parties involved in the hearing of a Disputed Claim.

[15] In fact, with respect to the medical causation issue which is the first issue to be determined by the Claims Officer, the Claims Officer has already held a scheduling hearing and has directed that by no later than August 16, 2006, all parties will file and serve all experts reports and will-say statements for all non-expert witnesses as well as comprehensive memoranda of fact of law in respect of the medical causation issues. To the extent that the Objecting Claimants appear to have some concerns as to natural justice, due process and fairness, in spite of the earlier decision of Judge Rakoff with respect to the Claims Resolution Order and the consequent amendments made to such Order, in my view, any such concerns are adequately addressed by the rulings made by the Claims Officer with respect to the hearing of the medical causation issue. I would expect that the Claims Officer would make similar rulings with respect to the other issues to be determined by him.

[16] In addition, as I understand it, all three actions commenced by the Objecting Claimants in the United States were ready for trial at the time that the CCAA proceedings commenced and I would have thought, as a result, that the Objecting Claimants are well aware of the defences being raised by the Applicants and the Third Parties to their claims and as to the positions they are taking with respect to all of the claims.

[17] Accordingly, it appears to me to be premature and unproductive to order further and better Notices of Objection at this time.

[18] The motion seeking an order requiring the Monitor and the Applicants to provide an Investigator selected by the Objecting Claimants relates to transactions referred to by the Monitor in preparing its Sixth Report which dealt with certain transactions entered into by the Applicants with related parties prior to the institution of these CCAA proceedings. The Objecting Creditors also seek to have the Investigator provided with copies of, or access to, all documents relevant to an investigation of the impugned transactions as the Investigator may request. It appears from the evidence before this court that the Applicants prepared for the Monitor a two-volume report (the "Corporate Transactions Report") setting out in extensive detail the negotiation, documentation and implementation of the impugned transactions. Subsequently by order of this court dated February 6, 2006, the Monitor was directed to review the Corporate Transactions Report and prepare its own report to provide sufficient information to allow creditors to make an informed decision on any plan advanced by the Applicants. This review was incorporated in the Monitor's Sixth Report filed with this court and the U.S. court on March 31, 2006. In preparing its Sixth Report, the Monitor had the full cooperation of, and full

access to the documents of, the Iovate Companies and Mr. Gardiner, the principal of the Iovate Companies. No stakeholder has made any formal allegation that the review conducted by the Monitor was flawed or incomplete in any way. The Monitor has also, pursuant to further requests, provided documentation and additional information to stakeholders on several occasions, subject in certain instances to the execution of confidentiality agreements particularly with respect to commercially sensitive information of the Applicants and the Iovate Companies which are Third Parties in this proceeding. There is no evidence before this court that the Monitor has, at any time, refused to provide information or to provide access to documents other than in response to a further request from the Objecting Claimants made shortly before the return date of these motions, which request is still under consideration by the Monitor. The Sixth Report is, in the opinion of the Respondents, including the Committee, a comprehensive, thorough, detailed and impartial report on the impugned transactions and I fail to see any utility in appointing another person to duplicate the work of the Monitor in reviewing the impugned transactions where there has been no allegation of any deficiency, incompleteness or error in the Sixth Report of the Monitor.

[19] I also fail to see how a further report of an Investigator duplicating the Monitor's work would be of any assistance to the Objecting Claimants in making a decision as to whether to support any Plan that may be presented to this court. The alternative to acceptance of a Plan is, of course, the bankruptcy of the Applicants and I would have thought that, equipped with the Corporate Transactions Report and the Sixth Report of the Monitor, the Objecting Claimants would have more than enough information to consider whether they wish to attempt to defeat any Plan and take their chances on the availability of relief in bankruptcy.

[20] In any event, it is my understanding that, at the request of the Committee, any oppression claims or claims as to reviewable transactions have been excluded from the Claims Resolution Process.

[21] The final relief sought in the motions before this court is for an Order providing for joint hearings before this court and the U.S. court and the establishment of a cross-border protocol in this proceeding to determine the application of Canadian and U.S. law or evidentiary rulings in respect of the determination of the liability of Third Parties. During the currency of the hearing of these motions, I believe it was conceded by the Objecting Claimants that the question of the applicability of U.S. law or evidentiary rulings would be addressed by the Claims Officer. The Objecting Claimants did not, on the hearing of these motions, press the need for the establishment of a protocol at this time. An informal protocol has been established with the consent of all parties whereby Justice Farley and Judge Rakoff have communicated with each other with respect to all aspects of this proceeding and I intend to follow the same practice. Any party may, of course, at any time bring a motion before this court and the U.S. court for an order for a joint hearing on any matter to be considered by both courts.

[22] The motions are dismissed. Any party wishing to make submissions as to the costs of this proceeding may do so by brief written submissions to me prior to October 31, 2006.

Ground J.

Released: October 13, 2006