Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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 **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

SUPPLEMENTAL JOINT BOOK OF AUTHORITIES OF THE IMPERIAL AND RBH MONITORS Vol 2 of 2

Motions for Sanction Orders and CCAA Plan Administrator Appointment Orders
(Returnable commencing January 29, 2025)

January 28, 2025

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See paras. 114-115.

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

Ville de Montréal *Appelante*

c.

Restructuration Deloitte Inc. *Intimée*

et

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

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.

RÉPERTORIÉ : MONTRÉAL (VILLE) *c.* RESTRUCTURATION DELOITTE INC.

2021 CSC 53

N° du greffe : 39186.

2021 : 20 mai; 2021 : 10 décembre.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Brown, Rowe et Martin.

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,

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Suspension des droits et recours des créanciers — Réclamations considérées dans le cadre des transactions ou arrangements — Compensation entre une dette née avant et une dette née après l'ordonnance initiale — Programme québécois de remboursement volontaire — Une créance découlant d'une entente conclue dans le cadre du Programme québécois de remboursement volontaire constitue-t-elle nécessairement une réclamation se rapportant à une dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d) de la Loi sur les arrangements avec les créanciers des compagnies? — Le pouvoir discrétionnaire dont dispose le juge surveillant dans le contexte d'une restructuration lui permet-il de suspendre le droit d'opérer compensation entre une dette née avant et une dette née après l'émission d'une ordonnance initiale qu'invoque un créancier? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.02,

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.

19(2)d), 21 — Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics, RLRQ, c. R-2.2.0.0.3 — Programme de remboursement volontaire, RLRQ, c. R-2.2.0.0.3, r. 1.

En août 2018, la Cour supérieure rend une ordonnance initiale assujettissant Groupe SM, une firme de génie-conseil, à des procédures déposées en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). L'ordonnance suspend notamment les droits et recours des créanciers et nomme un contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville de Montréal. La Ville refuse toutefois de payer ces travaux et invoque son droit d'opérer compensation entre ce qu'elle doit à Groupe SM et deux créances, nées avant l'ordonnance initiale, qu'elle prétend détenir contre celui-ci. Ces créances sont liées à l'application de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics* (« Loi 26 ») et, selon la Ville, résulteraient de fraude de Groupe SM. La première créance découle d'une entente de règlement intervenue dans le cadre du Programme de remboursement volontaire (« PRV ») issu de la Loi 26 (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM dans lequel elle lui réclame de l'argent au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau.

En réponse au refus de la Ville de payer les travaux effectués par Groupe SM après l'émission de l'ordonnance initiale, le contrôleur demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville ne peuvent faire l'objet de compensation. La juge surveillante accueille la demande. À l'instar de cette dernière, la Cour d'appel conclut que la compensation invoquée par la Ville ne peut s'opérer. Elle estime qu'une créance relative à la fraude visée par l'al. 19(2)d) de la *LACC* ne constitue pas une exception à la règle énoncée dans l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, selon laquelle la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale (« compensation pré-post ») est interdite. Elle est également d'avis que la Ville n'a pas prouvé que ses créances sont visées par l'al. 19(2)d). Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, la Cour d'appel, tout comme la juge surveillante, estime que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

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

Arrêt (le juge Brown est dissident) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Rowe et Martin : Premièrement, une créance découlant d'une entente conclue dans le cadre du PRV n'est pas nécessairement une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En l'occurrence, la Ville n'a pas démontré que la créance PRV se rapporte à une dette qui résulte de fraude au sens de cette disposition. Deuxièmement, en ce qui concerne la compensation pré-post, le juge surveillant possède le pouvoir discrétionnaire de suspendre l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law. Toutefois, le juge surveillant peut refuser de suspendre ou lever la suspension du droit à la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, l'ordonnance initiale a suspendu le droit de la Ville à la compensation pré-post, et il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, la Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*.

Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(2) prévoit exceptionnellement que certaines réclamations ne peuvent être compromises dans le cadre d'une transaction ou d'un arrangement, notamment celles découlant de fraude. Afin de démontrer que sa créance est une réclamation qui se rapporte à une dette résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d), le créancier intéressé a le fardeau d'établir, par prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service.

En l'espèce, la Ville n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments. Il est donc nécessaire d'interpréter le contenu de l'entente PRV, la

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

Loi 26 ainsi que son règlement d'application (« règlement PRV ») pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement. Cet exercice d'interprétation confirme que la créance PRV n'est pas visée par l'al. 19(2)d) de la *LACC*.

En premier lieu, il est clairement stipulé dans l'entente PRV intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité. On ne saurait donc présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la *LACC*.

En deuxième lieu, la Loi 26, tout comme le règlement PRV, ne créent pas une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur à l'endroit d'un organisme public. L'emploi du conditionnel à l'art. 3 de la Loi 26 et à l'art. 1 du règlement PRV pour décrire l'objet du PRV signale que la fraude est une éventualité, par opposition à quelque chose de certain. L'article 7 du règlement PRV appuie ce constat puisqu'il précise que le fait pour une personne physique ou une entreprise de se prévaloir du PRV ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute. La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation.

La Ville a tort de dire qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une conclusion que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Bien que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. Enfin, il ne faut pas confondre les deux régimes créés par la Loi 26. L'article 10 énonce qu'une fraude a été commise, mais celui-ci fait partie du régime introduit par le chapitre III (art. 10 à 17) qui est applicable aux recours judiciaires intentés contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public, et non du régime du PRV, introduit par le chapitre II (art. 3 à 9). Il appartient aux tribunaux de conclure qu'une fraude a été commise, et la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III, lequel entre en vigueur seulement lorsque le régime du

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

PRV, introduit par le chapitre II, prend fin. Le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV. En conséquence, la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la *LACC*. Ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux.

Par ailleurs, le droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law peut être suspendu par un tribunal en application des art. 11 et 11.02 de la *LACC*. L'article 11.02 de la *LACC* permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Bien que le texte de cette disposition limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension. Le tribunal est habilité à suspendre des droits reconnus aux créanciers mais dont l'exercice serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post. Une telle interprétation favorise les objectifs réparateurs de la *LACC*, en plus d'être cohérente avec l'économie de cette loi.

Dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice la compensation pré-post. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. L'interdiction absolue énoncée par la Cour d'appel du Québec dans l'arrêt *Kitco* à l'égard de la compensation pré-post doit donc être tempérée. Cependant, le tribunal doit faire preuve de prudence avant de permettre une telle forme de compensation, considérant son fort potentiel perturbateur.

En outre, l'art. 21 de la *LACC* ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la *LACC*. Lu à la lumière de son contexte, de son objet et de l'esprit de la *LACC*, l'art. 21 se limite à autoriser la compensation entre des dettes nées avant le prononcé de l'ordonnance initiale (« compensation pré-pré ») aux fins de quantification des réclamations des créanciers au jour de l'ouverture. Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Il

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.

s'ensuit que le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. La première considération vise tout autant l'ordonnance elle-même que les moyens utilisés et s'évalue au regard des objectifs réparateurs de la *LACC*, dont la protection de l'intérêt public. Dans des circonstances bien particulières, le tribunal pourrait conclure que la protection de l'intérêt public, de même que les autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*. Par contre, le tribunal doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier. La deuxième considération est également importante étant donné qu'elle décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage.

Dans la présente affaire, les termes de l'ordonnance de suspension rendue par la Cour supérieure sont suffisamment larges pour suspendre la compensation pré-post et il n'est pas indiqué de lever cette suspension en ce qui concerne la créance PRV. Puisque la Ville n'a pas apporté la preuve de la fraude alléguée et n'a pas invoqué un objectif réparateur de la *LACC* autre que la protection de l'intérêt public au soutien de sa position, elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. Au surplus, la Ville n'a pas fait montre de la diligence attendue dans le cadre d'une procédure fondée sur la *LACC*.

Pour ce qui est de la créance relative au contrat des compteurs d'eau, la Cour supérieure a accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans ce dossier. Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV.

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

Le juge Brown (dissident) : L'appel devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé, d'une part, si la Ville peut opérer compensation pré-post à l'égard de la créance PRV et, d'autre part, si la réclamation à l'égard des compteurs d'eau donne ouverture à compensation. Il y a accord avec l'avis de la majorité portant que le juge surveillant possède, en vertu de l'art. 11 de la *LACC*, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation pré-post. Cependant, ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. Le champ d'application de l'art. 21 de la *LACC* n'est pas restreint à la compensation pré-pré; la compensation pré-post est permise, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. De plus, rien dans l'art. 21 de la *LACC* n'interdit la compensation judiciaire.

L'approche établie par la Cour d'appel du Québec dans l'arrêt *Kitco*, selon laquelle la compensation pré-post ne sera jamais autorisée en vertu de la *LACC*, contient plusieurs erreurs et doit être rejetée. Tout d'abord, la Cour d'appel s'appuie erronément sur un arrêt de la Cour rendu dans un contexte de faillite sous le régime de la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Or, bien que le régime établi par la *LACC* et celui établi par la *LFI* doivent être perçus comme un ensemble intégré de règles du droit de l'insolvabilité, de nombreuses différences persistent entre ceux-ci, dont deux distinctions fondamentales. Premièrement, lorsque l'entreprise insolvable a recours à la *LACC*, elle continue ses opérations commerciales et n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la saisine des biens du failli. Il n'y a donc pas de perte de réciprocité sous le régime de la *LACC*. Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la *LACC*, par opposition à la *LFI*. Deuxièmement, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif de restructuration d'une entreprise en difficultés financières, par contraste avec la *LFI*, qui prévoit un ensemble de règles préétablies. Les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, en raison desquels un vaste pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC*. Ce pouvoir n'a pas d'équivalent dans la *LFI*.

Ensuite, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge

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

surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*. L'approche avancée dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes, qui va à l'encontre du principe de l'interprétation uniforme des lois fédérales.

Enfin, la suspension, en vertu de la *LACC*, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale. Par contre, lorsqu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant alors inexistant.

En l'espèce, il n'est pas nécessaire de trancher la question de savoir si la créance PRV doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la *LACC*. L'article 21 de la *LACC* doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Certes, la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre la compensation pré-post; cependant, la question de savoir si la créance PRV de la Ville résulte d'une fraude est une question à laquelle il appartient à la juge surveillante de répondre, et non à la Cour.

Étant donné que, s'estimant liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation pré-post. Les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée.

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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Dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, il n'est pas dans l'intérêt de la justice que la Cour se mette à la place de ce tribunal et tranche ces questions.

Jurisprudence

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

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Raphaël Lescop et *Eleni Yiannakis*, pour l'appelante.

Guy P. Martel et *Danny Duy Vu*, pour l'intimée.

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

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Marc Duchesne, pour l'intervenante l'Union des municipalités du Québec.

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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

I. Introduction

[1] Le présent pourvoi soulève un problème de compensation entre deux dettes dans le contexte de procédures engagées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Il s'agit de savoir si la compensation est permise entre des dettes entre les mêmes parties, d'une part, une dette résultant de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 (« Loi 26 »), antérieure à une ordonnance initiale émise en vertu de la *LACC*, et, d'autre part, une dette postérieure à cette ordonnance encourue entre les mêmes parties. Dans les présents motifs, nous utiliserons l'expression « compensation pré-post » pour désigner de manière générale la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale.

[2] Cette question fournit ainsi à notre Cour l'occasion d'interpréter pour la première fois certaines dispositions de la Loi 26, ainsi que son règlement d'application, le *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1 (« règlement PRV »). Ce faisant, nous clarifions, à l'intention des organismes publics, le fardeau de preuve qui leur incombe lorsqu'ils tentent d'établir le caractère frauduleux d'une créance résultant d'une entente conclue en vertu du Programme de remboursement volontaire (« PRV »).

[3] La Loi 26 a été adoptée par l'Assemblée nationale du Québec en mars 2015 à la suite d'une

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

commission d'enquête qui a mis en lumière l'existence de stratagèmes de collusion et de corruption dans l'octroi et la gestion de contrats publics dans l'industrie de la construction (« Commission Charbonneau »), et le règlement PRV a été pris quelques mois plus tard. Mis en vigueur pour une période de deux ans, le programme issu de cette loi a permis à des entreprises de « rembourser certaines sommes payées injustement dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive » (art. 3 de la Loi 26).

[4] Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, notre Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*. Nous sommes d'avis de répondre à cette question par la négative. On ne peut présumer qu'une créance issue du PRV est visée par cette disposition lorsqu'aucune preuve n'a été administrée à cet effet. Nous concluons par ailleurs que le tribunal devrait généralement exercer son pouvoir discrétionnaire afin de suspendre la compensation pré-post, bien qu'il puisse, dans de rares cas, refuser de la suspendre. De même, le tribunal peut, par la suite, lever la suspension du droit à la compensation pré-post dans les cas qui s'y prêtent. En l'espèce, toutefois, nous concluons que l'ordonnance initiale a suspendu le droit de l'appelante Ville de Montréal (« Ville ») à la compensation pré-post et qu'il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

[5] En conséquence, l'appel doit être rejeté.

II. Faits

[6] Groupe SM, qui était au moment des faits une firme de génie-conseil, a exécuté divers contrats pour la Ville sur une période de plusieurs années. Les travaux de la Commission Charbonneau ont

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)).

révélé l'existence d'un lien entre Groupe SM et des acteurs au cœur des stratagèmes de collusion. Deux de ses anciens dirigeants ont d'ailleurs fait l'objet d'accusations criminelles. Par la suite, Groupe SM est devenu insolvable.

[7] Le 24 août 2018, la Cour supérieure du Québec (« Tribunal ») rend une ordonnance initiale assujettissant Groupe SM à des procédures déposées en vertu de la *LACC* et suspendant les droits et recours des créanciers. L'intimée Restructuration Deloitte Inc. (« Deloitte ») est nommée à titre de contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville, notamment la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[8] La Ville refuse de payer ces travaux. Le 7 novembre 2018, elle invoque son droit d'opérer compensation entre sa dette envers Groupe SM résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances de Groupe SM qui, soutient-elle, sont nées avant l'ordonnance et résulteraient de fraude de ce dernier.

[9] Le 12 novembre 2018, le Tribunal approuve la vente partielle des actifs de Groupe SM à Thornhill Investments Inc. (« Thornhill »). Une semaine plus tard, les contrats de Groupe SM sont cédés à Thornhill.

[10] Les deux créances invoquées par la Ville sont liées à l'application de la Loi 26. Lue avec la *Loi sur l'intégrité en matière de contrats publics*, L.Q. 2012, c. 25, adoptée en 2012, et la *Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique*, L.Q. 2016, c. 18, adoptée en 2016, la Loi 26 a pour objectif de renforcer la confiance du public dans les institutions publiques en donnant suite aux révélations émanant de la Commission Charbonneau. Elle a été décrite comme « un repère législatif permettant de conclure au manque d'éthique et à la morale laxiste (sinon criminelle) dans plusieurs entreprises en lien avec l'octroi de contrats publics au Québec » (*R. c. Fedele*, 2018 QCCA 1901, par. 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.

[11] La première créance que la Ville prétend détenir contre Groupe SM résulte d'une entente de règlement intervenue en novembre 2017 entre Groupe SM et la ministre de la Justice, agissant pour le compte de la Ville, dans le cadre du PRV (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM, en septembre 2018, dans lequel elle lui réclame plus de 14 millions de dollars au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »).

[12] Vu le défaut de Groupe SM de rembourser la créance PRV et l'imminence de la vente de certains actifs à Thornhill, la Ville informe Groupe SM de son intention d'opérer compensation entre ce qu'elle lui doit et les créances ci-haut mentionnées, tout en précisant que ces créances ne peuvent être purgées ou compromises par la restructuration envisagée puisqu'elles découlent de la fraude et d'un détournement de fonds du Trésor public.

[13] En réponse, Deloitte demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville pour des travaux exécutés pour son bénéfice ne peuvent faire l'objet de compensation.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2019 QCCS 2316 (la juge Corriveau)*

[14] La juge surveillante accueille la demande en jugement déclaratoire de Deloitte et décide que la compensation pré-post ne peut s'opérer en faveur de la Ville. Même si, selon elle, la créance PRV est liée à une allégation de fraude non réfutée par Groupe SM, la juge surveillante conclut que, selon les enseignements de l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, la compensation pré-post n'est pas possible. Elle statue par ailleurs que la créance relative au contrat des compteurs d'eau n'est ni liquide ni exigible, de sorte que la compensation ne peut être opérée.

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

B. *Cour d'appel du Québec, 2020 QCCA 438 (les juges Rochette et Healy, le juge Ruel, dissident en partie)*

[15] Rédigeant pour la majorité, le juge Rochette rejette la prétention de la Ville relativement à la créance PRV. S'appuyant sur l'arrêt *Kitco*, il conclut, à l'instar de la juge surveillante, que la compensation pré-post ne peut s'opérer en l'espèce. En outre, il rejette l'argument de la Ville selon lequel une créance relative à la fraude visée par l'al. 19(2)d) de la *LACC* constitue une exception à la règle énoncée dans cet arrêt. Quoi qu'il en soit, il se dit d'avis que la Ville n'a pas prouvé que ses créances sont visées par cette disposition. Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, le juge Rochette ajoute que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

[16] Dissident en partie, le juge Ruel partage l'avis de ses collègues sur la nature de la créance relative au contrat des compteurs d'eau. Cependant, il est plutôt d'avis qu'il faut présumer que la créance PRV est visée par l'al. 19(2)d) de la *LACC* et que l'arrêt *Kitco* doit être distingué étant donné qu'il a été rendu dans un contexte différent. En dernière analyse, le juge Ruel estime que l'al. 19(2)d) de la *LACC* fait exception au principe établi dans cet arrêt et permet donc la compensation pré-post entre les dettes respectives des deux parties.

IV. Questions en litige

[17] Le présent pourvoi soulève les trois questions suivantes :

1. La créance PRV est-elle une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*?
2. La *LACC* autorise-t-elle la compensation entre une dette née avant une ordonnance initiale et une dette née après cette ordonnance?
3. Si la compensation est permise, la Ville devrait-elle être autorisée à retenir les paiements dus

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.

à Groupe SM en attendant que jugement soit rendu dans le dossier relatif au contrat des compteurs d'eau?

[18] Nous traiterons de ces questions en abordant séparément chacune des créances invoquées par la Ville.

V. Analyse

[19] Essentiellement, la Ville soutient que la créance PRV est une réclamation qui ne peut être considérée dans le cadre d'une transaction ou d'un arrangement, puisqu'elle se rapporte à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. Selon la Ville, une telle réclamation échappe à l'interdiction absolue énoncée dans l'arrêt *Kitco* à l'égard de la compensation pré-post. La Ville plaide également que le caractère absolu de la règle de l'arrêt *Kitco* est incompatible avec le large pouvoir discrétionnaire conféré au juge surveillant par la *LACC*. La Ville estime que le juge surveillant peut, dans l'exercice de son pouvoir discrétionnaire, autoriser la compensation pré-post dans des circonstances appropriées. L'exercice de ce pouvoir est d'autant plus indiqué en présence de fraude.

[20] Pour les motifs qui suivent, nous sommes d'avis que la créance PRV visée en l'espèce n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. Nous concluons par ailleurs que le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la *LACC*. Toutefois, nous somme d'avis que le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. À cet égard, le caractère frauduleux de la dette à l'origine d'une créance PRV, lorsque démontré, constitue un facteur pertinent dans l'exercice de la discrétion du juge surveillant. En l'espèce, nous estimons qu'il ne serait pas indiqué de permettre à la Ville d'opérer compensation en ce qui concerne la créance PRV. Il ne serait pas non plus approprié d'autoriser la Ville à retenir les paiements dus à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau.

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

A. *Créance du Programme de remboursement volontaire*

(1) Qualification de la créance du Programme de remboursement volontaire

[21] Il nous incombe de déterminer, d'entrée de jeu, si la créance PRV est une réclamation se rapportant à une dette frauduleuse, puisque cette prémisse explique le raisonnement de la Ville. Pour les motifs qui suivent, nous concluons que cette prémisse fondamentale n'est pas fondée : la créance PRV n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En effet, la seule participation au PRV par une société débitrice n'est pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. Considérant cette conclusion, il n'est pas nécessaire de nous prononcer sur l'argument subsidiaire de Deloitte selon lequel l'art. 19 de la *LACC* serait inapplicable en l'espèce, en raison de l'absence de plan prévoyant une transaction ou un arrangement.

[22] Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(1) de cette loi énonce le régime général encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement :

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le

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, [2020] 1 S.C.R. 522, 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

consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

[23] À titre d'exception à ce régime, le par. 19(2) de la *LACC* prévoit que certaines réclamations ne peuvent être compromises, notamment celles découlant de fraude :

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

. . .

d) 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 de la compagnie qui découle d'une réclamation relative à des capitaux propres;

[24] Pour déterminer le fardeau de preuve applicable à ce régime, il convient de se référer à la jurisprudence et à la doctrine portant sur l'al. 178(1)e) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), lequel s'apparente en tous points à l'al. 19(2)d) de la *LACC*. Comme notre Cour l'a souligné dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, ces deux lois « [font] partie d'un ensemble intégré de règles du droit de l'insolvabilité » (par. 78; voir aussi *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 74).

[25] Afin de satisfaire au fardeau qui lui incombe, c'est-à-dire démontrer que sa créance est une réclamation qui se rapporte à une dette « résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits », le créancier intéressé devra établir, par

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

prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service (*Léger c. Ouellet*, 2011 QCCA 1858, par. 30 (CanLII); *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376, par. 37 (CanLII); voir aussi L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. rév. (feuilles mobiles)), vol. 3, H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, par. 28; J. P. Sarra, G. B. Morawetz et L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), p. 1001 et 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5e éd. 2016), p. 502-503). Une fois ces éléments prouvés, le créancier d'une réclamation visée par l'al. 19(2)d) de la *LACC* bénéficie d'une position plus avantageuse que les autres créanciers ordinaires, dans la mesure où cette réclamation ne peut être compromise dans le cadre d'une transaction ou d'un arrangement, quoiqu'elle ne confère pas le statut de créancier garanti (voir Houlden, Morawetz et Sarra, H§63). Cette exception au régime général institué par le par. 19(1) de la *LACC* doit être interprétée restrictivement (voir notamment, par analogie, *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.), par. 96; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, par. 24).

[26] Le fardeau qui incombait à la Ville n'était certes pas négligeable. En effet, elle devait prouver que Groupe SM avait sciemment fait une fausse représentation ayant mené à la créance PRV. Toutefois, la Ville a estimé, aux fins de cette démonstration, qu'il suffisait de mentionner l'existence de cette créance, et n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments, présumant ou tenant pour acquis que la créance PRV découlait de représentations frauduleuses.

[27] En conséquence, pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement, il est nécessaire d'interpréter le contenu de l'entente PRV, la Loi 26 ainsi que le règlement PRV. À cet égard, et pour les raisons

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

que nous expliquons ci-dessous, nous partageons les conclusions des juges majoritaires de la Cour d'appel : la créance PRV n'est pas visée par l'al. 19(2)d) de la *LACC*.

[28] En premier lieu, le contenu même de l'entente PRV constitue un obstacle dirimant à la prétention de la Ville selon laquelle le seul fait de la participation à ce programme suffit pour conclure que sa créance résulte des activités frauduleuses de Groupe SM. En effet, comme il est clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la *LACC*. En conséquence, il incombait à la Ville de prouver, conformément aux dispositions de cette loi, que Groupe SM lui avait faussement et sciemment fait une représentation afin d'obtenir un bien ou un service.

[29] D'ailleurs, en cette matière, une règle jurisprudentielle bien établie veut qu'un tribunal tire généralement ses propres conclusions factuelles aux fins d'application de l'al. 19(2)d) (voir Houlden, Morawetz et Sarra, H§63). Il en est ainsi, notamment, malgré la présence de conclusions liées possiblement à la fraude prononcées dans le cadre d'un procès antérieur, ou encore lorsqu'un jugement par défaut ou un acquiescement à jugement contiendrait de telles conclusions. La jurisprudence portant sur l'al. 178(1)e) de la *LFI* permet d'inférer, par analogie, que les tribunaux se montrent particulièrement constants et rigoureux dans l'appréciation de la preuve qui leur est présentée à cet égard (voir notamment *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417, par. 2 (CanLII); *Dupuis*, par. 36-40; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164, par. 13-19 (CanLII); *Tavan c. Rostami*, 2014 QCCA 304, par. 3-6 (CanLII); *Léger*, par. 30-40; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, par. 20-25; *Sharma c. Sandhu*, 2019 MBQB 160, par. 38-45 (CanLII); *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719, par. 90-92 (CanLII); *Berger*, par. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (H.C.J. Ont.), p. 106-107, conf. par (1985), 53 C.B.R. (N.S.) 275 (C.A.);

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.

Agriculture Financial Services Corp. c. Zaborski, 2009 ABQB 183, 58 C.B.R. (5th) 301, par. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, par. 37-63; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261, par. 30-48 (CanLII); *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, par. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, par. 53-58).

[30] En deuxième lieu, la Loi 26, tout comme le règlement PRV publié dans la *Gazette officielle du Québec* en vertu des art. 3 et 4 de cette loi, n'appuient pas davantage la thèse de la Ville. Nous partageons l'avis des juges majoritaires de la Cour d'appel, qui rejettent l'idée d'une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur du seul fait de sa participation au PRV. Ce régime, qui a été en vigueur de novembre 2015 à décembre 2017, n'a pas créé une telle présomption.

[31] En effet, l'objet du PRV tel qu'il est défini à l'art. 3 de la Loi 26, au chapitre II intitulé « Programme de remboursement », étaye cette conclusion :

3. Le ministre publie à la *Gazette officielle du Québec* un programme de remboursement volontaire à durée déterminée afin qu'une entreprise ou une personne physique mentionnée à l'article 10 puisse rembourser certaines sommes payées injustement dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive.

[32] L'emploi du conditionnel dans l'expression « il aurait pu y avoir fraude ou manœuvre dolosive » contredit clairement la thèse avancée par la Ville. De plus, le conditionnel est également utilisé à l'art. 1 du règlement PRV pour décrire l'objet de ce programme :

1. Le Programme de remboursement volontaire permet à toute personne physique et à toute entreprise de rembourser certaines sommes payées injustement par un organisme public dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public, conclu après le 1er octobre 1996, et pour lequel il aurait pu y avoir fraude ou ma[n]œuvre dolosive.

[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*.

[33] Que la fraude soit caractérisée comme une éventualité, par opposition à quelque chose de certain, n'a rien de surprenant. En effet, comme l'objectif du PRV consiste à récupérer des sommes payées injustement par des organismes publics, il va de soi que la Loi 26 ne prévoit aucun mécanisme pour déterminer si, dans les faits, les sommes convenues dans le cadre du PRV sont reliées, en partie ou en totalité, à une fraude. L'article 7 du règlement PRV appuie ce constat, puisqu'il précise ce qui suit :

7. Le fait pour une personne physique ou une entreprise de se prévaloir du Programme ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute.

[34] La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation :

8. Toute personne physique ou entreprise qui se prévaut du Programme reconnaît que le fait qu'elle révèle des informations ou transmette des documents dans ce cadre n'a pas pour effet de limiter, de quelque façon que ce soit, la capacité d'un organisme public d'entreprendre contre elle tout recours civil concernant des contrats publics qui n'auront pas fait l'objet d'un règlement dans le cadre du Programme ou qui ne sont pas visés par la Loi.

De plus, toute personne physique ou entreprise reconnaît que sa participation au Programme, et la conclusion d'une entente en vertu de celui-ci, ne la protège, ni ses dirigeants, d'aucune façon de poursuites pénales et/ou criminelles qui ont été ou pourraient être intentées contre elle à l'égard de contrats publics qu'elle a conclus.

[35] En conséquence, la seule preuve qu'une personne physique ou une entreprise a participé au PRV ne saurait à elle seule permettre de qualifier une créance de réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*.

[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.

[36] Cependant, la Ville soutient qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une toute autre conclusion, à savoir que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Nous sommes d'avis qu'elle a tort.

[37] Il est vrai que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique :

1. La présente loi prévoit des mesures exceptionnelles adaptées au remboursement et au recouvrement de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de l'adjudication, de l'attribution ou de la gestion de contrats publics.

Toutefois, comme nous l'avons vu précédemment, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : il est acquis que, contrairement à l'art. 1 de la Loi 26, qui énonce l'objet de cette loi de manière générale, les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. L'interprétation de la Ville est également inconciliable avec les art. 7 et 8 du règlement PRV, qui sont reproduits plus haut.

[38] Cela dit, la Ville fait remarquer que l'art. 3 de la Loi 26 renvoie à l'art. 10 lequel énonce explicitement qu'une fraude a été commise :

10. Toute entreprise ou toute personne physique qui, à quelque titre que ce soit, a participé à une fraude ou à une manœuvre dolosive dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public est présumée avoir causé un préjudice à l'organisme public concerné.

Le cas échéant, la responsabilité de ses dirigeants en fonction au moment de la fraude ou de la manœuvre dolosive est engagée, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La responsabilité des administrateurs de l'entreprise en fonction au moment de la fraude ou de la manœuvre dolosive est également engagée s'il est établi qu'ils savaient ou qu'ils auraient dû savoir qu'une fraude ou une manœuvre dolosive a été commise relativement au contrat visé, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

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).

Les entreprises et les personnes physiques visées au présent article sont solidairement responsables du préjudice causé, à moins que l'organisme public n'y renonce.

[39] Nous ne partageons pas cette interprétation de la Ville. Il appartient aux tribunaux de conclure qu'une fraude de cette nature a été commise. Plus précisément, nous estimons que la Ville confond deux régimes créés par la Loi 26 : l'un introduit par le chapitre II — le PRV — (art. 3 à 9), l'autre par le chapitre III intitulé « Règles particulières applicables aux recours judiciaires » (art. 10 à 17). Le premier régime a été conçu afin d'inciter, pendant une période de deux ans, les personnes physiques ou les entreprises craignant qu'un organisme public introduise contre elles une poursuite civile à participer au PRV dans le but de conclure une entente en toute confidentialité (art. 7 de la Loi 26; art. 4 du règlement PRV). Or, ce n'est qu'une fois que le premier régime prend fin que le second entre en vigueur, lequel est d'une toute autre nature.

[40] Le régime prévu aux art. 10 à 17 de la Loi 26 est un régime exorbitant du droit commun, applicable aux recours judiciaires intentés par un organisme public ou le ministre de la Justice, pour le compte d'un organisme public, contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public. Lorsqu'un tel recours est accueilli, non seulement le tribunal peut-il tenir pour acquis que le défendeur a causé par son acte frauduleux un préjudice à l'organisme public (art. 10 al. 1), mais aussi que « [c]le préjudice est présumé correspondre à la somme réclamée par l'organisme public concerné pour le contrat visé lorsque cette somme ne représente pas plus de 20 % du montant total payé pour le contrat visé » (art. 11 al. 1), préjudice pour lequel les entreprises et les personnes physiques visées par la loi sont solidairement responsables (art. 10 al. 4). La somme accordée « porte intérêt à compter de la réception de l'ouvrage par l'organisme public concerné pour le contrat visé » (art. 11 al. 3). De même, le tribunal « doit ajouter à la somme qu'il accorde en réparation du préjudice un montant forfaitaire égal à 20 % de cette somme à titre de frais engagés pour l'application de la [. . .] loi » (art. 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.

[41] Autrement dit, ces dispositions visent à faciliter la preuve du lien de causalité et du préjudice lorsqu'un tel recours est intenté, mais, faut-il le souligner, elles demeurent sans effet dans l'éventualité où un tribunal judiciaire conclut que la preuve relative à la fraude s'avère insuffisante; aussi, et surtout, elles ne facilitent en aucun cas la preuve d'une telle faute. Partant, l'art. 10 de la Loi 26 n'est d'aucun secours pour la Ville, qui, de toute manière, n'a pas cherché à démontrer, autrement qu'en invoquant la seule existence de l'entente PRV, que Groupe SM a participé à une fraude dans le cadre d'un contrat qu'elle lui a octroyé. À en juger par les régimes mis en œuvre par cette loi, la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III de celle-ci. De plus, il appert que le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV, en l'occurrence les administrateurs et dirigeants des entreprises.

[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.

[42] En dernier lieu, il convient de souligner qu'il est facile d'imaginer qu'une entreprise ayant conclu un contrat public possiblement litigieux avec un organisme public fasse le choix stratégique de participer au PRV par crainte de mauvaise publicité ou encore pour éviter de s'exposer au régime exorbitant prévu au chapitre III de la Loi 26, lequel serait susceptible d'emporter pour elle, si le recours était accueilli en faveur de l'organisme, une responsabilité financière additionnelle non négligeable, en sus des frais juridiques qu'elle aurait à débourser.

[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*.

[43] En somme, ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux, pas plus que l'entente PRV ne constitue une présomption de fait grave, précise et concordante (art. 2849 du *Code civil du Québec*). Il s'ensuit que la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la *LACC*.

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

(2) Compensation entre des dettes nées avant et après le prononcé de l'ordonnance initiale (compensation pré-post)

[44] The bankruptcy of large companies often resulted in "the entire disruption of the corporation,

[44] La mise en faillite des grandes compagnies a fréquemment mené à [TRADUCTION] « la

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

perturbation complète des activités de l'entreprise, à la perte de sa clientèle et à la vente à rabais de son actif » (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 22-23; voir aussi *Century Services*, par. 16). Le législateur, soucieux de protéger la capacité de survie de ces compagnies essentielles à la prospérité économique et à un taux d'emploi élevé, a donc mis en place dans la *LACC* un processus de restructuration destiné à éviter leur démantèlement et la liquidation à rabais de leurs actifs (*Century Services*, par. 17-18 et 70; *Callidus*, par. 41-42).

[45] Initialement, la restructuration sous le régime de la *LACC* se faisait au moyen d'un plan d'arrangement ou de transaction négocié entre la compagnie débitrice et ses créanciers qui évitait sa mise en faillite en lui permettant de rajuster ses dettes et de réorganiser ses affaires (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 588-590 et 592). Puis a émergé, en application de la *LACC*, une pratique de liquidation qui peut elle aussi constituer un outil de restructuration de l'entreprise en difficulté « en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents » (*Callidus*, par. 45; voir aussi Sarra, p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311).

[46] L'instrument principal qui permet à la *LACC* de réaliser son objectif de restructuration est la suspension des procédures et des droits des créanciers (Sarra, p. 17 et 52; McElcheran, p. 5). L'effet direct de la suspension est qu'elle instaure une période de statu quo qui stabilise la situation de la compagnie débitrice en la mettant à l'abri de ses créanciers pendant que la restructuration suit son cours (*Century Services*, par. 60; voir aussi *Kitco*, par. 43). L'absence d'une telle période entraînerait une situation anarchique où chaque créancier se battrait pour faire valoir ses droits, sans égard à la survie de l'entreprise ou à la maximisation de sa valeur de liquidation (*Century Services*, par. 22).

[47] Durant cette période, la compagnie débitrice peut donc poursuivre ses activités sans craindre d'être poussée à la faillite par ses créanciers. Ce

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*

moment de répit crée un environnement propice à une négociation équitable entre les différentes parties prenantes, en plus d'offrir à la débitrice le temps nécessaire pour préparer un plan de transaction ou d'arrangement assurant sa survie ou pour prendre des mesures maximisant la valeur de l'entreprise qu'elle exploite en vue de sa liquidation en vertu de la *LACC* (*Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (B.R.), par. 15; *Kitco*, par. 43; *Callidus*, par. 40 et 46).

[48] La caractéristique fondamentale de la *LACC* est l'attribution au tribunal chargé de son application d'un vaste pouvoir discrétionnaire lui permettant de rendre les ordonnances nécessaires pour mener à bon port la restructuration et atteindre les objectifs de la *LACC* (*Century Services*, par. 19). Véritable « moteur » du régime législatif (*Callidus*, par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36), ce pouvoir discrétionnaire du tribunal joue également un rôle de premier plan dans le cadre de la suspension des procédures.

[49] En principe, le tribunal peut refuser une demande de suspension. Ces demandes sont toutefois rarement refusées, à tel point que les termes « ordonnance initiale » et « ordonnance de suspension » sont devenus, en pratique, interchangeables (Sarra, p. 51). La suspension est en effet demandée et accordée systématiquement, si ce n'est dans certains cas exceptionnels (p. 51).

[50] La suspension est cependant une mesure temporaire; une fois levée, les créanciers retrouvent la capacité d'exercer pleinement leurs droits et recours (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, par. 9 et 14). Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut assortir son ordonnance initiale d'une première période de suspension d'une durée maximale de 10 jours (par. 11.02(1) de la *LACC*). Par la suite, la suspension peut être renouvelée par le tribunal pour la période qu'il estime nécessaire (par. 11.02(2) de la *LACC*). Au moment du renouvellement de la suspension, ou à tout autre moment au cours des procédures, un créancier intéressé peut, conformément à la procédure prévue à cet effet dans l'ordonnance initiale, demander au tribunal de lever

(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.

la suspension affectant l'un de ses droits ou recours (Sarra, p. 58-60 et 88; voir aussi *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (C.S.J. Ont.), par. 5; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, par. 7-8 et 14-15).

[51] Bien que la *LFI* et la *LACC* fassent partie d'un ensemble intégré de règles du droit de l'insolvabilité, il existe tout de même des différences fondamentales entre les deux régimes (*Century Services*, par. 78). En effet, contrairement à ce qui prévaut sous la *LFI*, la *LACC* confère au tribunal un large pouvoir discrétionnaire lui permettant de décider de l'opportunité d'une suspension, de déterminer la durée de celle-ci et d'en ajuster la portée selon les besoins de la restructuration et selon ce qui est nécessaire pour réaliser les objectifs de la *LACC*. En ce sens, la *LACC* a été décrite comme une loi [TRADUCTION] « schématique » ne contenant « pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Century Services*, par. 57, citant *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44).

[52] Pour bien saisir les droits et restrictions applicables dans un cas donné, il ne suffit donc pas de lire la loi; il faut également se pencher sur l'exercice par le tribunal de son pouvoir discrétionnaire, lequel se manifeste dans toute la multitude d'ordonnances rendues tout au long des procédures.

[53] La question que soulève le présent pourvoi consiste donc à déterminer si le pouvoir discrétionnaire dont dispose le tribunal lui permet de suspendre le droit d'opérer compensation pré-post qu'invoque un créancier en vertu du droit civil ou de la common law et, corollairement, d'autoriser la compensation pré-post dans les cas qui s'y prêtent.

a) *Pouvoir d'accorder et de lever une suspension du droit à la compensation pré-post*

[54] Nous sommes d'avis que le vaste pouvoir discrétionnaire conféré au tribunal par les art. 11 et 11.02 de la *LACC* permet à celui-ci de suspendre des droits reconnus aux créanciers mais dont l'exercice

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

serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post.

[55] L'article 11.02 de la *LACC* permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Malgré le texte de l'art. 11.02, qui limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension (voir *Meridian*, par. 26; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), p. 113-114; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, par. 31-33; McElcheran, p. 135 et 245-246; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 363). À titre d'exemple, dans l'arrêt *Quintette Coal*, la Cour d'appel de la Colombie-Britannique a conclu que le droit d'un créancier d'opérer compensation pré-post pouvait être suspendu au même titre que toute autre mesure d'exécution possédant un fort potentiel perturbateur (voir aussi *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), par. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 13-16, conf. par 2015 BCCA 426, 378 B.C.A.C. 116, par. 28-30). Selon nous, cette interprétation est la bonne, puisqu'elle favorise les objectifs réparateurs de la *LACC*, en plus d'être cohérente avec l'économie de cette loi.

[56] À la lumière des divers modèles d'ordonnances initiales adoptés par les cours supérieures du pays, on constate d'ailleurs que l'interdiction d'opérer compensation entre des dettes est pratique courante et que, dans la très vaste majorité des cas, une telle interdiction entre en vigueur dès le prononcé de l'ordonnance initiale (voir Cour du Banc de la Reine de l'Alberta, *Alberta Template CCAA Initial Order*, janvier 2019 (en ligne), par. 14 et 16; Cour suprême de la Colombie-Britannique, *Model CCAA Initial Order*, 1er août 2015 (en ligne), par. 16 et 18; Cour supérieure de justice de l'Ontario, rôle des affaires commerciales, *Ordonnance initiale*, 21 janvier 2014 (en ligne), par. 15-16; Cour supérieure du Québec,

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

Chambre commerciale, *Ordonnance initiale*, mai 2014 (en ligne), par. 10 et 12; Cour du Banc de la Reine de la Saskatchewan, *Saskatchewan Template CCAA Initial Order*, 6 décembre 2017 (en ligne), par. 15-16).

[57] Le pouvoir discrétionnaire dont dispose le tribunal est donc suffisamment large pour lui permettre de suspendre le droit des créanciers d'opérer compensation pré-post. Dans un tel cas, l'interdiction d'opérer compensation pré-post découle directement de l'ordonnance de suspension. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. Sur ce point, nous écartons l'interdiction absolue proposée par la Cour d'appel du Québec dans l'arrêt *Kitco*, puisque nous concluons que le tribunal possède le pouvoir discrétionnaire de permettre la compensation pré-post dans les cas qui s'y prêtent.

[58] Rares seront toutefois les occasions où un tribunal ne devrait pas suspendre le droit d'opérer compensation pré-post dans l'ordonnance initiale. Faut-il le rappeler, le pouvoir discrétionnaire du juge surveillant, quoique vaste, n'est pas sans limites. Il doit tendre à la réalisation des objectifs réparateurs de la *LACC* (*Callidus*, par. 49).

[59] En effet, la période de statu quo pourrait devenir lettre morte si l'on permettait aux créanciers d'opérer sans retenue la compensation pré-post (voir *Kitco*, par. 20 et 43). L'affaire *Tungsten*, dans laquelle le tribunal avait suspendu l'exercice de la compensation pré-post constitue un bon exemple du potentiel perturbateur de cette forme de compensation (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten* (C.S.) »), par. 32, conf. par 2015 BCCA 390, 377 B.C.A.C. 6, par. 16, 20 et 25, et par 2015 BCCA 426, 378 B.C.A.C. 116, par. 29). Si le créancier pouvait, en invoquant la compensation, refuser de payer le prix pour les biens ou services fournis par la débitrice pendant la période de statu quo, la restructuration risquerait d'être torpillée. La débitrice serait incitée à ne fournir ni biens ni services à ses créanciers par

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

crainte de ne pas être payée en retour; elle serait alors privée des fonds nécessaires pour poursuivre ses opérations (voir *Kitco*, par. 46-48). L'article 32 de la *LACC* lui donne justement le droit de résilier tout contrat auquel elle est partie à la date à laquelle les procédures de restructuration ont été intentées, sous réserve des limites et formalités qui sont prévues par cette disposition. De plus, le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice durant cette période, si les sommes prêtées sont destinées à enrichir un autre créancier à son détriment. Enfin, le rempart érigé par la suspension contre les attaques tous azimuts des créanciers s'effriterait lui aussi, augmentant ainsi les risques de déconfiture et de faillite de la débitrice (voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 22 et 29).

[60] L'inévitable interruption de la relation d'affaires entre la débitrice et ceux qui sont à la fois créanciers et clients ne pourrait intervenir à un pire moment. Sans ces contrats et sans un fonds de roulement regarni par le paiement des comptes à recevoir et le financement intérimaire, la valeur de revente de l'entreprise exploitée par la débitrice s'atrophierait, dressant alors des écueils à sa restructuration par voie de liquidation. Par ailleurs, une telle situation peut également être défavorable pour le créancier qui désire opérer compensation. Si la débitrice met fin au contrat et refuse de s'exécuter, le créancier concerné sera privé du bénéfice du contrat et devra trouver un nouveau cocontractant à la place de la débitrice, sans garantie que le prix restera le même.

[61] En outre, lorsque la compensation pré-post a été suspendue, le tribunal conserve le pouvoir discrétionnaire de lever la suspension selon les faits particuliers de chaque affaire. Cependant, il doit faire preuve de prudence, considérant le fort potentiel perturbateur d'une telle compensation.

[62] Pour conclure, nous sommes d'avis que les art. 11 et 11.02 de la *LACC* autorisent le tribunal à suspendre l'exercice de la compensation pré-post. Tout en tempérant la règle énoncée dans l'arrêt *Kitco*, qui interdisait de manière absolue la compensation

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

pré-post, nous estimons que, dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice une telle forme de compensation. Finalement, lorsque l'ordonnance initiale a suspendu le droit des créanciers à la compensation pré-post, le tribunal conserve le pouvoir discrétionnaire de lever la suspension en fonction des circonstances.

b) *La portée de l'art. 21 de la LACC*

[63] Nous soulignons par ailleurs que l'art. 21 de la *LACC* ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la *LACC*. Bien que l'art. 21 de la *LACC* atteste d'un droit d'opérer compensation dans le cadre des procédures prises sous cette loi, nous sommes d'avis qu'il ne vise que la compensation entre des dettes nées *avant le prononcé de l'ordonnance initiale* (autrement dit, la « compensation pré-pré »). Cette conclusion s'impose suivant la méthode moderne d'interprétation des lois (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87). Notre interprétation de l'art. 21 de la *LACC* ne repose pas sur une analogie inappropriée avec les dispositions de la *LFI*.

[64] En effet, cet article précise qu'il est possible d'opérer compensation dans le cadre de procédures en insolvabilité introduites sous le régime de la *LACC*, mais il ne traite pas expressément de la compensation pré-post. Cette disposition est rédigée ainsi :

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

Lu à la lumière de son contexte, de son objet et de l'esprit de la *LACC*, nous sommes d'avis que l'art. 21 se limite à autoriser la compensation pré-pré aux fins

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]

de quantification des réclamations des créanciers au jour de l'ouverture.

[65] En ce qui concerne le contexte, l'art. 21 fait partie d'une section différente de celle visant le pouvoir discrétionnaire de suspension conféré au tribunal. Le pouvoir de suspension (art. 11 et 11.02) ainsi que la plupart de ses exceptions (voir, p. ex., art. 11.01, 11.08 et 11.1) figurent dans la partie II, intitulée « Juridiction des tribunaux ». Pour sa part, l'art. 21 fait plutôt partie de la section « Réclamations » de la partie III, qui comprend également les art. 19 et 20. Ceci indique que le législateur ne considérait vraisemblablement pas l'art. 21 comme une exception à la période de suspension. Si son intention avait été plutôt d'en faire une exception, il aurait inclus l'art. 21 dans la partie II ou affirmé expressément qu'il s'agit d'une exception.

[66] Au surplus, il ressort d'un examen de l'art. 21 dans le contexte plus large de la section « Réclamations » que cette disposition fait partie d'un ensemble de règles encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement et la quantification des montants qui en découlent.

[67] L'article 19 précise quelles sont les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement (par. (1)) et celles qui demeureront intactes malgré l'acceptation par les créanciers d'une transaction ou d'un arrangement et son homologation par le tribunal (par. (2)). Seules les créances ayant pris naissance avant la date d'ouverture des procédures en faillite ou insolvabilité constituent des « réclamations » visées par l'art. 19 et donnent ainsi aux créanciers le droit de voter sur une transaction ou un arrangement. Quant à l'art. 20, il contient des règles permettant de déterminer le montant des réclamations. Une fois déterminé, ce montant permet ensuite de définir le poids relatif du droit de vote de chaque créancier détenant une réclamation[1].

[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*).

[1] Le plan de transaction ou d'arrangement doit être approuvé par une majorité qualifiée des deux tiers en valeur des créanciers ou d'une catégorie de créanciers (par. 6(1) de la *LACC*).

[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 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).

[68] L'article 21 complète les art. 19 et 20; la compensation autorisée par l'art. 21 vise, entre autres, à déterminer la valeur de la réclamation qu'un créancier peut avoir contre la débitrice au *jour de l'ouverture*. Autrement dit, l'art. 21 vise à donner l'heure juste sur l'intérêt pécuniaire que détient chaque créancier dans la restructuration au jour de l'ouverture et le nombre de votes dont il devrait disposer (voir *Kitco*, par. 83). Cette disposition s'intéresse peu à ce qui pourrait se passer postérieurement à cette date dans les affaires de la débitrice; en effet, c'est au jour de l'ouverture que « doivent être établies les réclamations » et donc que la réciprocité des dettes doit s'apprécier (B. Boucher, « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 70; voir aussi *Kitco*, par. 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.

[69] Avec égards pour l'opinion de notre collègue, à la lumière du contexte de l'art. 21, il est apparent que cette disposition n'a pas pour vocation de légitimer la compensation pré-post.

[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).

[70] Cette interprétation contextuelle de l'art. 21, qui limite son champ d'application à la compensation pré-pré, est également confirmée par son objet. Cette disposition a été ajoutée à la *LACC* afin de prévenir l'injustice qui résulterait du fait qu'un créancier serait tenu de payer intégralement sa dette à la compagnie débitrice, mais ne recevrait presque rien de la débitrice en paiement de sa créance aux termes d'un arrangement ou d'une transaction. En raison de l'art. 21, le créancier reçoit paiement de sa créance jusqu'à concurrence de la valeur de la dette qu'il devait à la débitrice (Anderson, Gelbman et Pullen, p. 27; Boucher, nº 70; McElcheran, 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

[71] Il est vrai que la compensation « crée une sorte de garantie sur l'actif de la [compagnie insolvable] », parce qu'elle « autorise la partie qui invoque la compensation à "modifier" l'ordre de priorité » en réduisant la valeur de sa créance (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 59-60; voir *Kitco*, par. 63-68). Le créancier

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).

se sert de sa dette envers la débitrice comme d'une forme de garantie à l'égard de sa créance, une garantie d'une valeur égale à sa dette envers la compagnie insolvable (*Stein c. Blake*, [1996] 1 A.C. 243 (H.L.), p. 251). Cette portion de sa créance est donc assurée d'être payée en totalité (*Husky Oil*, par. 58). Par ses effets, la compensation déroge ainsi au principe de l'égalité entre les créanciers ordinaires, un principe fondamental du droit de l'insolvabilité qui s'applique avec autant de force dans le cadre de procédures intentées sous le régime de la *LACC*, dont l'un des objectifs réparateurs vise à assurer un traitement juste et équitable des réclamations déposées contre un débiteur (*Callidus*, par. 40). L'exception créée par la compensation doit donc être interprétée de manière restrictive. En règle générale, [TRADUCTION] « [u]ne fois que s'amorce formellement une procédure en matière d'insolvabilité, tous les recours des créanciers non garantis sont suspendus et chaque créancier doit faire la queue derrière les créanciers garantis et les créanciers privilégiés, et partager avec tous les autres créanciers non garantis, au prorata, toute somme qui reste dans le patrimoine » (McElcheran, 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.

[72] Le préjudice subi par un créancier désirant opérer compensation pré-post ne justifie pas d'élargir la portée de l'art. 21. Lorsque la dette due par le créancier prend naissance après le prononcé de l'ordonnance de suspension, le préjudice n'est qu'illusoire. Le fait que le créancier ait contracté des obligations envers la compagnie débitrice durant la période de suspension ne le place pas dans une pire situation que celle dans laquelle il aurait été s'il avait plutôt contracté avec un tiers. S'il avait contracté avec un tiers, il aurait de la même façon été contraint de payer intégralement le prix des produits ou services qu'il a obtenus (*Tungsten* (C.S.), par. 27). Le créancier qui contracte avec la compagnie débitrice durant la période de statu quo sait ou devrait savoir qu'il ne recevra probablement que des sous pour chaque dollar de sa créance pré-ordonnance et que le paiement de sa dette post-ordonnance lui bénéficiera, ainsi qu'aux autres créanciers.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the

[73] Puisque le préjudice ne se manifeste réellement qu'en ce qui concerne la compensation pré-pré,

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

cette exception au principe de l'égalité ne devrait donc porter que sur un seul des éléments d'actifs de la débitrice au jour de l'ouverture des procédures en insolvabilité, c'est-à-dire la dette du créancier à son endroit (*Kitco*, par. 68; *Husky Oil*, par. 59). Autrement, donner le feu vert à la compensation pré-post équivaudrait à attribuer à certains créanciers une « sorte de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures (par exemple, les sommes reçues à titre de financement intérimaire). Le professeur Wood décrit bien l'injustice qui serait ainsi causée aux autres créanciers ordinaires dont les droits et recours sont suspendus :

> [TRADUCTION] La capacité d'exercer un droit d'opérer compensation lors de procédures de restructuration peut avoir pour effet d'améliorer grandement la position d'un créancier au détriment des autres. Voici un exemple qui illustre cette affirmation. Supposons qu'une compagnie débitrice doit 1 000 $ à un créancier. Cette compagnie entame des procédures de restructuration. Alors que les procédures sont en cours, la compagnie débitrice vend et livre au créancier des biens d'une valeur de 1 000 $. Exerçant son droit d'opérer compensation, ce dernier recouvre entièrement le montant de sa réclamation, au détriment des autres créanciers non garantis, dont les réclamations seront compromises ou autrement affectées par le plan. [p. 400]

[74] Or, l'objectif de la période de suspension est justement d'empêcher un créancier d'être avantagé par rapport aux autres pendant la restructuration de la compagnie débitrice (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (C.S.), par. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), par. 6; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, par. 17). La compensation pré-post ne devrait pas permettre à un créancier de faire indirectement ce qu'il ne peut faire directement. Le législateur ne peut avoir souhaité créer une telle garantie additionnelle pouvant être réalisée pendant la période de suspension du seul fait que le créancier et la compagnie débitrice ont une relation d'affaires qui se poursuit.

[75] Faut-il le rappeler, considérer que l'art. 21 autorise la compensation pré-post minerait l'efficacité de la période de statu quo, mettrait en péril la survie

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

de la compagnie débitrice ou de l'entreprise qu'elle exploite et pourrait faire dérailler la restructuration. Il ne fait aucun doute que le législateur ne peut avoir souhaité qu'une compagnie en difficulté, privée de sa seule bouée de sauvetage, soit condamnée à crouler sous le poids de ses dettes, uniquement parce qu'un seul créancier a souhaité s'avantager au détriment des autres. Un tel résultat va à l'encontre des objectifs fondamentaux de la *LACC*.

[76] Avant de conclure, nous ouvrons une parenthèse au sujet de l'arrêt *Kitco*. Dans cette affaire, la Cour d'appel a rejeté l'interprétation littérale de l'art. 21 selon laquelle cette disposition autoriserait sans réserve toute forme de compensation, y compris la compensation pré-post. Notre collègue est d'avis que cet arrêt, appliqué par la majorité de la Cour d'appel et la juge surveillante dans la présente affaire, crée une asymétrie entre l'interprétation par les tribunaux québécois de l'art. 21 de la *LACC* et celle des tribunaux des autres provinces canadiennes. Notre collègue cite à cet égard les affaires *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (C.S.J. Ont.), et *Tungsten*.

[77] À notre avis, l'arrêt *Kitco* ne s'inscrit pas en faux contre la jurisprudence du reste du pays en ce qui concerne l'interprétation de l'art. 21. En effet, les affaires *Air Canada* et *Tungsten* n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers.

[78] D'abord, dans l'affaire *Air Canada*, les questions en litige ne portaient pas sur les répercussions de la compensation pré-post sur la réalisation des objectifs de la *LACC*. Cette affaire portait plutôt sur les critères de la compensation légale en common law, ainsi que sur l'interprétation d'une disposition de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, dont le texte différait de celui de l'art. 18.1 de la *LACC* (maintenant l'art. 21 de la *LACC*). Au chapitre de la compensation légale, Air Canada prétendait que le prononcé d'une ordonnance initiale en vertu de la *LACC* entraînait une perte de réciprocité entre

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.

les dettes, par analogie avec la saisine des biens du failli par un syndic sous le régime de la *LFI*. C'est dans ce contexte que le tribunal a conclu que l'ordonnance initiale rendue en application de la *LACC* ne modifie pas les qualités de créancière et de débitrice de la société insolvable, contrairement à une procédure de faillite.

[79] De plus, dans l'affaire *Tungsten*, le litige portait principalement sur la possibilité de suspendre le droit à la compensation pré-post. En première instance, le juge n'a procédé à aucune analyse des arguments relatifs aux impacts de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, estimant qu'il n'était pas nécessaire de le faire dans les circonstances. Notre collègue soutient que la question de savoir si la compensation pré-post pouvait s'opérer n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise par l'art. 21 de la *LACC*. Selon nous, l'absence de débat sur la possibilité d'opérer compensation pré-post a davantage pour effet d'affaiblir l'autorité de cette décision que de la renforcer.

[80] En conséquence, et avec égards pour l'opinion contraire, l'état du droit n'était pas définitif ailleurs au Canada sur l'interprétation de l'art. 21. Lorsqu'elle s'est prononcée dans l'arrêt *Kitco*, la Cour d'appel n'était pas liée par les affaires *Air Canada* et *Tungsten*.

[81] En somme, à l'instar de la Cour d'appel dans l'arrêt *Kitco*, nous concluons que l'art. 21 de la *LACC* permet la compensation pré-pré aux fins de quantification des réclamations des créanciers au jour de l'ouverture (*Kitco*, par. 82). Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Ainsi, le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

[82] Voyons ce qu'il en est en l'espèce.

(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

c) *Application*

[83] Dans la présente affaire, les termes de l'ordonnance de suspension rendue par le Tribunal sont suffisamment larges pour interdire la compensation pré-post :

[TRADUCTION]

Suspension des droits et recours

ORDONNE CE QUI SUIT : Durant la Période de suspension, et sous réserve, entre autres, de l'article 11.1 de la LACC, tous les droits et recours, notamment les modifications aux droits existants et les événements réputés survenir suivant toute entente à laquelle l'un des Débiteurs est partie en raison de l'insolvabilité des Débiteurs étrangers et/ou des présentes procédures fondées sur la LACC, de quelque manquement ou inexécution par les Débiteurs ou de quelque admission ou témoignage dans le cadre de ces procédures fondées sur la LACC, de quelque personne physique, firme, personne morale, société de personnes, société à responsabilité limitée, fiducie, coentreprise, association, organisation, organisme ou agence du gouvernement, ou de toute autre entité (toutes les entités énumérées précédemment étant appelées collectivement « **Personnes** » et individuellement « **Personne** ») visant les Débiteurs ou s'y rapportant, ou touchant l'Entreprise, les Biens ou toute partie de ceux-ci, sont suspendus par les présentes, sauf sur autorisation de la Cour.

. . .

Interdiction de porter atteinte aux droits

ORDONNE CE QUI SUIT : Durant la Période de suspension, il est interdit à toute Personne de supprimer, de refuser d'honorer, de modifier, de violer, de répudier, de résilier ou de cesser d'exécuter, selon le cas, quelque droit, droit de renouvellement, contrat, entente, licence ou permis en faveur des Débiteurs ou détenu par ceux-ci, sauf avec le consentement écrit des Débiteurs, le cas échéant, et du Contrôleur, ou sur autorisation de la Cour. [Nous soulignons.]

(d.a., vol. I, p. 75)

[84] L'ordonnance ayant suspendu la compensation à l'égard des créances pré-post, il reste à déterminer si le Tribunal aurait dû exercer son

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.

pouvoir discrétionnaire en vertu de l'art. 11 de la *LACC* et permettre l'application de cette compensation à l'égard de la créance PRV. Bien que nous soyons d'avis que la juge surveillante a fait erreur en concluant qu'elle ne possédait aucun pouvoir discrétionnaire l'habilitant à autoriser la compensation pré-post en se basant sur l'arrêt *Kitco*, il nous apparaît que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice. Au surplus, les délais occasionnés par le présent dossier causent préjudice aux droits des tiers de bonne foi ayant participé à la restructuration de Groupe SM. À cet égard, Thornhill n'a pas été en mesure de rembourser, selon les termes stipulés, le financement de transition consenti par les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP, également créancières de Groupe SM, notamment en raison du refus de la Ville d'acquitter le coût des travaux effectués par Groupe SM.

[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).

[85] Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur (*Callidus*, par. 49; *Century Services*, par. 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

[86] La première considération, soit le caractère opportun de l'ordonnance sollicitée, vise tout autant l'ordonnance elle-même que les moyens utilisés (*Century Services*, par. 70). Elle s'évalue au regard des objectifs réparateurs de la *LACC* (*Callidus*, par. 49; *Century Services*, par. 70). Parmi ces objectifs réparateurs, mentionnons les suivants : éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable; maximiser le recouvrement au profit des créanciers; assurer un traitement juste et équitable des réclamations déposées contre la compagnie débitrice; préserver la valeur d'exploitation dans la mesure du possible; protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise; améliorer le système de crédit de manière générale (*Callidus*, par. 40-42). À ce chapitre, le contexte d'une restructuration par voie de liquidation, ainsi que les répercussions de la compensation pré-post sur son bon déroulement, peuvent être soupesés par le tribunal dans l'exercice de son pouvoir discrétionnaire. De

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

surcroît, bien qu'elle recoupe un certain nombre des objectifs réparateurs dont les tribunaux doivent tenir compte, la protection de l'intérêt public doit elle aussi figurer sur cette liste (*Callidus*, par. 40; *Century Services*, par. 60).

[87] En l'espèce, la Ville prétend que la protection de l'intérêt public milite en faveur de la compensation pré-post. Elle estime que les juges majoritaires de la Cour d'appel ont commis une erreur en ne considérant pas « l'intérêt public de voir à la récupération des deniers publics détournés frauduleusement » (m.a., par. 2; voir aussi par. 80). Nous ne pouvons retenir cette prétention. Voici pourquoi.

[88] Selon nous, la Ville amalgame à tort l'intérêt public avec son propre intérêt en tant qu'organisme public titulaire d'une créance. L'objectif de protection de l'intérêt public ne signifie pas que les entités publiques devraient être placées dans une position plus avantageuse que les autres créanciers parce que leurs créances concernent des deniers publics. Cela contredit le principe de l'égalité entre les créanciers. Dans le contexte de la *LACC*, la protection de l'intérêt public ne saurait donc être réduite à la protection de l'intérêt d'un créancier en particulier. Elle suppose la prise en compte d'intérêts qui dépassent ceux de la compagnie débitrice et de ses créanciers, comme celui des employés dont les emplois sont menacés ou celui de la communauté dans laquelle évolue la compagnie débitrice (*Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 102; *Metcalfe*, par. 50-52; Sarra, p. 162 et 501; Wood, p. 341; voir aussi, pour une illustration éloquente, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (C.J. Ont. (Div. gén.)), par. 50).

[89] La protection de l'intérêt public peut aussi s'étendre à des considérations de moralité commerciale qui reflètent les normes sociales, comme des considérations liées au fait que nul ne devrait bénéficier d'activités frauduleuses auxquelles il a pris part (A. Keay, « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509, p. 513 et 525). Dans des circonstances bien particulières, le tribunal pourrait donc conclure que la protection de l'intérêt public, de même que les

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

autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*, d'où la pertinence de déterminer si la créance PRV est une réclamation qui découle de fraude dans le cas qui nous occupe. Mais si une telle conclusion est possible en droit, elle ne devrait pas relever de l'automatisme. Dans chaque cas, le tribunal doit exercer son pouvoir discrétionnaire de la façon indiquée dans les arrêts *Callidus* et *Century Services*, et si d'aventure il est appelé à accorder un poids prépondérant à l'objectif de protection de l'intérêt public, il doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier.

[90] En l'espèce, la créance PRV de la Ville est une créance ordinaire, puisque, comme nous l'avons indiqué, la Ville n'a pas apporté la preuve de la fraude alléguée et cette preuve ne saurait s'inférer du seul fait que sa créance se rattache à une entente conclue en vertu du PRV. En conséquence, sa prétention selon laquelle l'objectif de protection de l'intérêt public milite en faveur de la compensation pré-post doit être rejetée. La Ville n'a pas invoqué d'autre objectif réparateur de la *LACC* au soutien de sa position. Il s'ensuit qu'elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. De plus, les travaux effectués par Groupe SM pour la Ville étaient dans l'intérêt public, puisqu'ils consistaient à poursuivre la réalisation de chantiers majeurs, tels que la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[91] La deuxième considération, soit celle de la diligence, milite clairement à l'encontre de l'exercice de la compensation pré-post par la Ville. Sous le régime de la *LACC*, cette considération est importante étant donné qu'elle « décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage » (*Callidus*, par. 51). La procédure prévue par la *LACC* implique des négociations ainsi que des transactions entre le débiteur et les intéressés et elle est supervisée par le tribunal et le contrôleur; il s'ensuit que tous les acteurs qui y participent doivent

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.

se trouver sur un pied d'égalité et avoir une compréhension sans équivoque de leurs obligations et droits respectifs (par. 51). En conséquence, dans l'arrêt *Callidus*, notre Cour a conclu :

> La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie). [par. 51]

[92] Dans la présente affaire, il appert clairement que la Ville ne s'est pas comportée conformément à la norme de diligence attendue dans le cadre d'une procédure fondée sur la *LACC*. À ce propos, Deloitte soutient que la Ville aurait dû signifier son intention d'opérer compensation dans les jours qui ont suivi le prononcé de l'ordonnance initiale, le 24 août 2018. Le dossier ne révèle pas que la Ville a pris connaissance de l'ordonnance initiale dès le 24 août 2018, mais, tel qu'indiqué dans un courriel adressé au procureur de Deloitte, elle connaissait l'existence de cette ordonnance depuis le 10 septembre 2018 au moins. Quoi qu'il en soit, nous sommes d'avis qu'un créancier diligent, une fois qu'il a pris connaissance de l'insolvabilité du débiteur alors qu'il est l'objet d'une procédure intentée en vertu de la *LACC*, ne peut attendre de 47 à 58 jours pour lui signifier son intention d'opérer compensation.

[93] La Ville justifie la tardiveté de sa demande en affirmant qu'elle attendait un des paiements de la créance PRV dû le 31 octobre 2018, avant de prendre quelque action que ce soit. Or, l'entente PRV indique plutôt que ce paiement était dû le 1er octobre 2018. De plus, la Ville savait ou aurait dû savoir que le terme était échu depuis plusieurs semaines déjà, puisque l'insolvabilité de Groupe SM a entraîné la perte du bénéfice du terme de la créance PRV.

[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.

[94] Intentionnelle ou non, cette inaction de la Ville était de nature à la placer dans une position plus avantageuse que celle des autres créanciers ordinaires, et ce, faut-il le souligner, à un moment crucial des procédures de restructuration. En effet, en invoquant compensation, elle pouvait, ce faisant, obtenir des services sans les payer. La Ville devait se douter que si elle avait manifesté son intention de procéder ainsi dès le départ, en toute diligence, Groupe SM aurait vraisemblablement refusé d'entreprendre les travaux prévus au contrat, sachant qu'il ne serait pas payé et qu'il s'agirait là d'un obstacle majeur au processus de financement intérimaire. Qui plus est, suivant l'art. 32 de la *LACC*, Groupe SM aurait même pu demander la résiliation de ce contrat.

[95] En somme, les considérations guidant l'exercice du pouvoir discrétionnaire du tribunal ne justifient pas de lever la suspension du droit à la compensation pré-post de la Ville. Considérant nos conclusions relatives aux deux premières considérations, il n'est pas nécessaire de nous pencher sur la bonne foi de la Ville. Nous sommes d'avis que le renvoi du dossier en première instance mènerait inéluctablement au même résultat.

B. *Créance relative au contrat des compteurs d'eau*

[96] Ici encore, les termes de l'ordonnance de suspension prononcée par le Tribunal sont suffisamment larges pour interdire la compensation pré-post. Le Tribunal a cependant accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans le dossier relatif au contrat des compteurs d'eau. Voici les extraits pertinents de son jugement :

LE TRIBUNAL, saisi de la Demande de la Ville de Montréal datée du 27 septembre 2018 pour être autorisée à lever la suspension des procédures afin de traiter et liquider une réclamation en Chambre civile (la « **Demande** »);

. . .

LÈVE, en faveur de la Requérante Ville de Montréal, la suspension des procédures ordonnée dans ce dossier

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.

à l'égard de Les Consultants S.M. inc., Le Groupe S.M. inc., le Groupe SMI inc. et Le Groupe S.M. International S.E.C. (les « **Débitrices visées** ») [. . .] afin uniquement de permettre à la Requérante, Ville de Montréal, d'établir sa réclamation contre les Débitrices visées [. . .] dans le cadre des procédures initiées devant la Cour supérieure du Québec portant le numéro 500-17-104932-184; [Nous soulignons.]

(d.a., vol. IV, p. 129)

[97] Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. La Ville affirme qu'elle est en droit de retenir les paiements dus à Groupe SM jusqu'à ce qu'un jugement soit rendu dans l'affaire relative au contrat des compteurs d'eau.

[98] Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau n'est pas indiquée. Le renvoi du dossier en première instance pour trancher cette question serait, encore une fois, inutile et contraire aux intérêts de la justice.

[99] En effet, non seulement l'ordonnance recherchée par la Ville placerait Thornhill à la merci du résultat de procédures judiciaires longues et complexes — qui, faut-il le rappeler, concernent une créance de plusieurs millions —, mais elle ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV. La Ville confond ici l'intérêt public et son propre intérêt en tant qu'organisme public titulaire d'une créance qui n'a jamais été établie. Ensuite, la Ville n'a pas fait montre de diligence. Même si sa demande introductive d'instance dans le dossier relatif au contrat des compteurs d'eau a été introduite le 26 septembre 2018, la Ville a manqué à son obligation de diligence en attendant au 7 novembre 2018 pour signaler son intention d'opérer compensation, alors qu'elle avait connaissance de l'ordonnance initiale au moins depuis le 10 septembre 2018.

VI. Conclusion

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

English version of the reasons delivered by

[101] BROWN J. (dissenting) — 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

VI. Conclusion

[100] Pour ces motifs, nous sommes d'avis de rejeter le présent pourvoi avec dépens.

Les motifs suivants ont été rendus par

[101] LE JUGE BROWN (dissident) — Je partage l'avis de la majorité selon lequel le juge surveillant possède, en vertu de l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale (« compensation pré-post »). Cependant, j'estime que ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. En effet, à mon avis, bien qu'ils reconnaissent le large pouvoir discrétionnaire conféré au juge surveillant par la *LACC*, mes collègues majoritaires échouent à lui donner plein effet en ce qu'ils concluent que la compensation pré-post ne sera jamais autorisée sauf circonstances exceptionnelles.

[102] En outre, contrairement à mes collègues, qui restreignent le champ d'application de l'art. 21 de la *LACC* à la compensation entre des dettes nées avant la délivrance de l'ordonnance initiale, je conclus que la compensation pré-post est permise en vertu de l'art. 21 de la *LACC*, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. Les juges majoritaires de la Cour d'appel du Québec (2020 QCCA 438), ainsi que la juge surveillante (2019 QCCS 2316), s'appuient erronément sur l'arrêt de la Cour d'appel du Québec dans *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, pour conclure que la compensation pré-post ne sera jamais autorisée. Mais, pour les raisons exprimées ci-dessous, l'approche établie dans l'arrêt *Kitco* doit à mon avis être rejetée par la Cour.

[103] Étant donné que la juge surveillante n'a pas exercé son pouvoir discrétionnaire dans la présente affaire, se croyant liée par l'arrêt *Kitco*, il serait mal avisé pour la Cour d'exercer pour la première fois ce pouvoir afin de déterminer si la Ville de Montréal peut

(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

opérer compensation en l'espèce. Par conséquent, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM antérieures à l'ordonnance initiale et les sommes dues par la Ville à Groupe SM pour des travaux réalisés par ce dernier après l'ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la réclamation de la Ville à l'encontre de Groupe SM à l'égard des compteurs d'eau donne ouverture à compensation, puisque rien dans l'art. 21 de la *LACC* n'interdit la compensation judiciaire.

[104] Au surplus, et contrairement à mes collègues, j'estime qu'il n'est pas nécessaire dans le présent pourvoi de trancher la question de savoir si la réclamation de la Ville de Montréal à l'encontre de Groupe SM, laquelle s'appuie sur la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3, doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la *LACC*. À mon avis, l'art. 21 de la *LACC* doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Je conviens néanmoins avec mes collègues que le fait pour un créancier de démontrer qu'il a été victime d'une fraude au sens de l'al. 19(2)d) est un facteur favorable à la compensation pré-post qui doit être soupesé par le juge surveillant avec les autres considérations pertinentes.

[105] Mes collègues estiment qu'il est nécessaire de qualifier la créance de la Ville de Montréal issue du Programme de remboursement volontaire (« PRV »), parce que la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre ou non la compensation pré-post (par. 20). Tel qu'ils le reconnaissent, il s'agit d'un facteur pertinent dans l'exercice du pouvoir discrétionnaire *du juge surveillant*. Comme je l'explique

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 and the Quebec sales tax 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

plus amplement ci-après, la question de savoir si la créance PRV de la Ville de Montréal résulte d'une fraude est une question à laquelle il appartient *à la juge surveillante* de répondre dans le cadre de l'exercice de son pouvoir discrétionnaire, et non à *mes collègues* ou à la Cour.

I. L'arrêt *Kitco* de la Cour d'appel du Québec

[106] Métaux Kitco inc. est une entreprise qui se spécialise dans l'achat de ferraille d'or, dont elle extrait l'or fin afin de pouvoir le revendre. En vertu des règles fiscales, elle est soumise à un régime spécial, c'est-à-dire qu'elle paie la taxe sur les produits et services et la taxe de vente du Québec à l'achat de ferraille d'or (« intrants »), mais la vente d'or fin n'est pas assujettie à ces taxes. Conformément à ce régime spécial, Kitco paie les taxes à ses fournisseurs d'or, lesquels doivent remettre ces taxes à l'Agence du revenu du Québec. Par la suite, lors de la vente d'or fin, Kitco a droit à un remboursement des taxes payées. Cependant, l'Agence constate l'existence d'un stratagème frauduleux suivant lequel les fournisseurs d'or ne lui versent pas les taxes perçues, alors qu'elle rembourse Kitco pour celles-ci.

[107] L'Agence suspecte Kitco d'être impliquée dans ce stratagème frauduleux et lui envoie un avis de cotisation de plus de 300 millions de dollars (soit la dette pré-ordonnance). Le 7 juin 2011, elle entreprend l'exécution forcée de cet avis pour récupérer les sommes qu'elle estime dues. Dès le lendemain, Kitco dépose un avis d'intention de faire une proposition sous le régime de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), suspendant les recours de ses créanciers (art. 69). Un mois plus tard, elle obtient plutôt, en vertu de la *LACC*, une ordonnance initiale qui continue la suspension des recours (suspension toujours en vigueur au moment de l'arrêt). Parallèlement, Kitco continue ses activités commerciales depuis le 8 juin 2011 : elle paie des taxes sur les intrants et en réclame le remboursement à l'Agence, conformément au régime fiscal en place. L'Agence lui doit plus de 1,7 million de dollars en remboursement (soit la dette post-ordonnance), mais impute par compensation cette somme sur les

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

cotisations fiscales qu'elle réclame à Kitco. Cette dernière présente avec succès une requête devant la Cour supérieure pour forcer l'Agence à lui rembourser 1,7 million de dollars au motif qu'il s'agit d'une compensation illégale.

[108] Dans l'arrêt *Kitco*, le juge Vézina, qui rédige les motifs de la Cour d'appel, explique d'abord que le 8 juin 2011 constitue la date d'ouverture de la procédure en insolvabilité, et donc la date à laquelle les recours des créanciers sont suspendus et leurs réclamations doivent être établies (par. 34). Il se dit aussi d'avis que la compensation opérée par l'Agence est illégale. Selon lui, bien que l'art. 21 de la *LACC* ne dise pas expressément que seules les dettes nées avant les procédures en insolvabilité sont susceptibles de compensation, il faut rejeter l'interprétation littérale de cet article, puisqu'elle serait contraire notamment au principe voulant qu'il faille traiter les créanciers ordinaires sur un pied d'égalité (par. 20). Elle fait également échec à la période de statu quo, laquelle est nécessaire aux entreprises en difficultés financières pour leur permettre d'élaborer un plan d'arrangement (par. 43). Il conclut donc qu'une interprétation littérale serait au final contraire à l'objectif de restructuration de la *LACC* (par. 45).

[109] Cette conclusion s'appuie en grande partie sur le constat du juge Vézina que les régimes de la *LFI* et de la *LACC* entretiennent des « liens étroits » et constituent « deux régimes intégrés », de telle sorte que « les enseignements de la jurisprudence et les avis des auteurs sont transposables de l'[un] à l'autre » (par. 51-52). Il s'appuie sur le par. 56 de l'arrêt *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564, et en retient que « [l]es principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite » (*Kitco*, par. 61). À cet égard, il estime que les enseignements de l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, qui a précisé que la compensation s'apparentait à une forme de garantie, sont difficilement transposables en droit civil où la compensation est automatique et s'opère de plein droit dès que deux dettes coexistent et sont

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

certaines, liquides et exigibles (par. 65). Finalement, il considère que l'art. 21 de la *LACC* et le par. 97(3) de la *LFI* précisent à quel moment peut s'opérer la compensation, soit à la date où doivent être établies les « réclamations prouvables » des créanciers, c'est-à-dire le jour de l'ouverture des procédures d'insolvabilité :

À mon avis, les articles 21 *L.a.c.c.* et 97 (3) *L.f.i.* qui édictent que « les règles de la compensation s'appliquent à toutes les réclamations. . . », précisent par là le moment où la compensation s'opère, soit au moment où doivent être établies les réclamations; c'est au jour d'Ouverture que s'établit la réciprocité temporelle. [par. 82]

[110] Le juge Vézina estime, au par. 78, que la réponse à la question de savoir en quoi consiste une « réclamation prouvable » se trouve au par. 121(1) de la *LFI*, c'est-à-dire « [t]outes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date ».

[111] Avec égards, je suis d'avis que plusieurs erreurs ont été commises dans l'arrêt *Kitco*. Premièrement, le juge Vézina s'est erronément appuyé sur l'arrêt de la Cour dans *D.I.M.S. Construction* pour arriver à la conclusion que la compensation pré-post ne pouvait jamais être autorisée en vertu de la *LACC*, alors que cet arrêt a été rendu dans un contexte de faillite sous le régime de la *LFI*. Malgré les similitudes entre les régimes d'insolvabilité établis par la *LACC* et la *LFI*, ces deux lois sont distinctes — et de manière significative en l'espèce. Deuxièmement, l'arrêt *Kitco* repose sur une interprétation restrictive et inappropriée de l'art. 21 de la *LACC*, qui fait fi du caractère « souple » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14) et [TRADUCTION] « flexible » (R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 337) reconnu à la *LACC* ainsi que du vaste pouvoir discrétionnaire dont le juge surveillant est investi, alors que les tribunaux d'autres provinces canadiennes ont jugé que la compensation pré-post pouvait être permise. Troisièmement, l'arrêt *Kitco* a

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, [2020] 1 S.C.R. 522, 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*

été rendu dans un contexte de restructuration réelle d'une entreprise en difficultés financières, et il est difficilement transposable dans un contexte comme celui qui nous occupe, où il s'agit plutôt d'une liquidation des actifs et des contrats d'une entreprise.

A. *Les distinctions fondamentales entre les deux régimes d'insolvabilité*

[112] Il importe de souligner les différences fondamentales entre le régime établi par la *LACC* et celui établi par la *LFI*, lesquelles font ressortir, sous le régime de la *LACC*, le maintien de la réciprocité des dettes ainsi que le vaste pouvoir discrétionnaire permettant au juge surveillant d'autoriser la compensation pré-post. Je ne remets pas en doute l'idée que ces deux régimes doivent être perçus comme « un ensemble intégré de règles du droit de l'insolvabilité » et que des efforts législatifs visant à harmoniser les deux régimes ont été déployés depuis plusieurs décennies (*Century Services*, par. 19-24 et 78). Toutefois, comme nous le verrons ci-dessous, de nombreuses différences persistent entre ces deux régimes (Wood, p. 337).

[113] Les trois principales lois canadiennes en matière d'insolvabilité, c'est-à-dire la *LACC*, la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (« *LLR* »), ont comme objectifs fondamentaux : [TRADUCTION] « . . . le traitement juste et équitable des réclamations des créanciers, la protection de l'intérêt public, la création d'un processus juste, opportun et efficient, et, lors de la prise de la décision de restructurer ou de liquider une entreprise, l'établissement d'un équilibre coûts-avantages maximisant la valeur de celle-ci » (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10, objectifs mentionnés avec approbation par la Cour dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 40). La *LACC* a plus particulièrement comme objectif principal de permettre à une entreprise insolvable de se rétablir financièrement et commercialement par le dépôt d'un plan d'arrangement auprès de ses créanciers (Wood, p. 338; B. Boucher, « Procédures en vertu

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*

de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 2 et 8). En demandant une ordonnance initiale, l'entreprise insolvable se met à l'abri de ses créanciers, suspendant ainsi leurs recours pendant une certaine période, afin de pouvoir concentrer toutes ses énergies sur la confection d'un plan d'arrangement permettant une relance viable (Boucher, nº 2).

[114] Pour ces raisons, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif énoncé précédemment, soit la restructuration d'une entreprise en difficultés financières, par opposition à la *LFI*, qui prévoit un ensemble de règles préétablies (Boucher, nº 8; Wood, p. 337). En tant que telle, la *LACC* est une loi qualifiée de « réparatrice » (Boucher, nº 3; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 500).

[115] La Cour a reconnu que les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, notamment permettre la survie des activités de l'entreprise et éviter les pertes sociales et économiques pouvant résulter de la liquidation de cette dernière (*Century Services*, par. 70). En raison de la portée réparatrice de la *LACC*, un « vaste » pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC* (*Callidus*, par. 48; *Century Services*, par. 14). Cet article prévoit qu'un juge surveillant peut rendre « toute ordonnance qu'il estime indiquée », mais précise toutefois qu'une telle ordonnance ne peut être contraire aux restrictions prévues par la *LACC* et qu'elle doit être « indiquée » au regard des circonstances de chaque affaire. La Cour a indiqué dans l'arrêt *Callidus* que l'art. 11 est en quelque sorte le « moteur » de la *LACC* (par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36). Ce pouvoir discrétionnaire conféré au juge surveillant en vertu de la *LACC* permet la mise en place de solutions « créatives et efficaces » (*Century Services*, par. 21, citant Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la*

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).

Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies (2002), p. 50), en reconnaissance de la « position avantageuse » du juge surveillant, lequel « acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure [fondée sur la *LACC*] » (*Callidus*, par. 47-48). À titre de solutions « créatives » retenues par les tribunaux sous le régime de la *LACC*, mentionnons la « constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur », ainsi que la libération de « tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents » (*Century Services*, par. 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.

[116] Comme l'a reconnu la Cour encore récemment, le vaste pouvoir discrétionnaire conféré au juge surveillant par l'art. 11 de la *LACC* permet à ce dernier de mettre de l'avant des solutions « susceptibles de répondre aux circonstances de chaque cas et de "[s'adapter] aux besoins commerciaux et sociaux contemporains" » (*Callidus*, par. 48, citant *Century Services*, par. 58). Ce vaste pouvoir discrétionnaire du juge surveillant est unique à la *LACC* et n'a pas d'équivalent dans la *LFI*, laquelle est plutôt fondée sur des règles préétablies visant à régir une gamme de situations. Il s'agit donc là d'une distinction majeure entre les deux régimes d'insolvabilité.

[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

[117] Une autre différence majeure entre ces deux régimes est le fait que la *LACC* permet à une entreprise, après qu'elle a obtenu une ordonnance initiale, de poursuivre ses activités commerciales pendant la période de restructuration ou de réorganisation (*Callidus*, par. 41). La poursuite des activités commerciales de l'entreprise en difficulté évite « les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70) et permet de « protéger sa valeur d'exploitation » (*Callidus*, par. 46). Ainsi, lorsque l'entreprise insolvable a recours à la *LACC*, elle n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la

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

saisine des biens du failli (art. 71 de la *LFI*). Il n'y a donc pas de perte de réciprocité sous le régime de la *LACC*. La qualité de débitrice ou de créancière de l'entreprise insolvable demeure inchangée et n'est pas octroyée à un tiers.

[118] Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la *LACC*, par opposition à la *LFI*. En outre, cette même distinction fondamentale entre le régime de la *LACC* et celui de la *LFI* a joué un rôle crucial dans l'arrêt *D.I.M.S. Construction*, sur lequel s'est en grande partie appuyé le juge Vézina dans l'arrêt *Kitco*. En effet, dans l'arrêt *D.I.M.S. Construction*, la Cour devait décider si les régimes législatifs établis dans deux lois québécoises en matière de droit du travail portaient atteinte au plan de répartition prévu par la *LFI*. Ces deux lois établissaient un mécanisme similaire par lequel un employeur assujetti à l'une de ces lois devait payer la cotisation due par un entrepreneur dont il retenait les services. Une fois la cotisation payée par l'employeur, ce dernier avait le droit de retenir sur les sommes qu'il devait à l'entrepreneur le montant de la cotisation qu'il avait déboursé, et donc d'opérer compensation (par. 2). Dans cette affaire, trois employeurs avaient été sommés de payer les cotisations de l'entrepreneur D.I.M.S. Construction inc. *avant* sa faillite le 1er avril 1999, mais un seul d'entre eux avait payé la cotisation avant cette date (par. 3-4). Le syndic à la faillite de D.I.M.S. Construction demandait à la Cour de déclarer inopérants deux articles de ces lois dans le cadre d'une faillite sous le régime de la *LFI* en invoquant l'arrêt de la Cour dans *Husky Oil* (par. 5).

[119] Dans son analyse, la juge Deschamps s'attarde d'abord au par. 97(3) de la *LFI* portant sur la compensation et fait deux constats utiles. Premièrement, comme le par. 97(3) s'applique aux réclamations visant l'actif du failli, le créancier doit remplir les conditions prévues au par. 121(1) de la *LFI*, c'est-à-dire que, pour qu'il puisse opérer compensation, il doit « prouver une créance à laquelle le failli était assujetti en raison d'une obligation contractée antérieurement à la faillite » (par. 40 (je souligne)). Deuxièmement, le par. 97(3) précise que

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.]

la compensation s'opère de la même manière que si le failli était demandeur ou défendeur d'une action en justice, et elle permet exceptionnellement de faire « comme si le patrimoine du failli n'avait pas, par la faillite, été dévolu au syndic » (par. 41).

[120] La juge Deschamps conclut que trois scénarios sont possibles en droit civil québécois en fonction du moment où l'employeur paie la cotisation due par l'entrepreneur : (1) le paiement est fait par l'employeur *avant* la faillite et les dettes sont devenues certaines, liquides et exigibles *avant* la faillite, (2) le paiement est fait *avant* la faillite, l'employeur est endetté envers l'entrepreneur failli, mais l'une des conditions de la compensation légale n'est pas satisfaite et (3) le paiement est fait *après* la faillite (par. 42). Relativement au troisième scénario, lequel fait également interagir l'art. 1651 du *Code civil du Québec*, qui prévoit qu'une personne subrogée dans les droits d'une autre (ici, l'employeur) n'a pas plus de droits que le subrogeant, la juge Deschamps conclut que lorsque l'employeur paie après la faillite de l'entrepreneur, « [l]a double qualité de créancier et de débiteur » et donc la réciprocité des dettes ne survient qu'*après* la faillite (par. 51). Par conséquent, il faut en déduire que, lorsque lu en conjonction avec les art. 121, 136(3) et 141 de la *LFI*, le par. 97(3) de la *LFI* prévoit que « les créances mutuelles doivent avoir pris naissance avant la faillite » pour qu'il y ait compensation (par. 55 (je souligne)). La juge Deschamps ajoute, au par. 56, qu'en vertu des règles propres au régime de la faillite sous la *LFI*, le syndic peut s'opposer à la substitution du créancier (ici, l'employeur), si cela a pour effet de conférer à ce dernier une garantie qui n'existait pas au moment de la faillite :

> Ce qui distingue le paiement avant la faillite du paiement après la faillite est le fait que, dans le premier cas, la substitution de créancier a lieu avant le moment où le syndic acquiert les biens du failli. Lorsque le paiement est fait après la faillite, la substitution est postérieure à la faillite et le syndic est en mesure de s'y opposer. Les principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite. [Je souligne.]

[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)).

[121] L'argument est simple. Pour qu'il y ait compensation légale, en sus du fait que le caractère certain, liquide et exigible de la créance doit être démontré, « deux personnes doivent être réciproquement débitrices et créancières l'une de l'autre » (*Code civil du Québec : Annotations — Commentaires 2020-2021* (5e éd. 2020), par B. Moore, dir., et autres, p. 1558). Il s'agit là d'une des quatre conditions essentielles pour qu'il soit possible d'opérer compensation. Cette réciprocité des créances cesse d'exister lorsqu'une entreprise insolvable devient faillie, puisqu'un syndic à la faillite est nommé et obtient la saisine de ses biens (art. 71 de la *LFI*). La qualité de créancière ou de débitrice de l'entreprise qui devient faillie s'éteint au profit du syndic le jour de l'ouverture de la faillite. De plus, l'entreprise faillie cesse ses opérations commerciales et n'encourt normalement pas d'obligations post-faillite. C'est pourquoi les réclamations prouvables visées par la *LFI* doivent être établies le jour de l'ouverture de la faillite, et il ne peut logiquement y avoir compensation entre des dettes pré et post-faillite (par. 97(3) et 121(1)). Or, comme l'a fait remarquer avec justesse l'intervenante l'Union des municipalités du Québec à l'audience, la situation est tout autre lorsqu'une entreprise insolvable demande la délivrance d'une ordonnance initiale en vertu de la *LACC*, puisqu'elle continue ses activités commerciales, tout en demandant la suspension des recours de ses créanciers (transcription, p. 48-49). Sous le régime de la *LACC*, le contrôleur n'obtient pas la saisine des biens de l'entreprise ayant demandé une ordonnance initiale. La réciprocité des dettes subsiste, l'entreprise demeurant débitrice ou créancière d'une réclamation (voir à ce sujet L. Morin et G.-P. Michaud, « Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA* : After the *Kitco* and *Beyond the Rack* Decisions », dans Sarra et Romaine, *Annual Review of Insolvency Law 2016*, 311, p. 343-344; voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 23-25 (ces auteurs reconnaissent que la saisine des biens de l'entreprise insolvable n'est pas dévolue au contrôleur dans le cadre de la *LACC*, et que la réciprocité des dettes n'est pas éteinte, mais prêchent pour que la *LACC* soit interprétée par les tribunaux de manière à mettre fin à cette réciprocité)).

[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

[122] Ces deux distinctions fondamentales entre les régimes de la *LACC* et de la *LFI* suffisent à expliquer pourquoi l'approche mise de l'avant dans l'arrêt *Kitco* doit être rejetée par la Cour. Comme nous le verrons ci-après, les tribunaux d'autres provinces canadiennes se sont notamment appuyés sur ces distinctions entre les deux régimes pour conclure que l'art. 21 de la *LACC*, contrairement aux dispositions équivalentes dans la *LFI* (par. 97(3)) et la *LLR* (par. 73(1)), n'interdit pas la compensation pré-post.

B. *Les tribunaux d'autres provinces canadiennes ont reconnu la possibilité d'opérer compensation pré-post*

[123] Le droit d'opérer compensation en vertu de la *LACC* a fait l'objet de débats dans la jurisprudence canadienne, et ce, pour deux raisons. D'abord, avant la réforme législative de 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, c. 12) et l'ajout de l'art. 21 (autrefois l'art. 18.1), le droit d'opérer compensation n'était pas formellement reconnu dans la *LACC*. Ensuite, des questions portant sur l'encadrement du droit d'opérer compensation se sont soulevées dans les dernières décennies, notamment en ce qui a trait à la possibilité de suspendre temporairement le droit d'opérer compensation à la suite de la délivrance d'une ordonnance initiale (*LACC*, par. 11.02(1); voir *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications c. 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 n^o 1* ») (décision sur la demande d'autorisation d'appel), conf. par 2015 BCCA 426, 378 B.C.A.C. 116 (« *Tungsten n^o 2* »); *Re Just Energy Corp.*, 2021 ONSC 1793); ou de restreindre ce droit directement dans le texte d'une ordonnance initiale fondée sur la *LACC* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] Plus particulièrement, la question qui nous occupe ici est celle de savoir si l'art. 21 de la *LACC* permet d'opérer compensation pré-post. Cette question se pose avec une plus grande acuité dans le

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 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

[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.

cadre d'un processus de restructuration mené sous le régime de la *LACC*, puisque l'entreprise insolvable continue ses opérations commerciales.

[125] L'une des premières affaires dans lesquelles cette question a été examinée, après la réforme législative de 1997, est la décision *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, rendue par le juge Farley de la Cour supérieure de justice de l'Ontario. Dans cette décision, le juge Farley devait déterminer si un paragraphe inséré dans l'ordonnance initiale et qui visait à limiter le droit pour les créanciers d'Air Canada d'opérer compensation devait être modifié[2]. Essentiellement, Air Canada plaidait que la compensation légale prévue par la *LACC* ne pouvait être autorisée entre des dettes pré et post-ordonnance, comme c'est le cas en vertu de la *LFI* (par. 10-11). Puisque la *LFI* prévoit que, à l'ouverture de la faillite, les biens du failli sont dévolus au syndic en vertu de l'art. 71 (autrefois le par. 71(2)), le juge Farley a conclu qu'il n'y a alors plus de réciprocité entre un créancier et un débiteur failli post-faillite, condition pourtant nécessaire pour qu'il soit possible d'opérer compensation :

> [TRADUCTION] *Lors d'une faillite*, le syndic est ajouté à l'instance. Lorsqu'un créancier effectue des opérations post-faillite avec le syndic de faillite, il ne traite pas avec la même partie, c'est-à-dire avec le débiteur avant la faillite. [. . .] Par conséquent, le créancier qui contracte des obligations post-faillite envers un syndic de faillite ne peut invoquer la compensation légale pour éviter d'acquitter de telles obligations en opérant compensation entre celles-ci et ses réclamations (pré-faillite) contre le failli dont il a fait la preuve. Comme ce ne sont pas les mêmes parties qui sont concernées, il ne saurait y avoir d'obligations réciproques. [En italique dans l'original; par. 14.]

[126] Ensuite, le juge Farley a analysé le second argument d'Air Canada qui prétendait que l'art. 21 de la *LACC* (alors l'art. 18.1), devait être interprété de façon similaire au par. 73(1) de la *LLR* (par. 16-17),

[2] Le paragraphe en question était rédigé ainsi : [TRADUCTION] « LA COUR ORDONNE que seuls peuvent être exercés par les personnes concernées les droits d'opérer compensation qui sont autorisés par l'article 18.1 de la LACC à compter de la date de la présente ordonnance. Il est entendu que nul ne peut opérer compensation sur des obligations d'un Demandeur envers une telle personne nées avant la date de la présente ordonnance. » (par. 2). La dernière phrase posait particulièrement problème.

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.

lequel prévoit que la compensation s'applique à « toutes les réclamations sur l'actif d'une compagnie et à toutes les procédures en recouvrement de créances d'une compagnie, échues ou devenues exigibles à l'ouverture de la liquidation de la compagnie ». Le juge Farley a rejeté cet argument pour plusieurs raisons, insistant notamment sur les différences entre le texte du par. 73(1) de la *LLR* et celui de l'art. 21 de la *LACC*. Par exemple, ce dernier article ne prévoit pas que la compensation doit s'effectuer entre des réclamations devenues exigibles à la date de la délivrance de l'ordonnance initiale. Le juge Farley a souligné que ces différences rédactionnelles reflètent le choix du législateur, lequel n'a pas voulu adopter des dispositions législatives identiques en matière de compensation dans les trois lois canadiennes en matière d'insolvabilité (par. 23). Pour ces raisons, il a ordonné la modification du paragraphe de l'ordonnance qui limitait le droit d'opérer compensation (par. 24).

[127] Bien qu'il ait radié la partie de l'ordonnance initiale qui empêchait la compensation pré-post, le juge Farley a néanmoins suspendu la mise en œuvre de la compensation jusqu'à ce que la situation d'Air Canada se soit davantage stabilisée, afin d'éviter les conséquences perturbatrices qu'entraînerait le fait de permettre la compensation pendant la période de statu quo. Il a suggéré que le meilleur moment pour opérer compensation serait lors de la formulation d'un plan d'arrangement (par. 25).

[128] Mes collègues prétendent (au par. 77) que « les affaires *Air Canada* et *Tungsten* [que je décris ci-dessous] n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers ». Cette prétention ne tient toutefois pas compte du fait que la décision *Air Canada* est largement reconnue comme faisant autorité et appuyant la proposition selon laquelle la réciprocité n'est pas rompue par une ordonnance initiale rendue en vertu de la *LACC*, de sorte que la compensation pré-post est possible mais assujettie au pouvoir du juge surveillant d'en suspendre l'exécution (voir R. Thornton, « Air Canada and Stelco : Legal Developments and Practical Lessons », dans J.

(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. . . .
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> . . .
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> . . . 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.
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> . . .
>
> 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

P. Sarra, dir., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten n^o 3* »), par. 15). Par exemple, Robert Thornton écrit :

> [TRADUCTION] Air Canada était endettée envers certaines parties à la date de l'Ordonnance initiale. Après cette date, ces parties sont devenues débitrices d'Air Canada. Elles souhaitaient opérer compensation entre leurs dettes post-LACC envers Air Canada et les dettes pré-LACC de cette dernière envers elles. . . .
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> . . .
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> . . . Le juge Farley a conclu qu'il n'y a pas perte de mutualité dès l'introduction de procédures en vertu de la LACC. Par conséquent, la compensation légale est possible tant à l'égard de créances existant à la date d'une ordonnance initiale qu'à l'égard de créances nées après cette date. Le juge Farley était fondé à conclure ainsi.
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> . . .
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> Il semble maintenant clair au Canada que l'introduction de procédures en vertu de la LACC n'a pas d'incidence sur la compensation légale et sur la compensation en equity, sous réserve (i) du fait que le droit de les appliquer peut être « temporairement » suspendu et (ii) du fait que si la partie qui invoque la LACC refuse d'acquiescer à la compensation, il sera nécessaire de solliciter l'intervention des tribunaux.
>
> Les auteurs sont d'avis qu'il est approprié que les droits d'opérer compensation continuent de s'appliquer après l'introduction de procédures en vertu de la LACC. La partie qui invoque cette loi continue d'exploiter son entreprise comme à l'habitude. [Je souligne; p. 94-96.]

[129] Dans l'affaire *Tungsten*, la Cour d'appel de la Colombie-Britannique s'est également penchée sur la compensation prévue par l'art. 21 de la *LACC*, d'abord dans le cadre d'une demande de permission d'appeler de deux ordonnances de la Cour suprême de la Colombie-Britannique (*Tungsten n^o 1*, le juge Savage), puis en appel de cette décision refusant la permission d'appeler (*Tungsten n^o 2*). L'entreprise insolvable avait obtenu, en vertu de la *LACC*, une ordonnance initiale prenant effet à compter du 9 juin 2015, date à laquelle elle devait approximativement 4,4 millions de dollars à Global Tungsten and

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

Powders Corp. (« GTP ») aux termes d'un contrat de prêt. Par la suite, l'entreprise insolvable continuait de vendre du tungstène à GTP, laquelle a envoyé un avis indiquant qu'elle souhaitait opérer compensation entre sa créance (soit la dette pré-ordonnance) et les sommes échues ou à échoir pour la vente de tungstène (soit la dette post-ordonnance) (*Tungsten n^o^ 1*, par. 2 et 6). Le juge de première instance avait reconnu que GTP possédait un droit valide d'opérer compensation (*Tungsten n^o^ 2*, par. 7).

[130] Dans ces deux décisions, la principale question dont la Cour d'appel était saisie consistait à déterminer si le juge de première instance avait fait erreur en concluant que le droit d'opérer compensation pouvait être suspendu, au même titre que les recours des autres créanciers, à partir de la délivrance de l'ordonnance initiale. La question de savoir si compensation pré-post pouvait être opérée n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise sous le régime de la *LACC*. S'appuyant sur l'art. 21 de la *LACC* ainsi que sur l'art. 11 de celle-ci, qui confère un large pouvoir discrétionnaire au juge surveillant, la Cour d'appel a expliqué que rien dans le texte de l'art. 21 n'interdit au juge surveillant d'assujettir le droit d'opérer compensation à la suspension des recours (*Tungsten n^o^ 1*, par. 12-13 et 16; *Tungsten n^o^ 2*, par. 31 et 34-35).

[131] Contrairement à ce qu'avancent mes collègues au par. 79, dans cette affaire, tant le tribunal de première instance que la Cour d'appel ont considéré les arguments relatifs aux incidences de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, mais dans l'optique de la suspension du droit d'opérer compensation plutôt qu'en s'interrogeant sur la possibilité même de la compensation pré-post. Cela démontre que les inquiétudes de mes collègues quant au potentiel perturbateur de la compensation pré-post sont adéquatement prises en compte par le juge surveillant dans l'exercice de son pouvoir discrétionnaire d'autoriser la compensation ou d'en suspendre l'application.

[132] Le juge de première instance a notamment écrit ce qui suit : [TRADUCTION] « . . . une suspension

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

temporaire des droits peut être accordée pour appuyer l'application de l'ordonnance initiale et la réalisation des objectifs de la *Loi* » (*Tungsten n^o^ 3*, par. 25). Il a reconnu que les arguments relatifs aux incidences de la compensation pré-post ont du mérite, mais il n'était pas prêt à renverser la décision *Air Canada* (par. 17-18). Il a en outre suspendu le droit d'opérer compensation parce que, [TRADUCTION] « [a]fin de préserver le statu quo en vue d'effectuer la restructuration, la suspension du droit d'opérer compensation est, et était, absolument essentielle », ajoutant entre autres que, si la suspension de la compensation n'était pas reconduite, les efforts de restructuration « seraient désorganisés » et « [l]e statu quo serait considérablement affecté et cela mettrait effectivement un terme à la restructuration » (par. 32). Le juge saisi de la demande d'autorisation d'appel a quant à lui souligné que, [TRADUCTION] « [d]e toute évidence, pour qu'une tentative de transaction ou d'arrangement ait quelque chance de succès, il faut un moyen de tenir les créanciers à distance » (*Tungsten n^o^ 1*, par. 16). Il a ajouté que l'absence de suspension du droit d'opérer compensation aurait pour effet de favoriser GTP au détriment des autres créanciers (par. 18 et 25). Rédigeant l'arrêt de la Cour d'appel, le juge Groberman a insisté sur le principe selon lequel un créancier ne devrait pas pouvoir se prévaloir du droit d'opérer compensation afin de contourner une transaction ou un arrangement fondé sur la *LACC* (*Tungsten n^o^ 2*, par. 37-39).

[133] Malgré les protestations à l'effet contraire de mes collègues, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*.

[134] Force est de constater que l'approche avancée par la Cour d'appel du Québec dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes. Cette asymétrie va à l'encontre du principe de l'interprétation

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

uniforme des lois fédérales (Morin et Michaud, p. 344).

C. *La restructuration d'une entreprise insolvable versus la liquidation des actifs de cette entreprise*

[135] Enfin, dans l'arrêt *Kitco*, le juge Vézina a souligné que ses conclusions étaient fondées sur le fait que l'entreprise insolvable était engagée dans un véritable processus de restructuration et que la suspension des recours de ses créanciers était essentielle pour lui permettre de mener à bien ce processus. Il a insisté sur le fait que le plan de restructuration de Kitco était mis en péril parce que l'Agence opérait compensation sur les sommes qu'elle devait verser à Kitco. En effet, Kitco était obligée de poursuivre ses activités tout en payant des taxes de l'ordre de 15 p. 100 sur ses intrants d'or sans recevoir le remboursement auquel elle avait droit à cet égard. Elle se trouvait ainsi dans une position « insoutenable » comparativement aux entreprises concurrentes dans son domaine (par. 47-48).

[136] La suspension, en vertu de la *LACC*, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale, en particulier lorsque l'exercice du droit d'un créancier d'opérer compensation pré-post risque de saboter les efforts déployés par l'entreprise pour retrouver sa santé financière.

[137] En l'espèce, toutefois, et de l'avis même du contrôleur et des intervenants, il n'a jamais été question pour Groupe SM de proposer un plan d'arrangement. Dès le dépôt d'une demande d'ordonnance initiale en vertu de la *LACC* par les principaux créanciers de Groupe SM, il était clair que ces derniers souhaitaient opter pour un processus de liquidation, soit la vente de l'entreprise insolvable à un nouvel acquéreur. Dans ce cas particulier, alors qu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours

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

des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, puisqu'un plan d'arrangement n'est pas envisageable, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant inexistant.

II. L'absence d'exercice du pouvoir discrétionnaire par la juge surveillante en l'espèce

[138] À mon avis, la compensation pré-post est permise en vertu de l'art. 21 de la *LACC*, mais elle doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. La Cour a précisé, dans l'arrêt *Callidus*, les balises encadrant l'exercice de ce pouvoir discrétionnaire en vertu de l'art. 11 de la *LACC*. Les deux premiers critères sont énoncés à l'art. 11, qui précise que le juge surveillant peut rendre toute ordonnance qui est « indiquée » dans les circonstances de l'affaire et qui n'est pas contraire aux restrictions prévues par la *LACC*. De plus, la Cour a ajouté que l'exercice du pouvoir discrétionnaire doit permettre la réalisation des objets réparateurs de la *LACC* en s'attachant plus particulièrement aux critères de l'opportunité, de la bonne foi et de la diligence (par. 70).

[139] Mes collègues avancent une série d'arguments à l'encontre de la compensation en général et de la compensation pré-post en particulier : le fort potentiel perturbateur d'une compensation; le respect de la période de statu quo; la perte d'incitatifs pour la débitrice de fournir des biens et services durant la période de suspension, de crainte de ne pas être payée en retour, ce qui aurait pour effet de la priver des fonds nécessaires pour poursuivre ses opérations; le fait que le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice si les sommes prêtées sont destinées à enrichir un autre créancier; le fait que le rempart érigé par la suspension contre les attaques des créanciers s'effriterait; le fait que la compensation déroge au principe de l'égalité entre les créanciers ordinaires et le fait que la compensation pré-post équivaut à attribuer à certains créanciers une « sorte

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, [2021] 2 S.C.R. 704, 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

de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures; etc. (par. 59, 61 et 73).

[140] La plupart de ces arguments présument que la compensation pré-post sera systématiquement accordée sans égards aux circonstances propres à chaque affaire, et nonobstant la question de savoir si celle-ci est « indiquée » — d'où la position de mes collègues selon laquelle la compensation pré-post ne devrait jamais être autorisée, sauf circonstances exceptionnelles. Bien que légitimes, ces arguments doivent être laissés à l'appréciation du juge surveillant qui, dans l'exercice de son pouvoir discrétionnaire d'accorder ou non la compensation pré-post dans une affaire donnée, les soupèsera avec les autres considérations et circonstances pertinentes, le tout à la lumière des objectifs réparateurs de la *LACC*.

[141] Estimant être liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*. Vu l'absence d'exercice de ce pouvoir par la juge surveillante, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation entre les sommes dues par la Ville de Montréal à Groupe SM et la créance de cette dernière à l'encontre de Groupe SM. La Cour a précisé que les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée en s'appuyant sur « une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC* » (*Callidus*, par. 76).

[142] Mes collègues sont d'avis que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice (par. 84 et 98). Avec égards, je ne suis pas d'accord. En effet, la Cour a récemment rappelé dans l'arrêt *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704, que dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, « il n'est pas dans l'intérêt de la justice que notre Cour se mette à la place de [ce tribunal] et

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.

tranche ces questions en première instance » et que le rôle de la Cour se limite à réviser l'exercice de ce pouvoir « avec un regard empreint de déférence » (par. 88).

III. Conclusion

[143] Pour ces raisons, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure afin qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM pré-ordonnance initiale et les sommes dues par la Ville à Groupe SM post-ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la Ville peut opérer compensation quant à sa réclamation à l'égard des compteurs d'eau.

Pourvoi rejeté avec dépens, le juge BROWN *est dissident.*

Procureurs de l'appelante : IMK, Montréal.

Procureurs de l'intimée : Stikeman Elliott, Montréal.

Procureurs des intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Thornhill Investments Inc. : Fasken Martineau DuMoulin, Montréal.

Procureur de l'intervenante la Ville de Laval : Service des affaires juridiques de la Ville de Laval, Laval.

Procureurs de l'intervenante l'Union des municipalités du Québec : Borden Ladner Gervais, Montréal.

TAB
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See para. 27.

Alberta Court of Queen's Bench
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.
Date: 1988-12-22

J.J. Marshall, Q.C., and J.A. Legge, for Norcen Energy Resources Limited and Prairie Oil Royalties Company, Ltd.

E.D. Tavender, Q.C., D. Lloyd, R. Wigham and R.C. Dixon, for Oak-wood Petroleums Ltd.

B. Tait and B.D. Newton, for Bank of Montreal.

B. O'Leary, M.R. Russo, A. Pettie and A.Z. Breitman, for Sceptre Resources Limited.

L. Robinson, for Royal Bank of Canada.

P.T. McCarthy and T. Warner, for HongKong Bank of Canada.

R. Gregory and P. Jull, for Bank America, Canada.

R.C. Pittman and B.J. Roth, for Esso Resources.

W. Corbett, for Canadian Co-operative Society and Saskatchewan Co-operative Society.

T.L. Czechowskyj, for National Bank.

J.G. Hanley and H.J.R. Clarke, for A.B.C. noteholders.

V.P. Lalonde and L.R. Duncan, for Innovex Equities Corporation.

I. Kerr, for Alberta Securities.

G.K. Randall, Q.C., for Director C.B.C.A.

(Calgary No. 8801-14453)

December 22, 1988.

[1] FORSYTH J.:– On 12th December 1988 Oak-wood Petroleums Limited ("Oakwood") filed with the court a plan of arrangement ("the plan") made pursuant to the Companies' Creditors Arrangement Act (Canada), R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36] ("C.C.A.A."), as amended, ss. 185 and 185.1 [now ss. 191 and 192] of the Canada Business Corporations Act, S.C. 1974-75-76 [now R.S.C. 1985, c. C-44] as amended, and s. 186 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15, as amended.

[2] On 16th December 1988 Oakwood brought an application before me for an order which would, inter alia, approve the classification of creditors and shareholders proposed in the plan. I would note that the classifications requested are made pursuant to ss. 4, 5 and 6 of the C.C.A.A. for the purpose of holding a vote within each class to approve the plan.

[3] Since my concern primarily is with the secured creditors of Oak-wood, I shall set out, in part, the sections of the C.C.A.A. relevant to the court's authority with respect to compromises with secured creditors:

> 5. Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may … order a meeting of such creditors or class of creditors …
>
> 6. Where a majority in numbers representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings … held pursuant to sections 4 and 5 … agree to any compromise or arrangement … [it] may be sanctioned by the court, and if so sanctioned is binding on all the creditors …

[4] The plan filed with the court envisions five separate classes of creditors and shareholders. They are as follows:

(i) The secured creditors;

(ii) The unsecured creditors;

(iii) The preferred shareholders of Oakwood;

(iv) The common shareholders and holders of class A non-voting shares of Oakwood;

(v) The shareholders of New York Oils Ltd.

[5] With the exception of the proposed class comprising the secured creditors of Oakwood, there has been for the moment no objection to the proposed groupings. I add here that shareholders of course have not yet had notice of the proposal with respect to voting percentages and classes with respect to their particular interests. With that caveat, and leaving aside the proposed single class of secured creditors, I am satisfied that the other classes suggested are appropriate and they are approved.

[6] I turn now to the proposed one class of secured creditors. The membership of and proposed scheme of voting within the secured creditors class is dependent upon the value of each creditor's security as determined by Sceptre Resources Ltd. ("Sceptre"), the purchaser under the plan.

[7] As a result of those valuations, the membership of that class was determined to include: the Bank of Montreal, the A.B.C. noteholders, the Royal Bank of Canada, the National Bank of Canada and the HongKong Bank of Canada and the Bank of America Canada. Within the class, each secured creditor will receive one vote for each dollar of

"security value". The valuations made by Sceptre represent what it considers to be a fair value for the securities.

[8] Any dispute over the amount of money each creditor is to receive for its security will be determined at a subsequent fairness hearing where approval of the plan will be sought. Further, it should be noted that all counsel have agreed that, on the facts of this case, any errors made in the valuations would not result in any significant shift of voting power within the proposed class so as to alter the outcome of any vote. Therefore, the valuations made by Sceptre do not appear to be a major issue before me at this time insofar as voting is concerned.

[9] The issue with which I am concerned arises from the objection raised by two of Oakwood's secured creditors, namely, HongKong Bank and Bank of America Canada, that they are grouped together with the other secured creditors. They have brought applications before me seeking leave to realize upon their security or, in the alternative, to be constituted a separate and exclusive class of creditors and to be entitled to vote as such at any meeting convened pursuant to the plan.

[10] The very narrow issue which I must address concerns the propriety of classifying all the secured creditors of the company into one group. Counsel for Oakwood and Sceptre have attempted to justify their classifications by reference to the "commonality of interests test" described in *Sovereign Life Assur. Co. v. Dodd,* [1892] 2 Q.B. 573 (C.A.). That test received the approval of the Alberta Court of Appeal in *Savage v. Amoco Acquisition Co.* (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 87 A.R. 321, where Kerans J.A., on behalf of the court, stated [pp. 264-65]:

> We agree that the basic rule for the creation of groups for the consideration of fundamental corporate changes was expressed by Lord Esher in *Sovereign Life Assur. Co. v. Dodd,* [supra] when he said, speaking about creditors:
>
> "… if we find a different state of facts existing among different creditors which may differently affect their minds and their judgments, they must be divided into different classes."

[11] In the case of *Sovereign Life Assur. Co.,* Bowen L.J. went on to state at p. 583 that the class:

> … must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

[12] Counsel also made reference to two other "tests" which they argued must be complied with – the "minority veto test" and the "bona fide lack of oppression test". The former, it is argued, holds that the classes must not be so numerous as to give a veto

power to an otherwise insignificant minority. In support of this test, they cite my judgment in *Amoco Can. Petroleum Co. v. Dome Petroleum Ltd.,* Calgary No. 8701-20108, 28th January 1988 (not yet reported).

[13] I would restrict my comments on the applicability of this test to the fact that, in the *Amoco* case, I was dealing with "a very small minority group of [shareholders] near the bottom of the chain of priorities". Such is not the case here.

[14] In support of the "bona fide lack of oppression test", counsel cite *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.,* [1891] 1 Ch. 213 (C.A.), where Lindley L.J. stated at p. 239:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide,* and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent …

[15] Whether this test is properly considered at this stage, that is, whether the issue is the constitution of a membership of a class, is not necessary for me to decide as there have been no allegations by the HongKong Bank or Bank of America as to a lack of bona fides.

[16] What I am left with, then, is the application to the facts of this case of the "commonality of interests test" while keeping in mind that the proposed plan of arrangement arises under the C.C.A.A.

[17] Sceptre and Oakwood have argued that the secured creditors' interests are sufficiently common that they can be grouped together as one class. That class is comprised of six institutional lenders (I would note that the A.B.C noteholders are actually a group of ten lenders) who have each taken first charges as security on assets upon which they have the right to realize in order to recover their claims. The same method of valuation was applied to each secured claim in order to determine the security value under the plan.

[18] On the other hand, HongKong Bank and Bank of America have argued that their interests are distinguishable from the secured creditors class as a whole and from other secured creditors on an individuals basis. While they have identified a number of individually distinguishing features of their interests vis-à-vis those of other secured parties (which I will address later), they have put forth the proposition that since each creditor has taken separate security on different assets, the necessary commonality of interests is not

present. The rationale offered is that the different assets may give rise to a different state of facts which could alter the creditors' view as to the propriety of participating in the plan. For example, it was suggested that the relative ease of marketability of a distinct asset as opposed to the other assets granted as security could lead that secured creditor to choose to disapprove of the proposed plan. Similarly, the realization potential of assets may also lead to distinctions in the interests of the secured creditors and consequently bear upon their desire to participate in the plan.

[19] In support of this proposition, the HongKong Bank and Bank of America draw from comments made by Ronald N. Robertson, Q.C. in a publication entitled "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association – Ontario Continuing Legal Education, 5th April 1983, at p. 15, and by Stanley E. Edwards in an earlier article, "Reorganizations under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 603. Both authors gave credence to this "identity of interest" proposition that secured creditors should not be members of the same class "unless their security is on the same or substantially the same property and in equal priority". They also made reference to a case decided under c. 11 of the Bankruptcy Code of the United States of America which, while not applying that proposition in that given set of facts, accepted it as a "general rule". That authority is *Re Palisades-on-the-Desplaines; Seidel v. Palisades-on-the-Desplaines,* 89 F. 2d. 214 at 217-18 (1937, Ill.).

[20] Basically, in putting forth that proposition, the HongKong Bank and Bank of America are asserting that they have made advances to Oakwood on the strength of certain security which they identified as sufficient and desirable security and which they alone have the right to realize upon. Of course, the logical extension of that argument is that in the facts of this case each secured creditor must itself comprise a class of creditors. While counsel for the HongKong Bank and Bank of America suggested it was not necessary to do so in this case, as they are the only secured creditors opposed to the classification put forth, in principle such would have to be the case if I were to accept their proposition.

[21] To put the issue in another light, what I must decide is whether the holding of distinct security by each creditor necessitates a separate class of creditor for each, or whether notwithstanding this factor that they each share, nevertheless this factor does not override the grouping into one class of creditors. In my opinion, this decision cannot be made without considering the underlying purpose of the C.C.A.A.

[22] In *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* Calgary No. 8801-14453, 17th November 1988 [now reported 63 Alta. L.R. (2d) 361], after canvassing the few authorities on point, I concluded that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations. In referring to the case authority *Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.,* [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75, I stated at pp. 24 and 25 [pp. 375-76]:

> It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:
>
> "Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency proceedings' *with the object of preventing a declaration of bankruptcy and the sale of these assets.* If the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part, provisions for the setdement of the liabilities of the insolvent are an essential element of any insolvency legislation …"

[23] I went on to note:

> *The C.C.A.A. is an Act designed to continue, rather than liquidate companies* … The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term *an Act designed to promote the continuation of an insolvent company.* [emphasis added]

[24] In this regard, I would make extensive reference to the article by Mr. Robertson, Q.C., where, in discussing the classification of creditors under the C.C.A.A. and after stating the proposition referred to by counsel for the HongKong Bank and Bank of America, he states at p. 16 in his article:

> An initial, almost instinctive, response that differences in claims and property subject to security automatically means segregation into different classes does not necessarily make economic or legal sense in the context of an act such as the C.C.A.A.

[25] And later at pp. 19 and 20, in commenting on the article by Mr. Edwards, he states:

> However, if the trend of Edwards' suggestions that secured creditors can only be classed together when they held security of the same priority, that perhaps classes should be sub-divided into further groups according to wheth-er or not a member of the class also holds some other security or form of interest in the debtor company, *the multiplicity of discrete classes or subclasses classes might be so compounded as to defeat the object of the act.* As Edwards himself says, the subdivision of voting

groups and the counting of angels on the heads of pins must top somewhere and some forms of differences must surely be disregarded.

[26] In summarizing his discussion, he states on pp. 20-21:

> From the foregoing one can perceive at least two potentially conflicting approaches to the issue of classification. On the one hand there is the concept that members of a class ought to have the same "interest" in the company, ought to be only creditors entitled to look to the same "source" or "fund" for payment, and ought to encompass all of the creditors who do have such an identity of legal rights. *On the other hand, there is recognition that the legislative intent is to facilitate reorganization, that excessive fragmentation of classes may be counter-productive and that some degree of difference between claims should not preclude creditors being put in the same class.*
>
> *It is fundamental to any imposed plan or reorganization that strict legal rights are going to be altered and that such alteration may be imposed against the will of at least some creditors.* When one considers the complexity and magnitude of contemporary large business organizations, and the potential consequences of their failure it may be that the courts will be compelled to focus less on whether there is any identity of legal rights and rather focus on whether or not those constituting the class are persons, to use Lord Esher's phrase, "whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest" …
>
> If the plan of reorganization is such that the creditors' particular priorities and securities are preserved, especially in the event of ultimate failure, *it may be that the courts will, for example in an apt case decide that creditors who have basically made the same kinds of loans against the same kind of security, even though on different terms and against different particular secured assets, do have a sufficient similarity of interest to warrant being put into one class and being made subject to the will of the required majority of that class.* [emphasis added]

[27] These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve.

[28] In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the HongKong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors.

[29] I turn now to the other factors which the HongKong Bank and Bank of America submit distinguishes them on individual bases from other creditors of Oakwood. The

HongKong Bank and Bank of America argue that the values used by Sceptre are significantly understated. With respect to the Bank of Montreal, it is alleged that that bank actually holds security valued close to, if not in excess of, the outstanding amount of its loans when compared to the HongKong Bank and Bank of America whose security, those banks allege, is approximately equal to the amount of its loans. It is submitted that a plan which understates the value of assets results in the oversecured party being more inclined to support a plan under which they will receive, without the difficulties of realization, close to full payments of their loans.

[30] The problem with this argument is that it is a throwback to the “identity of interest” proposition. Differing security positions and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender, with the possible exception of the A.B.C. noteholders who could be lumped with the HongKong Bank or Bank of America, as their percentage realization under the proposed plan is approximately equal to that of the HongKong Bank and Bank of America.

[31] Further, the HongKong Bank and Bank of America also submit that since the Royal Bank and National Bank of Canada are so much more undersecured on their loans, they too have a distinct interest in participating in the plan which is not shared by themselves. The sum total of their submissions would seem to be that, since oversecured and undersecured lenders have a greater incentive to participate, it is only those lenders, such as themselves with just the right amount of security, that do not share that common interest. Frankly, it appears to me that these arguments are drawn from the fact that they are the only secured creditors of Oakwood who would prefer to retain their right to realize upon their security, as opposed to participating in the plan. I do not wish to suggest that they should be chided for taking such a position, but surely expressed approval or disapproval of the plan is not a valid reason to create different classes of creditors. Further, as I have already clearly stated, the C.C.A.A. can validly be used to alter or remove the rights of creditors.

[32] Finally, I wish to address the argument that, since Sceptre has made arrangements with the Royal Bank of Canada relating to the purchase of Oakwood, it has an interest not shared by the other secured creditors. The Royal Bank’s position as a principal lender in the reorganization is separate from its status as a secured creditor of Oakwood and arises from a separate business decision. In the absence of any allegation that the Royal Bank will not act bona fide in considering the benefit of the plan of the

secured creditors as a class, the HongKong Bank and Bank of America cannot be heard to criticize the Royal Bank's presence in the same class.

[33] In light of my conclusions, the result is that I approve the proposed classification of secured creditors into one class.

[34] There is one further comment I wish to make with respect to the valuations made by Sceptre for the purposes of the vote calculations. I assume that Sceptre will be relying on those valuations at any fairness hearing, assuming this matter proceeds. I would simply observe that the onus is of course on Sceptre to establish that the valuations relied on and set forth in their plan in fact represent fair value under all the circumstances.

[35] It has been obvious during the course of the hearing of this phase of the application that at least two of the secured creditors, to whom reference has been made, are not satisfied that that is the case, and in the event evidence is led by them in an effort to establish that the values proposed do not represent the fair value, the onus will be on Sceptre and Oakwood to establish the contrary. Underlying my comments above are of course the court's concern of ensuring that approval of any plan proposed does not result in unfair confiscation of the property of any secured creditors. In that regard, the underlying value of the assets of each individual secured creditor on the facts of this case would appear to be of prime importance.

Application granted.

TAB
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See p. 2.

1950 CarswellQue 23
Quebec Superior Court

Paris Fur Co. v. Nu-West Fur Corp.

1950 CarswellQue 23, 30 C.B.R. 193

In re Paris Fur Company Inc. (Debtor) and Nu-West Fur Corpn. of Canada Limited

Bertrand J.

Judgment: January 27, 1950

Counsel: *J. Rudner* and *Lawrence Marks*, for petitioners.
Clarence Gross and *Jacques Panneton, K.C.*, for debtor-respondent.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Effect of arrangement

:

The Court, having heard the parties on a demand by the above described petitioners to sanction a proposal of compromise on the debtor-company's outstanding unsecured debts, examined the proceedings and deliberated, renders the following judgment:

On December 3, 1949 the above debtor corporation presented before the Court its petition asking that, for reasons therein specified, particularly its inability to meet its liabilities as they became due, the Court order a special general meeting of its unsecured creditors for the purpose of submitting to them a scheme of settlement of its debts, pursuant to the dispositions of *The Companies' Creditors Arrangement Act 1933* [16 C.B.R. 447]; the whole with costs against the petitioners.

By a judgment of that very date, the Court granted the petition, ordered the meeting to be held on December 16, 1949 at the Montreal Old Court House, stayed and suspended all proceedings against the debtor company, and appointed a chairman to take charge of the meeting granted, the whole with costs against the company petitioner.

The record purports to show that notices stating the date and place for the meeting called for were sent by registered mail to all unsecured creditors, whose list as given under oath is attached to the debtor's petition and corresponds in figures to the balance sheet as at November 30, 1949 also attached.

A meeting was in fact held on December 16 and proces-verbal thereof kept and transcribed for the record under the signature of Joseph Duhamel as chairman. It appears thereby that 26 out of 46 unsecured creditors, representing $86,971.95 of ordinary debts out of a total of $95,210.49, therefore the majority in number and more than three-fourths in value, voted in favour of a plan of arrangement whereby the debtors would pay 100 cents on the dollar from now down to April 30, 1951 by instalments, the equivalent of 75 cents whereof would be guaranteed personally by Naphthali Nadel, president of the debtor-company, according to a written undertaking by said Nadel, who as a collateral security agrees to transfer hypothecarily to a committee of two for the creditors his property 5207-5209 Jeanne Mance in Montreal, by notarial deed, with a right in their favour to collect and deposit all revenues, but with obligation for them to pay all charges, including capital of mortgage, interest and taxes as they may become due, and all other accessories more fully particularized in the writing signed and filed in the Court's record.

On December 29, the petitioners whose petition is now considered, Nu-West Fur et al., without any notice to the debtors, had two guardians appointed by this Court to take possession of the debtor's business and premises, and also control all receipts and disbursements. That same day, the debtor filed in Court a desistment from its previous petition for calling the meeting of its creditors and from all proceedings thereunder, but said desistment made no mention of the costs incurred on them.

After these happenings, creditors Nu-West Fur and Turgel Fur presented on December 30 their petition now pondered, wherein they recite the above facts and pray that the Court sanction the proposal of compromise agreed to as above, same to be declared binding on and between all persons concerned therein, including the guarantor Nadel.

On January 3, 1950 when the petition just mentioned was being discussed in open Court, the debtor-company again filed a desistment from its demand by petition of December 3, 1949 for a meeting of its creditors and all proceedings thereunder, with an additional declaration "that it does not intend to take advantage of the provisions of the Companies' Creditors Arrangement Act, the whole with costs s'il y a lieu".

So the Court is now called upon to decide whether it still has to adjudicate on the petition under consideration by the named creditors to ratify the agreement already referred to, or is no longer seized of the said demand by the effect of the new desistment now providing for any costs incurred.

First of all, it is no longer within the debtor-company's discretion at the present stage to desist from its petition for a meeting of its creditors, as it has been granted by the Court at its request, and acted upon so completely that the parties involved could not be put back into their position previous to its presentation, contrary to the spirit of arts. 275 and 277 C.C.P.

Furthermore, the desistment, if countenanced, would amount to setting aside or nullifying a judgment of this Court, at the option of one only of the many parties now interested and involved therein, all of which makes no legal sense, and does not sound respectful of the orders of the Court and the process developed thereunder, even due account being taken of art. 548 C.C.P., as this disposition, by implication at least, protects vested rights.

(*St-Jacques v. Le Curé de St. Jean-Berchmans* (1917), 52 Que. S.C. 104; *White v. Reilly* (1937), 43 P.R. 261 cited).

If secs. 4 and 5 of *The Companies' Creditors Arrangement Act* are read together, it appears that the petition calling for a meeting can be urged by "any such creditor"; the text itself does not specify who should or could apply for the Court's sanction of the compromise concluded, and therefore no fundamental or founded objection to any creditor presenting such a demand can be raised. And this finding also disposes of the debtor-company's unilateral move of trying to dispense with the proceedings heretofore completed as a result of its first petition.

When sec. 5 of the Act disposes that the compromise arranged "may be sanctioned by the Court", it cannot be construed as implying that the Court has discretion to refuse its sanction for other reasons than those pertaining to fulfilment of the requirements related to conditions of validity and obligatory strength of the transaction effected between a debtor and its ordinary creditors. Our laws are not based on caprice, nor does their general inspiration exhibit any trend that the Court substitute for the interested parties on terms of their accord, except whenever violation of a legal disposition or principle is traced. No such exception would appear to exist in our case.

The petitioning creditors rely on another ground which is far from negligible. Their reasoning thus runs: the arrangement offered by the debtors and their guarantor in writing before the meeting presided over by a chairman named by the Court having been accepted and concurred in by a unanimous vote recorded in the proces-verbal signed by said chairman, a covenant was thereby formed by mutual consent which could now be enforced, according to articles 982 and 984 C.C.

If this be so, an obligation has been created and nothing but a mutual consent could set the covenant aside, as no cause is shown for its annulment for reasons of law (art. 1022 C.C.).

Finally, no sympathetic concurrence in the debtor's standpoint is warranted, because in final analysis it attempts avoiding payment of what has become due and legally recoverable on the debtor's recognized liabilities, while the guarantor whose

personal pledge secures payment does not withdraw his undertaking. And, be it noted, the engagement by the debtor to completely satisfy all claims in the extended delays assented to graces its creditors with no particular advantages, but just represents what it is obliged to in law.

Therefore considering that, according to the above observations and the juridical propositions connected therewith, the petition under review should be granted;

The Court doth sanction the proposal of compromise for payment of one hundred cents on the dollar more fully detailed in the writing filed wth the petition as exhibit P.1, and attached to the proces-verbal of the meeting held on December 16, 1949 under *The Companies' Creditors Arrangement Act*, in reference to the above debtor, and doth declare same binding on and between the petitioners, the debtor-respondent, its ordinary creditors and the guarantor Napthali Nadel; the whole with costs against the debtor-respondent.

End of Document

TAB
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See para. 24.

SUPREME COURT OF CANADA

CITATION: Quebec (Commission des droits de la personne et des droits de la jeunesse) *v.* Directrice de la protection de la jeunesse du CISSS A, 2024 SCC 43

APPEAL HEARD: March 19, 2024
JUDGMENT RENDERED: December 20, 2024
DOCKET: 40602

BETWEEN:

Commission des droits de la personne et des droits de la jeunesse
Appellant

and

Directrice de la protection de la jeunesse du CISSS A
Respondent

- and -

Attorney General of Quebec, A, B, X,
Canadian Civil Liberties Association and
British Columbia Civil Liberties Association
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 122)
Wagner C.J. (Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)

Commission des droits de la personne et des droits de la jeunesse *Appellant*

v.

Directrice de la protection de la jeunesse du CISSS A *Respondent*

and

Attorney General of Quebec, A, B, X, Canadian Civil Liberties Association and British Columbia Civil Liberties Association *Interveners*

Indexed as: Quebec (Commission des droits de la personne et des droits de la jeunesse) *v.* Directrice de la protection de la jeunesse du CISSS A

2024 SCC 43

File No.: 40602.

2024: March 19; 2024: December 20.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Status of persons — Child protection — Encroachment upon child's rights — Corrective powers of tribunal — Tribunal declaring that young person's rights had been encroached upon in context of social intervention — Tribunal ordering corrective measures — Director of youth protection challenging measures on ground that they did not relate directly to young person's situation referred to tribunal — Scope of corrective powers conferred on Youth Division of Court of Québec in cases of encroachment upon child's rights — Youth Protection Act, CQLR, c. P-34.1, s. 91 para. 4.

In the context of social intervention, a young person and her parents filed an application with the Youth Division of the Court of Québec ("tribunal") for a declaration of encroachment upon rights under s. 91 para. 4 of the *Youth Protection Act* ("*YPA*"). That provision states that where "the tribunal concludes that the rights of a child in difficulty have been wronged by persons, bodies or institutions, it may order the situation to be corrected". The tribunal identified four situations that had encroached upon the young person's rights, and it recommended and ordered a series of corrective measures. Four of these measures were challenged by the director of youth protection for the Centre intégré de santé et de services sociaux A ("DYP"), who took the view that they went beyond the corrective powers conferred on the tribunal by s. 91 para. 4 of the *YPA* because they did not relate directly to the young person's situation. To begin with, as regards the first two measures, the tribunal ordered that the youth workers, educators and intervention officers who worked in the individualized treatment units be able to receive specific training on mental health and that these units

be able to obtain support from a healthcare professional specializing in mental health. Next, as regards the other two measures, the tribunal ordered the Centre intégré de santé et de services sociaux A ("CISSS A") to implement a protocol within a reasonable time period to set out the steps to be taken when a child spits during an intervention and to adapt all isolation rooms so that they were safer and their walls were covered with a material that prevented injury.

The Superior Court allowed the DYP's appeal in part, holding that the four impugned orders exceeded the powers conferred on the tribunal by the legislature because they applied to children other than the one whose situation had been referred to the tribunal. The Superior Court varied the impugned orders so that they applied specifically to the young person's situation and they named her expressly. The decision was subsequently appealed by the young person, by her parents and by the Commission des droits de la personne et des droits de la jeunesse. That commission had intervened for the first time before the Superior Court to argue that s. 91 para. 4 gives the tribunal broad corrective powers allowing it to make general orders not specifically intended to correct the situation experienced by the child before it. Like the Superior Court judge, the majority of the Court of Appeal found that the four impugned orders were general in nature, went beyond the situation of the child who was the subject of the proceedings and therefore had to be narrowed. However, the majority of the Court of Appeal varied two of the impugned measures, as varied by the Superior Court, so that they were ordered against the DYP rather than the CISSS A.

Held: The appeal should be allowed in part.

The legislature intended to confer on the tribunal the corrective powers needed to ensure the fullest protection of the interests and rights of the child whose situation has been referred to it, that is, protection that applies to both the present and the future and that takes account of the circumstances at the source of the encroachment upon rights as well as the impact of the encroachment on the child's psychological and physical state. The tribunal may order corrective measures whose purpose is to put an end to the situation of encroachment where it is still encroaching upon the child's rights, to remedy the psychological or physical consequences for the child resulting from the encroachment upon rights, and to prevent the recurrence of the situation of encroachment for the child. A preventive corrective measure may be ordered only if the child whose rights have been encroached upon is at risk of being subjected to the situation of encroachment again, if the corrective measure can effectively help to prevent the recurrence of the situation of encroachment and if the measure is related to the protection of the interests and rights of the child whose situation has been referred to the tribunal.

The *YPA* must be given a large and liberal interpretation that will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit. Every provision of the *YPA* must also be interpreted in accordance with the *Charter of human rights and freedoms*, while bearing in mind the *Convention on the Rights of the Child* ("*CRC*"). The starting point in any interpretive

exercise is the text of the provision. In the absence of statutory definitions, what should be focused on is the grammatical and ordinary meaning of the text, that is, the natural meaning that appears when the provision is simply read through as a whole.

In this case, consideration of the grammatical and ordinary meaning of the phrase "the situation to be corrected" in s. 91 para. 4 leads to the conclusion that the legislature intended to grant the tribunal corrective powers that allow it to redress a situation, to restore order or the normal state of affairs. However, this consideration does not make it possible to say with certainty which situation is in question. Furthermore, consideration of the grammatical and ordinary meaning of the phrase is of little assistance in determining whether the legislature's intention in granting the tribunal the corrective powers set out in s. 91 para. 4 was that, in exercising them, the tribunal concern itself exclusively with protecting the rights and interests of the child whose situation has been referred to it, or whether the legislature also intended that the tribunal concern itself with protecting the rights and interests of all other children who, though not the subject of the proceedings, are or may find themselves in the same situation as the child before the tribunal.

An analysis of the scheme of the *YPA* suggests that the legislature did not intend the tribunal to be able to order corrective measures aimed in whole or in part at protecting the rights and interests of children whose situations have not been referred to it but who may find themselves in the same situation of encroachment as the child before it. The tribunal's mandate is to render justice in an individualized and

particularized manner on the basis of the interests and rights of the child whose situation has been referred to it. With a view to ensuring functional complementarity between social intervention and judicial intervention, the tribunal must make decisions that are in the interest of the child and that respect the child's rights, the ultimate goal being to limit any danger to the child's security and development, but also to prevent abuse.

The fact that the tribunal is called upon to render justice in an individualized and particularized manner on the basis of a single child's situation is also clear from all of the provisions relating to the tribunal's jurisdiction. No provision of the *YPA* reveals an intention to depart from this logic of individualized and particularized justice that runs throughout the *YPA* when it comes to encroachment upon rights. The legislature did not intend to grant the tribunal powers going beyond those required to carry out the mandate assigned to it. This conclusion is also supported by the fact that other actors have been given a mandate to examine the system as a whole, to identify its shortcomings and to reform it. The proper functioning of the youth protection system depends on the actions of a range of political, social and legal actors that have been given roles, responsibilities and powers that are both distinct and complementary. There is nothing to suggest that, under the wide-ranging reform of the *YPA*, the tribunal's mandate has been broadened to allow it to take a critical look at systemic issues in child protection and to order corrective measures to reform the system for the benefit of children whose situations have not been referred to it.

The legislative history of s. 91 para. 4 and of other related provisions concerning encroachment upon rights confirms what the scheme of the *YPA* already reveals: the tribunal can deal with the situation of only one child at a time. Moreover, there is nothing to suggest that the legislature intended to authorize the tribunal to order corrective measures that would apply to children whose situations have not been referred to it but who may find themselves in the same situation of encroachment as the child before it. The legislature's decision to omit the words "encroaching upon the rights of the young person" within the phrase "the situation to be corrected" in s. 91 para. 4 should not be interpreted as a broadening of the tribunal's power to order corrective measures to protect the interests and rights of children whose situations have not been referred to it.

The *YPA* establishes a scheme whose purpose is to protect the interests and rights of children whose security or development is in danger, thereby helping to implement Canada's obligations under the *CRC* in domestic law. The *CRC* weighs in favour of interpreting s. 91 para. 4 in a large and liberal manner so that the tribunal will have all the corrective powers it needs to ensure that the child whose rights have been encroached upon has the fullest and most effective protection possible. However, there is no indication that, in order to comply with the *CRC*, provincial and territorial legislatures must, in cases of encroachment upon rights, give courts or tribunals the mandate and powers they need to concern themselves with protecting the interests and rights of more than one child at a time. States parties to the *CRC* possess a margin of

discretion in determining what measures are appropriate to promote the best interests of the child and to protect the child's rights.

In the case of social and judicial intervention, the legislature had in mind that this fundamental purpose of protecting the children who are the most vulnerable in society would be attained through the cumulative effect of individualized and particularized interventions aimed at protecting the interests and rights of one child at a time. The recourse for a declaration of encroachment upon rights is one of the legal tools put in place by the legislature to achieve this purpose. The corrective powers conferred on the tribunal by s. 91 para. 4 must therefore be interpreted in a large and liberal manner to ensure the attainment of this purpose, which is clearly affirmed in the *Charter of human rights and freedoms*. The various types of corrective measures that can be ordered must be conceived of generously to ensure the fullest possible protection for the child whose rights have been encroached upon. Over and above correcting the situation at the source of the encroachment upon rights, the tribunal must also be able to order preventive corrective measures that will follow the child through the system to ensure that the child is adequately protected in the future.

At least three validity criteria govern the exercise of the tribunal's power to order preventive corrective measures under s. 91 para. 4. These criteria are based on the limits built into this enabling provision. First, for a preventive corrective measure to be ordered, the child whose situation has been referred to the tribunal must be at risk of being subjected to the situation of encroachment again. This criterion will generally

be met where the child is still the subject of intervention under the *YPA*. Second, the preventive corrective measure ordered must be able to effectively help to prevent the recurrence of the situation of encroachment. Once the source of the encroachment upon rights is identified, the tribunal will be able to consider one or more corrective measures that could effectively help to prevent the recurrence of the situation of encroachment. These measures will logically focus on one or more of the circumstances shown by the evidence to be at the source of the encroachment. The wide range of corrective measures that can effectively help to prevent the recurrence of the situation of encroachment will, however, be narrowed once account is taken of an additional criterion: any preventive corrective measure must, third, be related to preventing the recurrence of the situation of encroachment for the child whose situation has been referred to the tribunal. This requirement flows from the legislative intent discerned from s. 91 para. 4 of the *YPA*. The corrective measure must therefore be primarily intended to protect the interests and rights of the child whose situation has been referred to the tribunal. The corrective measure must be related to events experienced by the child in environments where the child has spent or might spend time, on the basis of the evidence and the context. The tribunal must confine itself to ordering a corrective measure that reflects the risk of harm faced by the child, as shown by the evidence. That being said, the order, to be valid, does not necessarily have to expressly name the child whose situation has been referred to the tribunal.

To effectively protect the child whose rights have been encroached upon, the preventive corrective measures will sometimes have to be broad in scope. At least

two types of measures can be contemplated. First, the tribunal may order a corrective measure specifically directed at persons, bodies or institutions that, in light of the evidence, could potentially contribute to the recurrence of the encroachment upon the child's rights. Second, the tribunal may order a measure that will follow the child through the system, either as an alternative to or in addition to the first type of measure, in light of the evidence in the record, the circumstances of the case and the need to protect the child for the future. Broad corrective measures will generally have the advantage of protecting the interests and rights of many other children in an indirect and incidental manner, but this is of no relevance in determining whether the measures were validly imposed. A preventive corrective measure related to the interests and rights of the child whose situation has been referred to the tribunal may very well have positive indirect and incidental consequences for a large number of children. There is nothing to prevent the tribunal from ordering a corrective measure to eliminate a systemic or institutional practice, provided that the three validity criteria are met. Lastly, the magnitude of the budgetary impact of the corrective measure is not in itself a criterion for the validity of the order. Such a validity criterion has no basis in the *YPA*, and its application would entail considerable practical difficulties, adding another barrier to access to justice in the youth protection system.

Where rights have been encroached upon, the tribunal has a power to make recommendations that it derives from the text, scheme and object of the *YPA*. When the circumstances do not lend themselves to stating a conclusion in the form of an order, the tribunal can still make a non-binding recommendation anchored in the evidence

concerning the encroachment upon the rights of the child whose situation has been referred to it. This power to make recommendations is to be exercised with caution and allows the tribunal to point out the existence of a problem relating to an encroachment upon the child's rights and to encourage the authorities to address it. The recommendation must be based on the situation of encroachment experienced by the child, as shown by the evidence.

In this case, the four corrective measures challenged by the DYP were ordered to prevent abusive or inadequate restraint and isolation measures from being used again, where it was established that the young person was at risk of being subjected to the identified situations of encroachment again. As regards the first two orders, the tribunal erred by not limiting the scope of these measures so that they were related to preventing the recurrence of the situation of encroachment for the young person. Nothing in the evidence adduced supported the conclusion that such broad orders were necessary to protect the young person's interests and rights in the future. The Superior Court properly intervened to narrow the scope of these orders so that they were related to the protection of the young person's interests and rights. As for the third order, the tribunal exceeded its powers by ordering the CISSS A to implement a protocol that set out the steps to be taken when a child spits during an intervention. The order as worded was not related to preventing the recurrence of the situation of encroachment for the young person. In light of the findings of fact, the order should have been directed at the rehabilitation centres for young persons with adjustment problems ("RCYPAPs") of the CISSS A and at any other RCYPAP that would be

responsible for the young person. The order should also have been made against the DYP. Finally, as regards the fourth order, which required that the isolation rooms be made safer, this corrective measure was not sufficiently anchored in the evidence and the context. The order should have been varied to direct the DYP, and not the CISSS A, to have at least one isolation room, covered with a material that prevented injury, available for the young person at all times in units A and B of the CISSS A and in the other RCYPAP units to which she would be entrusted. Other alternative orders were also available and acceptable and could therefore have been made. However, since the young person is no longer the subject of social intervention under the *YPA* and never will be again given that she is now an adult, no order will be made.

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Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *R. v. Audet*, [1996] 2 S.C.R. 171; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Lamothe v. Ruffo*, [1998] R.J.Q. 1815; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Barendregt v. Grebliunas*, 2022 SCC 22; *B.J.T. v. J.D.*, 2022 SCC 24; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *Protection de la jeunesse – 174220*, 2017 QCCQ 9973; *Protection de la jeunesse – 175726*, 2017 QCCQ 10171; *Protection de la jeunesse – 1610815*, 2016 QCCQ 20163; *Protection de la jeunesse – 202094*, 2020 QCCQ 1912; *Protection de la jeunesse – 212922*, 2021 QCCQ 5132; *Protection de la jeunesse – 2023*, 2020 QCCQ 61; *Protection de la jeunesse – 137151*, 2013 QCCQ 17367; *Protection de la jeunesse – 171278*, 2017 QCCQ 2752; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Hydro-*

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APPEAL from a judgment of the Quebec Court of Appeal (Levesque, Schrager and Hogue JJ.A.), 2022 QCCA 1653, [2022] AZ-51899040, [2022] Q.J. No. 13560 (Lexis), 2022 CarswellQue 21735 (WL), setting aside in part a decision of Poirier J., 2021 QCCS 2251, [2021] AZ-51770110, [2021] J.Q. nº 6108 (Lexis), 2021 CarswellQue 8125 (WL), setting aside in part a decision of Roy J.C.Q., 2019 QCCQ

3916, [2019] AZ-51608758, [2019] J.Q. nº 5507 (Lexis), 2019 CarswellQue 7385 (WL). Appeal allowed in part.

Catherine Gauvreau, *Christine Campbell* and *Stéphanie Fournier*, for the appellant.

Audrey Boctor, *Julie Langlois*, *Vanessa Ntaganda* and *Mélanie Poulin*, for the respondent.

Éric Cantin and *Mario Normandin*, for the intervener the Attorney General of Quebec.

Stéphane Pouliot and *Gabrielle Gallio*, for the interveners A and B.

Charlotte Vanier Perras, for the intervener X.

Karine Joizil and *Simon Bouthillier*, for the intervener the Canadian Civil Liberties Association.

Vincent Larochelle, for the intervener the British Columbia Civil Liberties Association.

English version of the judgment of the Court delivered by

THE CHIEF JUSTICE —

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I. Overview

[1] The very idea of a child's rights being encroached upon in the context of social intervention under the *Youth Protection Act*, CQLR, c. P-34.1 ("*YPA*"),[1] provokes indignation. At such a time, the child is in an extremely vulnerable position. The child may have been sexually, physically or psychologically abused, have been

[1] Unless otherwise indicated, any reference to the statute is a reference to the version in force on the date the Court of Québec's judgment was rendered, July 2, 2019.

neglected or abandoned, or have serious mental health or behavioural disorders. As author Laurence Ricard notes, encroachment upon the rights of such a child in the course of social intervention seems, in this context, [TRANSLATION] "like twisting a knife in the wound": How can it be explained that intervention by the youth protection system may add to the harm already suffered by a child even though the primary mission of this system is to protect them? ("Un regard sur la notion de lésion de droits en matière de protection de la jeunesse" (2021), 62 *C. de D.* 605, at p. 608; see also *YPA*, s. 2). This case illustrates, however, how difficult it can be for those involved with a child in the course of intervention under the *YPA* to prevent such encroachments upon rights from happening or recurring, given that the causes of these encroachments are often numerous and complex.

[2] This appeal provides an opportunity for this Court to consider the corrective powers conferred by the legislature on the Youth Division of the Court of Québec ("tribunal") where persons, bodies or institutions have encroached upon a child's rights in the course of social intervention. The tribunal's power to intervene in this regard derives from s. 91 para. 4 of the *YPA*, which states that where "the tribunal concludes that the rights of a child in difficulty have been wronged by persons, bodies or institutions, it may order the situation to be corrected".

[3] This laconic provision gives the tribunal broad powers that have at times been compared to superintending and reforming powers in the interest of the child and at times been likened to the remedial powers of courts where there has been a violation

of fundamental rights. However, the exact contours of these powers remain unclear and are a subject of debate. The present case therefore affords an occasion to circumscribe their scope.

[4] First, the Court must interpret the passage in s. 91 para. 4 stating that the tribunal may order "the situation to be corrected". More specifically, it must be determined whether the legislature intended that the tribunal be able to order corrective measures only to prevent the recurrence of a situation of encroachment for the child whose rights were encroached upon, or whether it intended that the tribunal also be able to order corrective measures to prevent the same situation of encroachment from occurring for any other child who might be faced with it. Second, the Court must consider a question relating to respect for the right of the Centre intégré de santé et de services sociaux A ("CISSS A") to be heard or duly called. The Court is being asked to determine whether, in the circumstances, the tribunal could make orders against the CISSS A.

II. Factual Background

[5] On January 17, 2018, the tribunal ordered that a young person, the intervener X, be placed in a rehabilitation centre for young persons with adjustment problems ("RCYPAP") because her security and development were in danger within the meaning of the *YPA* (2018 QCCQ 10492). Pursuant to that order, the young person was placed in various RCYPAP units and was also hospitalized for certain periods. During her stays in the units, the young person's rights were repeatedly encroached

upon, a fact not disputed by the respondent, the director of youth protection for the CISSS A ("DYP"). Since the tribunal's judgment summarized below clearly lays out the facts that led to the encroachments upon rights and since these facts are not in dispute, I see no need to recount them again here in detail.

III. Procedural and Judicial History

A. *Court of Québec, 2019 QCCQ 3916*

[6] The issue of encroachment upon rights arose before the tribunal in the context of an application by the DYP for the review and extension of the order made in January 2018. In connection with that application, the young person and her parents, respectively, filed an application for a declaration of encroachment upon rights under s. 91 para. 4 of the *YPA*.

[7] The tribunal allowed in part the application for the review and extension of the order of January 2018, after finding that the young person's security and development were still in danger. In deciding the applications for a declaration of encroachment upon rights, the tribunal identified four situations that had encroached upon the young person's rights: the unjustified and unduly long suspension of psychological counselling, in violation of an order made on January 17, 2018; an educator's unjustified refusal to allow the young person, who had run away from her family home, to take refuge at the RCYPAP to which she had been entrusted, and the inadequate support subsequently offered to her when she reported that she had been

sexually assaulted after running away; the fact that the young person's medical record was poorly kept, and the lack of care and follow-up for more than two weeks when she had injuries to her hands; and the imposition of abusive or inadequate restraint and isolation measures.

[8] The tribunal recommended and ordered a series of corrective measures. Four of them were later challenged by the DYP, who took the view that they went beyond the corrective powers conferred on the tribunal by s. 91 para. 4 of the *YPA* because they did not relate directly to the young person's situation. The four corrective measures in question were worded as follows:

> [TRANSLATION]
>
> **AS CORRECTIVE MEASURES:**
>
> [340] **ORDERS** that the youth workers, educators and intervention officers who work in the individualized treatment units be able to receive specific training on mental health and report back to the Commission des droits de la personne et des droits de la jeunesse;
>
> [341] **ORDERS** that the individualized treatment units be able to obtain support from a healthcare professional specializing in mental health and report back to the Commission des droits de la personne et des droits de la jeunesse;
>
> . . .
>
> [345] **ORDERS** that the Centre intégré de santé et de services sociaux A implement a protocol within a reasonable time period that sets out the steps to be taken when a child spits during an intervention and report back to the Commission des droits de la personne et des droits de la jeunesse;
>
> [346] **ORDERS** that the Centre intégré de santé et de services sociaux A adapt all isolation rooms so that they are safer and their walls are covered with a material that prevents injury;

B. *Quebec Superior Court, 2021 QCCS 2251*

[9] The appellant, the Commission des droits de la personne et des droits de la jeunesse ("CDPDJ"), intervened for the first time before the Superior Court to argue that s. 91 para. 4 of the *YPA* gives the tribunal broad corrective powers allowing it [TRANSLATION] "to make general orders . . . not specifically intended to correct the situation experienced by the child, but rather by children who may experience the same situation" (para. 19).

[10] The Superior Court judge allowed the DYP's appeal in part. With regard to the applicable standard for intervention, he found that the question at issue was a question of law, in respect of which the court could intervene unreservedly if an error had been made. Relying mainly on the Quebec Court of Appeal's decision in *Protection de la jeunesse – 123979*, 2012 QCCA 1483, [2012] R.J.Q. 1603, he then held that the four impugned orders exceeded the powers conferred on the tribunal by the legislature because they applied to children other than the one whose situation had been referred to the tribunal. On completing his analysis, he decided to vary the impugned orders so that they applied specifically to the young person's situation and they named her expressly. The Superior Court judge's decision was subsequently appealed by the CDPDJ, by the young person and by her parents, the interveners A and B.

C. *Quebec Court of Appeal, 2022 QCCA 1653*

(1) Majority Reasons

[11] Like the Superior Court judge, the majority of the Court of Appeal found that the four impugned orders were [TRANSLATION] "general in nature" (para. 78), went "beyond [the] situation" of the child who was the subject of the proceedings (para. 80) and therefore had to be narrowed. However, the majority was of the view that the orders set out at paras. 345-46 could not be made against the CISSS A because the latter was not formally a party to the proceedings at first instance. The majority accordingly allowed the appeal in part for the sole purpose of correcting the orders set out at paras. 345-46 of the tribunal's judgment, which had previously been varied by the Superior Court judge, so that the orders were directed at the DYP and not the CISSS A (paras. 2 and 82-83).

[12] According to the majority, the issue was [TRANSLATION] "[w]hether section 91 *in fine* allows [the tribunal] to order institutions or public bodies to take measures that require assigning a portion of their available funds to a specific purpose" (para. 70). This was therefore a question of law that the majority answered in the negative. In the majority's view, only a [TRANSLATION] "clear and explicit" legal rule allows courts to order an allocation of public funds for specific purposes, and s. 91 *in fine* of the *YPA* does not fit this definition (para. 67; see also para. 68). This means that the tribunal does not have, under this section, a [TRANSLATION] "general power of intervention or review of the decisions that institutions or bodies are required to make about their operations, organization, or premises" (para. 75).

[13] It follows from the above that a corrective measure may be ordered only if it is [TRANSLATION] "limited to that which is necessary to correct the situation or prevent its recurrence with respect to [the] child in particular" (para. 76). Moreover, such an order must not [TRANSLATION] "interfere in the management of the resources available to the institutions or bodies concerned" (para. 77). The majority thus found that even where a corrective measure addresses the situation that encroached upon the child's rights and is limited solely to what is necessary to prevent the recurrence of that situation, the order imposing the measure might still be invalid if its budgetary impact is too significant. According to the majority, the financial impact of an order determines [TRANSLATION] "whether the court is allowed to make it" (para. 81).

(2) Concurring Reasons

[14] The concurring judge would have allowed the appeals in part and restored the orders made at paras. 345-46 of the tribunal's judgment while indicating that they should be directed against the DYP rather than the CISSS A. He would also have specified that only the isolation rooms in units A and B of the RCYPAPs of the CISSS A had to be made safer (paras. 3 and 56-59).

[15] In his view, while it is true that there [TRANSLATION] "must . . . be a connection between the corrective order and the child whose rights were wronged", it is not "necessary that the remedial measure apply only to the child who has been a victim of the wrong" (para. 36). Everything depends on what is revealed by the evidence. More specifically, [TRANSLATION] "[w]hen it is proven . . . that the source of

the problem that led to the wrong is institutional or systemic in nature and that the wrong may have been caused by multiple people or multiple institutions or by the state of the premises, Court of Québec judges may make orders to remedy the wrongful situation at its source" (para. 38).

[16] It follows from the above that the tribunal may order a corrective measure of general application as long as the evidence shows that the encroachment experienced by the child resulted from [TRANSLATION] "a generalized practice or situation" (para. 39). The financial impact of such a measure on the DYP should not prevent the tribunal from making corrective orders that are permitted by the *YPA* and required by the circumstances of a case.

IV. Issues

[17] The appeal raises the following question: What is the scope of the corrective powers that the legislature intended to confer on the tribunal in s. 91 para. 4 of the *YPA*? More specifically, did the legislature intend that the tribunal only be able to order corrective measures to prevent the recurrence of a situation of encroachment for the child whose rights were encroached upon, or did it intend that the tribunal also be able to order corrective measures to prevent the same situation of encroachment from occurring for any other child who might be faced with it?

[18] The appeal also raises a secondary question regarding whether, in the circumstances, it was possible for the tribunal to make orders against the CISSS A in

view of its right to be "heard" or "duly called" pursuant to art. 17 para. 1 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*").

[19] On the basis of my analysis, I conclude that the legislature intended to confer on the tribunal the corrective powers needed to ensure the fullest protection of the interests and rights of the child before it. In practical terms, this means that the tribunal may order corrective measures whose purpose is (1) to put an end to the situation of encroachment where it is still encroaching upon the child's rights; (2) to remedy the psychological or physical consequences for the child resulting from the encroachment upon rights; and (3) to prevent the recurrence of the situation of encroachment for the child.

[20] In my view, any corrective measure that is ordered must protect the interests and rights of the child whose situation has been referred to the tribunal. This means that a preventive corrective measure may be ordered only if the child whose rights have been encroached upon is at risk of being subjected to the situation of encroachment again. Where this is the case, the tribunal may order any corrective measure that can effectively help to prevent the recurrence of the situation of encroachment, provided that the measure is related to the protection of the child's interests and rights. The budgetary impact of the corrective measure has no bearing on its validity.

[21] Contrary to what is suggested by the DYP, the Superior Court judge and the majority of the Court of Appeal, it is not necessary for corrective measures to

specifically mention the child's name in order for the measures to be related to the protection of the child's interests and rights. Moreover, depending on the circumstances and the evidence adduced, it is possible for a broad corrective measure — that corrects, for example, an institutional factor at the source of the situation of encroachment — to be a measure related to the protection of the child's interests and rights. Such corrective measures will generally have the advantage of protecting the interests and rights of many other children in an indirect and incidental manner.

[22] With regard to the question of the CISSS A's right to be heard or duly called (art. 17 para. 1 *C.C.P.*), the appellant has not satisfied me that there is reason to intervene to restore the orders so as to direct them, as the tribunal did, against the CISSS A.

V. Analysis

A. *Judicial Intervention in Cases of Encroachment Upon Rights: Scope of the Corrective Powers Conferred on the Tribunal Under Section 91 Paragraph 4 of the YPA*

(1) Principles That Must Guide the Interpretive Exercise

[23] It is well settled that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd.*

(Re), [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 22).

[24] In this case, it is important to highlight a few principles that guide the interpretation of s. 91 para. 4 of the *YPA*. First, the *YPA* must be given a large and liberal interpretation that will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit (see *Interpretation Act*, CQLR, c. I-16, s. 41; *Protection de la jeunesse – 123979*, at para. 21). However, just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise. The text specifies, among other things, the means chosen by the legislature to achieve its purposes. These means "may disclose qualifications to primary purposes, and this is why the text remains the focus of interpretation" (M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 *Alta. L. Rev.* 919, at p. 927; see also pp. 930-31). In other words, they may "tell an interpreter just how far a legislature wanted to go in achieving some more abstract goal" (p. 927). As this Court recently noted, an interpreter must "interpret the 'text through which the legislature seeks to achieve [its] objective', because 'the goal of the interpretative exercise is to find harmony between the words of the statute and the intended objective . . .'" (*R. v. Breault*, 2023 SCC 9, at para. 26, quoting *MediaQMI inc. v. Kamel*, 2021 SCC 23,

[2021] 1 S.C.R. 899, at para. 39; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at para. 10).

[25] Second, every provision of the *YPA* must be interpreted in accordance with the *Charter of human rights and freedoms*, CQLR, c. C-12 ("*Quebec Charter*"), which is a source of fundamental law. It is especially important to bear in mind s. 39 of the *Quebec Charter*, which enshrines the right of every child "to the protection, security and attention that his parents or the persons acting in their stead are capable of providing". While this Court has already stated in *obiter*, in a case that concerned neither the *YPA* nor the normative scope of s. 39, that this provision "do[es] not directly implicate the state at all" (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 89), it is clear that this section applies when the state, through a director of youth protection, exercises attributes of parental authority (see, e.g., *YPA*, s. 91 para. 1*(n)*; *Civil Code of Québec*, arts. 186 and 199). There is also no doubt that this section is relevant in interpreting the *YPA*'s provisions, including provisions like s. 91 para. 4 that may affect the state's rights and obligations. Indeed, since 2022, the legislature has expressly referred to s. 39 of the *Quebec Charter* in the preamble to the *YPA*, which only confirms the interpretive value of this provision in explaining the object and purport of any provision of the *YPA* (see *Interpretation Act*, s. 40 para. 1; *Quebec Charter*, s. 53; *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35, at paras. 32-33, quoting *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, at para. 20).

[26] Third, in the interpretation of any provision of the *YPA*, it is important to bear in mind the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 ("*CRC*"), which was ratified by Canada on December 13, 1991, and by which Quebec declared itself to be bound through an order in council (see Décret 1676-91, (1992) 124 G.O. II, 51; *YPA*, preamble (ad. 2022, c. 11, s. 1)). In keeping with the presumption of conformity, the *YPA* must be interpreted in a manner consistent with Canada's obligations under the *CRC*, insofar as the text allows. While the interpretive weight of this international instrument is undeniable, I note that the analysis must remain focused on the legislature's intention and not on the obligational content of the treaty. It is imperative to interpret first and foremost "what the legislature (federally and provincially) has enacted" rather than subordinating the result of this exercise to what the federal executive has agreed to internationally or to the international treaties by which a provincial executive has declared its intention to be bound through an order in council. This is a matter of respect for the principle of separation of powers (*Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, at para. 48; see also paras. 45-47; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at para. 60; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at paras. 53-54; *Michel v. Graydon*, 2020 SCC 24, [2020] 2 S.C.R. 763, at para. 103, per Martin J., concurring; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at paras. 1301-7).

[27] Finally, I note that, in the interpretation of a provision like s. 91 para. 4, which authorizes a statutory tribunal to exercise certain powers, the principle of

separation of powers does not automatically limit the scope of the powers conferred on that tribunal by the legislature. Rather, the principle of separation of powers requires that full effect be given to the legislature's intention as revealed by the interpretation of this enabling provision under the modern approach to interpretation. There is no rule whereby the legislature is presumed to intend to limit the powers it confers on a statutory tribunal on the basis of the magnitude of the budgetary impact of their exercise (see *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 15 and 28). To the extent that the reasons of the majority of the Quebec Court of Appeal suggest otherwise, they are wrong in law.

(2) Interpretation of Section 91 Paragraph 4 of the *YPA*

[28] The starting point in any interpretive exercise is the text of the provision. In the absence of statutory definitions, what should be focused on is the grammatical and ordinary meaning of the text, that is, "the natural meaning" that appears when the provision is simply read through as a whole (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, quoted in R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 3.02[1]; see also *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 34). For ease of reference, I will reproduce the text of s. 91 here:

> **91.** Where the tribunal concludes that the security or development of the child is in danger, it may, for the period it determines, order the implementation of one or more of the following measures:
>
> *(a)* that the child remain with his family or be entrusted to one of his parents and that the child's parents report periodically to the director on the measures they apply in their own regard or in their child's regard to put

an end to the situation in which the security or development of the child is in danger;

(b) that the child and the child's parents take an active part in the application of any of the measures ordered by the tribunal;

(c) that certain persons designated by the tribunal not come into contact with the child;

(d) that the child not come into contact with certain persons designated by the tribunal;

(e) that the child be entrusted to other persons;

*(e.*1*)* that the child be entrusted to a kinship foster family chosen by the institution operating a child and youth protection centre;

(f) that a person working for an institution or body provide aid, counselling or assistance to the child and the child's family;

(g) that the child be entrusted to an institution operating a hospital centre or local community service centre or to another body so that he may receive the care and assistance he needs;

(h) that the child or the child's parents report in person, at regular intervals, to the director to inform him of the current situation;

(i) that the child receive specific health care and health services;

(j) that the child be entrusted to an institution operating a rehabilitation centre or to a foster family, chosen by the institution operating a child and youth protection centre;

(k) that the child attend a school or another place of learning or participates in a program geared to developing skills and autonomy;

(l) that the child attend a childcare establishment;

*(l.*1*)* that specific information not be disclosed to one or both of the parents or any other person designated by the tribunal;

(m) that a person ensure that the child and his parents comply with the conditions imposed on them and that that person periodically report to the director;

(n) that the exercise of certain attributes of parental authority be withdrawn from the parents and granted to the director or any other person designated by the tribunal;

> *(o)* that a period over which the child will be gradually returned to his family or social environment be determined.
>
> The tribunal may make any recommendation it considers to be in the interest of the child.
>
> The tribunal may include several measures in the same order, provided those measures are consistent with each other and in the interest of the child. It may thus authorize that personal relations between the child and the child's parents, grandparents or another person be maintained, in the manner determined by the tribunal; it may also provide for more than one environment to which the child may be entrusted and state how long the child is to stay in each of those environments.
>
> Where the tribunal concludes that the rights of a child in difficulty have been wronged by persons, bodies or institutions, it may order the situation to be corrected.

[29] In this case, special attention should be paid to the fourth paragraph, particularly the passage stating that the tribunal may order "the situation to be corrected".

(a) *Text*

(i) The Verb "Correct" ("*Corriger*")

[30] The verb "correct" ("*corriger*" in the French version) is not defined in the *YPA*. It is an open-ended term with a high level of generality, especially when compared with the exhaustive and detailed list of the powers that the tribunal has where it concludes that a child's security or development is in danger (s. 91 para. 1). Indeed, a comparative reading of the words used by the legislature to describe the tribunal's powers where a child's security or development is in danger (s. 91 paras. 1 to 3) and its

powers where a child's rights have been encroached upon (s. 91 para. 4) suggests that the legislature has deliberately allowed the tribunal some latitude and creativity in cases of encroachment upon rights as regards the corrective measures that may be ordered (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 110; Ricard, at p. 632).

[31] When the provision is read as a whole, the verb "correct" evokes the idea of "redressing", "rectifying" or "remedying" the situation. This ordinary meaning also finds support in some of the dictionary definitions of the equivalent French verb "*corriger*". For example, *Le Grand Robert de la langue française* (electronic version) states that the verb "*corriger*" may mean [TRANSLATION] "[t]o bring back to a moral or societal norm (that which departs from it)" or "[t]o bring back into line (something excessive) through opposite action." Similarly, the *Dictionnaire Larousse* (online) states that "*corriger*" may mean [TRANSLATION] "to rectify that which is deficient" or to re-establish "what is right, proper, correct".

[32] It is important to note that the ordinary meaning of the verb "correct" or "*corriger*" that appears when s. 91 is read is consistent with the meaning that emerges from a reading of the other two provisions that use the verb "*corriger*" in French with "remedy" as the English equivalent. First, s. 23*(c)* states that the CDPDJ "shall take the legal means it considers necessary to remedy any situation where the rights of a child are being encroached upon". Second, s. 25.2 provides that the CDPDJ "may recommend the cessation of the alleged act or the carrying out, within the time it may

fix, of any measure designed to remedy the situation". In these two provisions, the verb "*corriger*" or "remedy" is also used in relation to "*la situation*" ("any situation" or "the situation" in English) in the context of encroachment upon rights. As in s. 91 para. 4, the verb "*corriger*" evokes the idea of bringing back into line or back to normal that which is not.

(ii) The Words "the Situation" ("*la Situation*")

[33] The word "situation" ("*situation*" in the French version) is not defined in the *YPA* and has a high level of generality as well. Moreover, when the provision is read as a whole, its ordinary meaning is ambiguous in the context. Does it refer to "the situation *at the source of the encroachment upon rights*", "the situation *of the child whose rights have been or are being encroached upon*", or both?

[34] On the one hand, the use of the definite determiner "*la*" in s. 91 para. 4 ("*la situation*", or "the situation" in English) rather than the possessive "*sa*" ("*sa situation*", or "his situation" in English) may suggest that it is the situation of encroachment in question, that is, the situation at the source of the encroachment upon rights. This interpretation would thus be consistent with one of the common meanings of the French word "*situation*", that is, [TRANSLATION] "[a]ll of the circumstances" that a person or thing is in, or "all of the relations" linking a person to a social environment (*Le Grand Robert de la langue française*; see also *Dictionnaire Larousse*). Similarly, the *Dictionnaire de l'Académie française* (9th ed. (online)) indicates that the word "*situation*" may mean [TRANSLATION] "all of the conditions in which [a person] finds

themself". The fact that the words "*la situation*" or "the situation" refer to the situation of encroachment is also supported by other provisions of the *YPA* that deal with encroachment upon rights and refer to "*la situation*" in French, including s. 23*(c)*, which in English states that the CDPDJ "shall take the legal means it considers necessary to remedy any situation where the rights of a child are being encroached upon" (see also *YPA*, s. 74.1 para. 2).

[35] On the other hand, what is evident from reading s. 91 as a whole is that, in the case of both danger to security or development and encroachment upon rights, the tribunal has been given a series of powers to protect a vulnerable child whose situation has been referred to it. With this in mind, it therefore seems entirely plausible that the French word "*situation*" refers here to the state, both psychological and physical, of the child whose rights have been encroached upon. This meaning, which appears when the provision is read as a whole, also finds support in the dictionaries. *Le Grand Robert de la langue française* indicates that the word "*situation*" may refer to a person's [TRANSLATION] "[m]ental disposition" or "psychological state". The *Dictionnaire de l'Académie française* indicates that the word "*situation*" may mean the [TRANSLATION] "[s]tate of a person, of a thing at a particular time". Moreover, one of the definitions of the term "*situation*" given by the *Trésor de la Langue Française informatisé* (online) is also to the same effect: [TRANSLATION] "All of the physical or mental conditions in which a person finds themself".

(iii) Conclusion

[36] Consideration of the grammatical and ordinary meaning of the phrase "the situation to be corrected" leads to the conclusion that the legislature intended to grant the tribunal corrective powers that allow it to redress a situation, to restore order or the normal state of affairs. However, this consideration does not make it possible to say with certainty which situation is in question. Is it the circumstances at the source of the encroachment upon rights? Is it the child's psychological and physical state? Or is it both? Furthermore, consideration of the grammatical and ordinary meaning of the phrase is of little assistance in determining whether the legislature's intention in granting the tribunal the corrective powers set out in s. 91 para. 4 was that, in exercising them, the tribunal concern itself exclusively with protecting the rights and interests of the child whose situation has been referred to it, or whether the legislature also intended that the tribunal concern itself with protecting the rights and interests of all other children who, though not the subject of the proceedings, are or may find themselves in the same situation of encroachment as the child before the tribunal.

(b) *Scheme of the YPA*

[37] An analysis of the scheme of the *YPA* sheds helpful light on the question at the centre of the disagreement between the parties, that is, whether the legislature intended that the tribunal be able to order corrective measures aimed in whole or in part at protecting the rights and interests of children whose situations have not been referred to it but who may find themselves in the same situation of encroachment as the child before it. The analysis suggests that this is not the case.

(i) The Tribunal's Mandate Is To Render Justice in an Individualized and Particularized Manner on the Basis of the Interests and Rights of the Child Whose Situation Has Been Referred to It

[38] Judicial intervention under the *YPA* is generally conceived of as an avenue of last resort, unless there are particular circumstances that justify prioritizing the judicial process over voluntary measures. To the extent possible, clinical teams representing the youth protection directors seek to intervene in the life of a child in difficulty and of the child's family on a consensual basis, in accordance with the logic of de-judicialization that informs the youth protection system. However, where consensus is not possible, the *YPA* provides for intervention by the tribunal (see, e.g., ss. 47.1, 51 to 51.8, 52 et seq., and Chapter V "Judicial Intervention"; see also Ricard, at pp. 612-13; R. Joyal and M. Provost, "La *Loi sur la protection de la jeunesse* de 1977: une maturation laborieuse, un texte porteur", in R. Joyal, ed., *L'évolution de la protection de l'enfance au Québec: des origines à nos jours* (2000), 179, at p. 181).

[39] The scheme of the *YPA* shows that the legislature intended the tribunal's intervention to be guided by the logic of individualized and particularized justice based on the interests and rights of the particular child whose situation has been referred to it. With a view to ensuring functional complementarity between social intervention and judicial intervention, the tribunal, like the representatives of the youth protection directors, must make decisions that are "in the interest of the child and respect his rights" (s. 3 para. 1), the ultimate goal being [TRANSLATION] "to limit any danger to the child's security and development, but also to prevent abuse" (E. Bernheim and

M. Coupienne, “Faire valoir ses droits à la Chambre de la jeunesse: état des lieux des barrières structurelles à l’accès à la justice des familles” (2019), 32 *Can. J. Fam. L.* 237, at pp. 262-63, citing L. Mercier, “Contexte d’autorité et judiciarisation: régression ou redéfinition novatrice de la pratique sociale professionnelle?” (1991), 40:2 *Service social* 43, at p. 49; see also *YPA*, ss. 47.1, 51 to 51.8 and 52 et seq.; R.F., at paras. 41 and 59, citing *Lamothe v. Ruffo*, [1998] R.J.Q. 1815 (Sup. Ct.), at p. 1822; Ricard, at pp. 612-13 and 636). Since every child is unique, these matters are considered on a case-by-case basis. This is an intrinsically contextual analysis that must take into account, “[i]n addition to the moral, intellectual, emotional and material needs of the child, his age, health, personality and family environment and the other aspects of his situation” (s. 3 para. 2; see also *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at paras. 38 and 44; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at paras. 89-90; *Barendregt v. Grebliunas*, 2022 SCC 22, at para. 97; *B.J.T. v. J.D.*, 2022 SCC 24, at para. 53).

[40] The fact that the tribunal is called upon to render justice in an individualized and particularized manner on the basis of a single child’s situation is also clear from all of the provisions relating to the tribunal’s jurisdiction, including those in Chapter V of the *YPA*, which delineates the scope of judicial intervention. For example, s. 73 para. 1 provides that the tribunal “shall hear the case of a child”. Section 74.1 para. 1 states that the director or the CDPDJ “may refer to the tribunal the case of a child whose security or development is considered to be in danger”. In addition, with regard to encroachment upon rights, the *YPA* provides that the CDPDJ “shall take the

legal means it considers necessary to remedy any situation where the rights of a child are being encroached upon" (s. 23*(c)*). For this purpose, it may "refer to the tribunal any situation where it has reason to believe that the rights of the child have been wronged by persons, bodies or institutions" (s. 74.1 para. 2; see also s. 25.3). Similarly, "[a] child or his parents may apply to the tribunal where they disagree" with a decision made in their case (s. 74.2). The legislature has expressly provided for just one exception to this rule. After taking into consideration the opinions of the parties, the tribunal may deal with the individual situations of several children at the same time if they have the same parent and if, in doing so, there is no risk of prejudice to any of them. However, even in such circumstances, in keeping with the individualized and particularized conception of judicial intervention that imbues the entire *YPA*, the tribunal must make "separate orders for each child in accordance with section 91"(s. 73.1).

[41] I note that no provision of the *YPA* reveals an intention to depart from this logic of individualized and particularized justice that runs throughout the *YPA* when it comes to encroachment upon rights. To give the tribunal the power to order preventive corrective measures to protect the interests and rights of children whose situations have not been referred to it, the legislature could have granted the CDPDJ the power to apply to the tribunal for corrective measures in the public interest, as the legislature did for the Human Rights Tribunal in cases of discrimination (see *Quebec Charter*, s. 80; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2

S.C.R. 789, at paras. 102-5). Similarly, it could have indicated that the tribunal, in its decisions, must concern itself with the "interests of children", as it did in describing the responsibilities of the Minister of Health and Social Services (see, e.g., *YPA*, s. 28 (ad. 2022, c. 11, s. 16)). But it did not do so. In short, it appears that the legislature did not intend to grant the tribunal the power to order corrective measures "that transcend the case before it" (*Bombardier*, at para. 102).

[42] Finally, even if it were to be concluded, as the CDPDJ suggests (A.F., at para. 50; transcript, at pp. 21-22), that the combined effect of ss. 23*(b)*, 25.2 and 25.3 is to depart from this logic of individualized and particularized justice by allowing the tribunal to make broad orders to protect the interests and rights of children whose situations have not been referred to it but have been investigated by the CDPDJ, this would be of only limited relevance in this case. This is because the tribunal was dealing in the present case with a single child's situation, which had not been investigated by the CDPDJ. This is a very different scenario, which it is important to distinguish.

(ii) Other Actors Are Responsible for Looking at the System as a Whole and Reforming It

[43] The conclusion that the tribunal must render justice in an individualized and particularized manner on the basis of the interests and rights of the child whose situation has been referred to it is also supported by the fact that other actors have been given a mandate to examine the system as a whole, to identify its shortcomings and to reform it, taking into consideration the interests of children who are the subject of

intervention under the *YPA*. In this context, it is all the more plausible that the legislature intended to limit the tribunal's role.

[44] Consideration of the scheme of the *YPA* shows that the Quebec legislature views the protection of the province's young people as a collective responsibility. It has created a youth protection system whose proper functioning depends on the actions of a range of political, social and legal actors that have been given roles, responsibilities and powers that are both distinct and complementary.

[45] The first actor responsible for looking at the system as a whole and reforming it is the Minister of Health and Social Services. The Minister may, with the government's prior approval, give binding directives to institutions to ensure that the objectives of social intervention are achieved (s. 133.1). These directives may be based on, among other things, recommendations issued by the CDPDJ (s. 23*(e)*). The Minister is also tasked with laying before the National Assembly, every five years, a study measuring the impact of the *YPA* on the stability and living conditions of children and, if necessary, recommending amendments to the *YPA* (s. 156.2). In addition, the Minister may request that the CDPDJ carry out studies and research on any question related to its competence, including the promotion and protection of the rights of children (s. 23*(a)* and *(f)*).

[46] Next, there is the CDPDJ, a central aspect of whose statutory mandate is to examine the youth protection system and collaborate with political actors in reforming it. For example, every five years, the CDPDJ must "report to the Government on the

carrying out of this Act and on the advisability of amending it" (s. 156.1 para. 1; see, e.g., CDPDJ, *Rapport sur la mise en œuvre de la Loi sur la protection de la jeunesse (article 156.1 de la LPJ)* (2020)). The CDPDJ may also, of its own motion, carry out studies and research on any question related to its competence by taking an overall look at the youth protection system and make recommendations accordingly to various government departments that have an influence on the system (s. 23*(e)* and *(f)*; see Ricard, at pp. 633-35; L. Lemonde and J. Desrosiers, "Le droit à un recours effectif lors de la violation des droits fondamentaux des mineurs privés de liberté" (2002), 62 *R. du B.* 205, at pp. 215-16).

[47] It is worth noting that a recent legislative reform carried out partly in response to the recommendations of the Special Commission on the Rights of the Child and Youth Protection (Laurent Commission) is consistent in every respect with this collaborative approach among various actors, some of whom primarily have [TRANSLATION] "their attention focused on the system", while others have their attention "focused on the child" in question whose situation has been referred to them (R.F., at para. 43; see *An Act to amend the Youth Protection Act and other legislative provisions*, S.Q. 2022, c. 11; National Assembly, *Journal des débats*, vol. 46, No. 21, 2nd Sess., 42nd Leg., December 8, 2021, at pp. 1091-93 (L. Carmant)).

[48] Among other measures in that reform, the legislature clarified and expanded the powers of the Minister of Health and Social Services so that the Minister can look critically at the system and contribute to the development of public policies

for reforming it. In Chapter III, entitled "Body and Persons Entrusted With Youth Protection", there is now a division devoted to the Minister's role. It states that the Minister is "by virtue of office the Government's adviser on all issues relating to youth protection or to children and families in vulnerable situations" and that the Minister "must be consulted whenever a ministerial decision is made involving the interests of children or the respect of their rights in relation to youth protection" (*YPA*, s. 28). In addition, with "a view to studying, improving or defining standards and obligations applicable to the responsibilities or to the social intervention of the director in order to, among other things, reduce response times", the Minister may now, by regulation, implement a pilot project on a range of matters (*YPA*, s. 133 (ad. 2022, c. 11, s. 61); see National Assembly, *Journal des débats de la Commission de la santé et des services sociaux*, vol. 46, No. 22, 2nd Sess., 42nd Leg., April 5, 2022, 15 h (L. Carmant)).

[49] The tribunal's corrective powers with respect to encroachments upon rights have remained unchanged, as has the tribunal's jurisdiction. Under this wide-ranging reform of the *YPA*, the tribunal's role is limited to rendering justice in an individualized and particularized manner. There is nothing to suggest that the tribunal's mandate has been broadened to allow it to take [TRANSLATION] "a critical look at systemic issues in child protection" (Ricard, at p. 635) and to order corrective measures to reform the system for the benefit of children whose situations have not been referred to it. The actors responsible for focusing their attention on the system are the Minister of Health and Social Services and, in certain cases, the CDPDJ. Further, the Minister and the CDPDJ are now supported in this role by new actors, including the National Director

of Youth Protection and the panel of directors chaired by the National Director (*YPA*, ss. 23 to 27 and 28 to 30.8 (ad. 2022, c. 11, s. 16); *Instaurer une société bienveillante pour nos enfants et nos jeunes: rapport de la Commission spéciale sur les droits des enfants et la protection de la jeunesse* (2021), at pp. 379-81; *Journal des débats*, December 8, 2021, at pp. 1091-93 (L. Carmant)).

(iii) Conclusion on the Tribunal's Role

[50] In light of the scheme of the *YPA*, the tribunal's mandate is to render justice in an individualized and particularized manner on the basis of the interests and rights of the child whose situation has been referred to it. The tribunal is not the actor chosen by the legislature to look critically at the youth protection system as a whole and to reform it. That role is instead entrusted to others: the Minister of Health and Social Services, the CDPDJ and especially, since 2022, the National Director of Youth Protection.

[51] It must be recognized that the legislature did not intend to grant the tribunal powers going beyond those required to carry out the mandate assigned to it. If the legislature's intention, in matters of encroachment upon rights, had been to distance itself from this vision of individualized and particularized judicial intervention that imbues the entire *YPA* and to authorize the tribunal to make orders that apply to children whose situations have not been referred to it, the legislature would have done so in explicit terms. For example, it could have clearly conferred on the tribunal the power to make orders in the public interest, or it could have expressly stated that the tribunal,

in making its decisions, must take into account not only the interests of the child before it but also the interests *of children*. It did not so, however.

(c) *Legislative History*

[52] Section 91 para. 4 (formerly s. 91 para. 2) was added to the *YPA* in 1984 as part of a legislative reform enacted in response to the report of the Special Parliamentary Commission on Youth Protection chaired by Jean-Pierre Charbonneau (see *An Act to amend the Youth Protection Act and other legislation*, S.Q. 1984, c. 4 ("*Act to amend the YPA* (1984)"), s. 46). That commission had a mandate to study the new youth protection system that had been in place since the coming into force of the *Youth Protection Act*, S.Q. 1977, c. 20. It was to recommend [TRANSLATION] "legislative and regulatory amendments" to address difficulties in the implementation of the 1977 *YPA* and, from an overall perspective, to improve the functioning of the youth protection system (*Rapport de la Commission parlementaire spéciale sur la protection de la jeunesse* (1982), at p. xiii; see also p. 9; National Assembly, *Journal des débats*, vol. 27, No. 69, 4th Sess., 32nd Leg., March 13, 1984, at pp. 5123-42 (P.-M. Johnson, C. Sirros and J.-P. Charbonneau); Ricard, at pp. 614-15).

[53] Section 91 para. 4 was incorporated into the *YPA* at the same time as s. 74.1 para. 2, which provided that the CDPDJ's predecessor, the Comité de la protection de la jeunesse ("Committee"), could also refer to the tribunal (formerly the Youth Court) "any situation where it has reason to believe that the rights of the child have been wronged by persons, bodies or establishments". These two provisions were part of the

legislative response to the Special Parliamentary Commission's recommendation to grant powers to the Committee so that it could [TRANSLATION] "apply to the Court on the basis of rights being encroached upon, and not only where security or development is in danger" (*Rapport de la Commission parlementaire spéciale*, at p. 544). In its report, the Special Parliamentary Commission criticized the fact that the 1977 *YPA* gave the Committee a power to investigate encroachments upon rights (s. 23*(b)* (formerly s. 23(*d*))) and made it responsible for taking "the legal means it considers necessary to remedy any situation where the rights of a child are being encroached upon" (s. 23*(c)* (formerly s. 23(*e*))) without adequately equipping it, from a legal standpoint, to perform its role. In short, the Commission found it deplorable that the 1977 *YPA* did not provide for referral to the tribunal in cases of encroachment upon a child's rights. In enacting ss. 91 para. 4 and 74.1 para. 2, the legislature was thus attempting to [TRANSLATION] "fil[l] a gap" in the articulation of the powers of the Committee and the tribunal to deal with encroachments upon rights (Ricard, at p. 615).

[54] With regard to s. 91 para. 4 specifically, the Special Parliamentary Commission had recommended adding the following paragraph at the end of s. 91:

> [TRANSLATION] Where the Court concludes that the rights of a young person in difficulty have been encroached upon by persons, bodies or institutions acting pursuant to the Act respecting assistance to children and youth in difficulty, it may, in the judgment determining that rights have been encroached upon, order that the situation encroaching upon the rights of the young person be corrected. [Emphasis added.]
>
> (National Assembly, *Proposition législative: annexe IV au rapport de la Commission parlementaire spéciale sur la protection de la jeunesse* (1982), s. 1085)

The legislature followed that recommendation but decided to omit the words "encroaching upon the rights of the young person" in the wording of s. 91 para. 4.

[55] Therefore, what the members of the Special Parliamentary Commission had in mind was that the tribunal would correct the situation at the source of the encroachment upon rights. Moreover, the wording of the recommendation suggests that the tribunal must concern itself with the interests and "the rights of the young person" whose situation has been referred to it, rather than the interests and rights of other children who are not before it. The question that naturally then arises is whether the legislature's decision to omit the words "encroaching upon the rights of the young person" in the wording of s. 91 para. 4 reflects its intention to broaden the tribunal's corrective powers so that it can order corrective measures to protect the interests and rights of children whose situations have not been referred to it.

[56] The legislative debates surrounding the enactment of the new version of s. 91 in 1984 shed no light on the question, since s. 91 para. 4 was not specifically discussed during those debates (see National Assembly, Standing Committee on Social Affairs, "Étude détaillée du projet de loi 60 — Loi modifiant la Loi sur la protection de la jeunesse et d'autres dispositions législatives (3)", *Journal des débats: commissions parlementaires*, No. 4, 4th Sess., 32nd Leg., March 22, 1984, at pp. 109-10). That being said, it can be seen from the context surrounding the addition of s. 91 para. 4 that the legislature probably considered it unnecessary to specify that "the situation" the tribunal may order to be corrected is "the situation encroaching upon the rights of the

young person". It was reasonable for the legislature to think that this could be inferred, by necessary implication, from ss. 23*(c)* and 74.1 para. 2. These provisions stated, respectively, that the Committee had to take "the legal means it considers necessary to remedy any situation where the rights of a child are being encroached upon" and that it could "refer to the Court any situation where it has reason to believe that the rights of the child have been wronged". In my view, the legislature's decision to omit the words "encroaching upon the rights of the young person" should not be interpreted as a broadening of the tribunal's power to order corrective measures to protect the interests and rights of children whose situations have not been referred to it.

[57] I pause here to elaborate on this last point and respond to an argument made by the CDPDJ. Sections 91 para. 4 and 74.1 para. 2 were inserted into the *YPA* at the same time as the provisions broadening the Committee's power to investigate encroachments upon rights so that it could do so in respect of a group of children (s. 23*(b)*), granting the Committee the power to make recommendations following an investigation into an encroachment upon rights (s. 25.2), and specifying that the Committee could refer the matter to the Youth Court if its recommendation was not implemented within the time fixed (s. 25.3) (see *Act to amend the YPA* (1984), ss. 10, 12, 38 and 46). These additions addressed the Special Parliamentary Commission's recommendation that the Committee's investigative powers be strengthened and clarified by drawing inspiration from the investigative powers already granted to Quebec's Commission des droits et libertés de la personne (*Rapport de la Commission parlementaire spéciale*, at pp. 544 and 547; *Proposition législative*, ss. 113, 129 and

130). It was hoped that the Committee, in exercising its powers to investigate and make recommendations, could deal with [TRANSLATION] "collective problems" rather than strictly individual situations. In short, the legislature wanted the Committee's investigative role to relate to [TRANSLATION] "group problem[s]" as well, such as those affecting "a group of children in a given reception centre in a given situation" (see National Assembly, Standing Committee on Social Affairs, "Étude détaillée du projet de loi 60 — Loi modifiant la Loi sur la protection de la jeunesse et d'autres dispositions législatives (2)", *Journal des débats: commissions parlementaires*, No. 3, 4th Sess., 32nd Leg., March 21, 1984, at p. 45 (P.-M. Johnson)).

[58] The CDPDJ argues that the combined effect of ss. 23*(b)*, 25.2 and 25.3 is to authorize the tribunal to make broad orders to protect the interests and rights of a group of children whose situation has not been referred to it but has been investigated by the CDPDJ, and who may find themselves in the same situation of encroachment as the child before the tribunal. The legislative history shows that this is not the case. The CDPDJ's interpretation of ss. 23*(b)*, 25.2 and 25.3 cannot be reconciled with the language of ss. 23*(c)*, 74.1 para. 2 and 91 para. 4, which clearly indicates that only the situation of a single child is referred to the tribunal in a case involving encroachment upon rights. Presumably, if the legislature had intended to extend the tribunal's jurisdiction or corrective powers to the situation of a group of children in respect of which the CDPDJ had investigated, it would have indicated this explicitly in the *YPA*'s provisions on judicial intervention (Chapter V). In particular, it would have specified this in ss. 74.1 and 91 para. 4, which were examined by a parliamentary committee and

then incorporated into the *YPA* at the same time as ss. 23*(b)*, 25.2 and 25.3. But it did not do so.

[59] In this context, it must be concluded that the provisions relied upon by the CDPDJ are not intended to authorize the tribunal to deal with the situation of a group of children or to order corrective measures to protect the interests and rights of a group of children whose situation has not been referred to it but has been investigated by the CDPDJ. On the contrary, these provisions describe the steps that the CDPDJ must take before applying to the tribunal, after having investigated (s. 23*(b)*) and decided to make a recommendation subject to a time limit (ss. 25.2 and 25.3). In any event, I reiterate that even if the CDPDJ's interpretation were to be accepted, this would be of very limited assistance in this appeal, because the tribunal was dealing in this case with a single child's situation, which had not been investigated by the CDPDJ. This is a very different scenario, which it is important to distinguish.

[60] In short, I am of the view that the legislative history of s. 91 para. 4 and of other related provisions concerning encroachment upon rights confirms what the scheme of the *YPA* already reveals: the tribunal can deal with the situation of only one child at a time. Moreover, there is nothing to suggest that the legislature intended to authorize the tribunal to order corrective measures that would apply to children whose situations have not been referred to it but who may find themselves in the same situation of encroachment as the child before it. Lastly, the tribunal must correct the situation at the source of the encroachment upon the child's rights, but the legislative history does

not indicate whether the tribunal can also seek to remedy the impact of the encroachment on the child's psychological or physical state.

(d) *CRC*

[61] Article 3 of the *CRC* makes it clear that the best interests of the child must be a primary consideration in "all actions concerning children" (Article 3(1)). Its aim is also for states parties to undertake "to ensure the child such protection and care as is necessary for his or her well-being" (Article 3(2)). To this end, states must ensure that "the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision" (Article 3(3)).

[62] The CDPDJ is correct in stating that the *CRC* weighs in favour of interpreting s. 91 para. 4 in a large and liberal manner so that the tribunal will have all the corrective powers it needs to ensure that the child whose rights have been encroached upon has the fullest and most effective protection possible (see United Nations, Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, U.N. Doc. CRC/GC/2003/5, November 27, 2003, at para. 24; United Nations, Committee on the Rights of the Child, *Concept Note: General Comment on Children's Rights to Access to Justice and Effective Remedies*, 2024 (online), at paras. 4-7 and 16).

[63] That being said, it is undeniable that states parties to the *CRC* possess a margin of discretion in determining what measures are appropriate to promote the best interests of the child and to protect the child's rights (see *CRC*, Article 4; J. Tobin, "Article 4. A State's General Obligation of Implementation", in J. Tobin, ed., *The UN Convention on the Rights of the Child: A Commentary* (2019), 108, at pp. 111-12). I agree with the DYP that there is no indication that, in order to comply with the *CRC*, provincial and territorial legislatures must, in cases of encroachment upon rights, give courts or tribunals the mandate and powers they need to concern themselves with protecting the interests and rights of more than one child at a time (see R.F., at para. 39, quoting United Nations, Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, U.N. Doc. CRC/C/GC/14, May 29, 2013, at para. 32).

(e) *Object of the Provision*

[64] The *YPA* establishes a scheme whose purpose is to protect any child whose security or development is or may be in danger (s. 2 para. 1). As the CDPDJ noted, in doing so, the *YPA* [TRANSLATION] "gives life" to s. 39 of the *Quebec Charter* (transcript, at p. 27). It also helps to implement Canada's obligations under the *CRC* in domestic law.

[65] The recourse for a declaration of encroachment upon rights is one of the legal tools put in place by the legislature to achieve this fundamental purpose of the

YPA of protecting the interests and rights of children whose security or development is in danger. In establishing this recourse and granting corrective powers to the tribunal, the legislature had the objective [TRANSLATION] "of ensuring that any state intervention in relation to a child [covered by the *YPA*] is carried out in a manner that respects the child's rights" (Ricard, at pp. 616-17; see also p. 609; *YPA*, s. 3). The legislature was therefore seeking to provide additional protection to a vulnerable child whose right to protection had already been encroached upon by their parents or by the persons acting in their stead at the time of the intervention by the director of youth protection in the child's life (Ricard, at pp. 616 and 619). Through this oversight and judicial review mechanism, the legislature also sought to ensure that the director of youth protection and the other persons, bodies or institutions called upon to interact with the child in the course of social intervention could be held accountable (see V. P. Costanzo and M. Paré, "Les réponses judiciaires au non-respect des droits de l'enfant dans l'intervention sociale: Utilité ou futilité du recours en lésion de droits?" (2023), 33:2 *N.P.S.* 135, at pp. 153 and 156; C. Brodeur, "Chronique — Le non-respect des ordonnances par la direction de la protection de la jeunesse: contexte juridique et survol de la jurisprudence", *Repères*, June 2022 (online), at pp. 7-8).

[66] The corrective powers conferred on the tribunal by s. 91 para. 4 must be interpreted in a large and liberal manner to ensure the attainment of this purpose of protecting children, which is clearly affirmed in the *Quebec Charter* and the *CRC* (*Quebec Charter*, s. 39; *CRC*, Article 3; see also *Civil Code of Québec*, art. 32; *Interpretation Act*, s. 41; *Protection de la jeunesse – 123979*, at para. 21). The various

types of corrective measures that can be ordered must be conceived of generously to ensure the fullest possible protection for the child whose rights have been encroached upon. By "full protection", I mean protection that applies to both the present and the future and that takes into account the circumstances at the source of the encroachment upon the child's rights as well as the impact of the encroachment on the child's psychological and physical state.

[67] In this regard, I am of the view that the interpretation proposed by the CDPDJ — to the extent that it focuses exclusively on rectifying the circumstances at the source of the encroachment upon rights — undermines the tribunal's ability to protect the interests and rights of the child before it in a given case. Indeed, such an interpretation is incompatible with the possibility of ordering corrective measures to remedy the negative impact of an encroachment upon rights on the child's psychological or physical state. In some respects, the CDPDJ's interpretation also seems to limit the type of preventive corrective measures that may be ordered. Over and above correcting the situation at the source of the encroachment upon rights, the tribunal must also, in my opinion, be able to order preventive corrective measures that will follow the child through the system to ensure that the child is adequately protected in the future.

[68] With regard to the question at the centre of the disagreement between the parties — that is, whether the tribunal may order corrective measures to prevent children whose situations have not been referred to it from finding themselves in the

same situation of encroachment as the one that encroached upon the rights of the child before it — I am of the view that the purpose clause in the French version of the *YPA* allows this question to be answered in the negative. Its first paragraph states that the *YPA* "*a pour objet la protection de l'enfant dont la sécurité ou le développement est ou peut être considéré comme compromis*" ("[t]he purpose . . . is to protect children whose security or development is or may be considered to be in danger") (s. 2). Since 2022, the purpose clause has stated as well — relying on the wording of s. 2.3 para. 1*(a)* of the version of the *YPA* in force at the relevant time — that the *YPA* "*a aussi pour objet de mettre fin à la situation qui compromet la sécurité ou le développement de l'enfant et d'éviter qu'elle ne se reproduise*" ("also aims to put an end to and prevent the recurrence of situations in which the security or the development of a child is in danger") (s. 2 para. 1).

[69] Section 3 provides as follows:

> **3.** Decisions made under this Act must be in the interest of the child and respect his rights.
>
> In addition to the moral, intellectual, emotional and material needs of the child, his age, health, personality and family environment and the other aspects of his situation must be taken into account.

[70] It is true that the *YPA* establishes a youth protection system whose fundamental mission, as the appellant states, is to protect vulnerable children in Quebec (A.F., at para. 58). That being said, the wording of s. 2, namely the *YPA*'s purpose clause, and that of s. 3 lead to the conclusion that, in the case of social and judicial

intervention, the legislature had in mind that this goal would be attained through interventions aimed at protecting the interests and rights of one child at a time. It is through the cumulative effect of individualized and particularized interventions that the legislature hopes to achieve the fundamental purpose of Quebec's youth protection system, which is to protect "the children" who are the most vulnerable in society. This observation is important given the fact that purpose statements in a statute are the "first, 'most direct and authoritative evidence' of the legislative purpose" (*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 130, quoting *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 49) and also given the fact that, in an interpretive exercise, it is important to consider the general purpose of both the provision and the statute while bearing in mind the means chosen by the legislature to achieve these general objectives (see *Breault*, at para. 26, quoting *MediaQMI inc.*, at para. 39; see also *9147-0732 Québec inc.*, at para. 10; Mancini, at pp. 927 and 930-31).

(f) *Conclusion*

[71] A large and liberal interpretation of s. 91 para. 4, which ensures the attainment of the general purpose of protecting children while taking into consideration the text, the statutory scheme and the context, leads me to conclude that the legislature intended to confer on the tribunal the powers needed to ensure full protection of the interests and rights of the child whose situation has been referred to it. By this I mean protection that applies to both the present and the future and that takes account of the

circumstances at the source of the encroachment upon rights as well as the impact of the encroachment on the child's psychological and physical state. What this means in practical terms, in my view, is that the tribunal may order corrective measures with the following purposes: (1) to put an end to the situation of encroachment where it is still encroaching upon the child's rights; (2) to remedy the psychological or physical consequences for the child resulting from the encroachment upon rights; and (3) to prevent the recurrence of the situation of encroachment for the child. The tribunal can thus order a wide range of corrective measures so as to render justice in a flexible and creative manner in each case.

[72] It follows from the above that a preventive corrective measure may be ordered only if the child whose rights have been encroached upon is at risk of being subjected to the situation of encroachment again. The fact that other children whose situations have not been referred to the tribunal might benefit from the preventive corrective measure is not sufficient, on its own, to allow the tribunal to order it.

[73] Contrary to what the CDPDJ argues, this conclusion is not absurd, unreasonable or incompatible with the general purpose of protecting vulnerable children that infuses the *YPA* (A.F., at paras. 57-58). Rather, it accurately reflects the means chosen by the legislature to guarantee the protection of the interests and rights of children who are the subject of social intervention under the *YPA*. In the case of the tribunal, these means are centred around individualized and particularized justice. The fact that the CDPDJ would prefer other means that it considers more effective for

achieving this general purpose of protecting vulnerable children in Quebec — for example, granting the tribunal the power to make orders in the public interest or in the interest *of children* who are the subject of intervention under the *YPA* — is not sufficient to characterize as absurd or unreasonable the interpretation that is called for when the text of the provision, the statutory scheme, the context and the object are considered.

[74] Moreover, as we will see in greater detail in the next section, the fact that the tribunal may order corrective measures only to protect the interests and rights of the child whose situation has been referred to it does not mean that the order, to be valid, necessarily has to name that child expressly. To hold otherwise would be an error of law. Nor does it mean that a corrective measure cannot have the indirect and incidental effect of protecting the interests and rights of other children who may find themselves in the same situation of encroachment as the child whose situation has been referred to the tribunal. Finally, it also does not mean that the tribunal cannot order corrective measures to eliminate a systemic or institutional practice. Indeed, there is nothing to prevent the tribunal from ordering such a corrective measure, provided that the child whose rights have been encroached upon is at risk of being subjected to the situation of encroachment again, that the corrective measure can effectively help to prevent the recurrence of the situation of encroachment and that the measure is related to the protection of the interests and rights of the child whose situation has been referred to the tribunal. I will come back to this.

[75] I would note here that my proposed interpretation of s. 91 para. 4 is consistent with the judicial interpretations of s. 91 para. 4 that have been adopted thus far. There are already instances where the tribunal will order corrective measures to put an end to a situation of encroachment that is still ongoing at the time a declaration of encroachment upon rights is made. This will be the case, for example, where the situation of encroachment results from an absence of psychological counselling that the child's state makes necessary and where this absence of counselling continues at the time of the hearing. In such a case, the tribunal will order the corrective measures needed to put an end to the absence of counselling (see, e.g., *Protection de la jeunesse – 174220*, 2017 QCCQ 9973, at paras. 41-51 and 68-69).

[76] Similarly, if the encroachment upon rights has had negative physical or psychological consequences for the child, the tribunal may sometimes order measures that can remedy those consequences or improve the child's state. For example, the tribunal will occasionally order the provision of social services that have become necessary because of the negative consequences of the encroachment upon rights for the child, or it will order the director of youth protection to cover the costs of therapy that has become necessary as a result of a situation of encroachment caused by the director of youth protection (see, e.g., *Protection de la jeunesse – 175726*, 2017 QCCQ 10171, at paras. 111, 113 and 135; *Protection de la jeunesse – 1610815*, 2016 QCCQ 20163, at paras. 17-18, 67-75 and 105; *Protection de la jeunesse – 202094*, 2020 QCCQ 1912, at paras. 109-18, 123-24 and 130-31; M. Provost, *Youth Protection Law in Québec* (2023), at pp. 287-89). Similarly, there may be grounds for ordering the

person, body or institution that encroached upon the child's rights to apologize in writing to the child and their family with a view to offering some form of solace and restoring the relationship of trust with the youth protection system (see *Protection de la jeunesse – 212922*, 2021 QCCQ 5132, at paras. 701-2).

[77] Finally, it is also common for the tribunal to order corrective measures to prevent the recurrence of the situation of encroachment for the child whose rights have been encroached upon. It is recognized in the jurisprudence that even where the situation of encroachment has ended by the time of the hearing, this does not preclude the tribunal from making preventive orders to ensure that the situation of encroachment does not recur for the child whose situation has been referred to it (*Protection de la jeunesse – 123979*, at paras. 20-26; Ricard, at p. 632). For example, the tribunal may order, as a corrective measure, that training be given to a youth worker to impress upon them the importance of respecting certain fundamental principles governing social intervention under the *YPA* to ensure that, in the future, the worker will be better able to establish and maintain a relationship of trust with the child and the child's parents (*Protection de la jeunesse – 123979*, at para. 21; S. Papillon, "Le jugement en matière de lésion de droits de la Chambre de la jeunesse: où en sommes-nous?" (2015), 56 *C. de D.* 151, at p. 176). Similarly, the tribunal may order that its judgment be served on actors responsible for taking an overall look at the system and participating in its reform (see, e.g., *Protection de la jeunesse – 2023*, 2020 QCCQ 61, at paras. 331 and 456; *Protection de la jeunesse – 137151*, 2013 QCCQ 17367, at paras. 85-87 and 93) or may recommend that the CDPDJ investigate a problematic situation with a view to making

the necessary recommendations to the Minister of Health and Social Services (see, e.g., *Protection de la jeunesse – 171278*, 2017 QCCQ 2752, at paras. 73-74 and 80).

(3) Criteria for the Validity of Corrective Measures Ordered for Preventive Purposes

[78] In light of the disagreement that exists on this question between the parties and between the judges of the Court of Appeal, I believe it is essential to set out three criteria for determining the validity of corrective measures ordered for preventive purposes. These criteria are based on the limits built into s. 91 para. 4 of the *YPA* by the legislature. Without purporting to be exhaustive, they will serve in the future both to guide the tribunal when it contemplates ordering such corrective measures and to support the appellate courts called upon to review the validity of these measures.

(a) *The Child Must Be at Risk of Being Subjected to the Situation of Encroachment Again*

[79] First, for a preventive corrective measure to be ordered, the child whose situation has been referred to the tribunal must be at risk of being subjected to the situation of encroachment again. To hold otherwise would amount to recognizing that the tribunal has the power to make orders in the public interest or in the interest of children who are the subject of social intervention under the *YPA*. However, this is not what the legislature intended.

[80] I note that this criterion is flexible and easily met, in view of the imperative of protecting children from any risk of harm that infuses the *YPA* (see Bernheim and Coupienne, at p. 262, citing *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at pp. 176-78). While mere conjecture unsupported by the evidence is not enough to conclude that the child is at risk of being subjected to the situation of encroachment again, this criterion will generally be met where the child is still the subject of intervention under the *YPA*. However, if the child is no longer the subject of intervention at the time the tribunal decides the application for a declaration of encroachment upon rights and if nothing in the evidence suggests that the child might be so again before reaching the age of majority, the criterion will not be met. No preventive corrective measure can then be ordered. In every case, the question of whether a child is at risk of being subjected to the same situation of encroachment in the future is a contextual determination that will depend on the tribunal's assessment of the evidence.

(b) *The Corrective Measures Must Be Able to Effectively Help to Prevent the Recurrence of the Situation of Encroachment*

[81] Second, the preventive corrective measure or measures ordered must be able to effectively help to prevent the recurrence of the situation of encroachment.

[82] To this end, the tribunal must begin by focusing increased attention on the circumstances that gave rise to the encroachment upon rights, the number and nature of which will vary from case to case. As Dickson C.J. stated in another context, the tribunal should look first to the past so that it can then make preventive orders that can

effectively prevent a situation from recurring in the future (see *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 ("*CN*"), at p. 1145; see also Ricard, at p. 620). At this stage, the tribunal must [TRANSLATION] "try to understand the source of the encroachment" (Ricard, at p. 620). Again, this is a highly factual determination that will depend on the evidence adduced.

[83] Understanding the source of an encroachment upon rights will be easy in cases where the encroachment results from only one act or omission by an individual. For example, in the case at bar, it was easy for the tribunal to determine the source of the encroachment upon the young person's right to security and protection on July 27, 2018. The encroachment was caused by a CISSS A educator who unjustly refused to allow the young person, who had run away, to take refuge at the RCYPAP to which she had been entrusted.

[84] In other cases, understanding the source of an encroachment will be more difficult, especially when institutional and individual factors are present. This will be the case where the act or omission by an individual that contributed to an encroachment upon rights is closely linked to institutional factors (Ricard, at p. 632). By "institutional factor", I mean any factor that relates primarily to the functioning of a legal person, institution or body, such as training, a protocol or an internal practice (see, by analogy, *CN*, at pp. 1139 and 1143; R. W. Zinn, *The Law of Human Rights in Canada: Practice and Procedure* (loose-leaf), at § 1:6). The infringement of the young person's right to receive health care with continuity and in a personalized manner is a good example.

The tribunal noted that the encroachment upon this right originated both in a series of individual acts or omissions by health care personnel and youth workers and in institutional factors, primarily the institution's poor medical record-keeping.

[85] Once the source of the encroachment upon rights is identified, the tribunal will be able to consider one or more corrective measures that could effectively help to prevent the recurrence of the situation of encroachment. These measures will logically focus on one or more of the circumstances shown by the evidence to be at the source of the encroachment. In this regard, I emphasize that, at the stage of presenting testimonial and documentary evidence, the parties play an important role in assisting the tribunal to determine innovative corrective measures based on best practices.

[86] Finally, I note that the aim here is not to determine the corrective measure that will be *the most* effective in preventing the recurrence of the situation of encroachment for the child. Rather, it is to identify the corrective measures that can be expected to be effective in helping to prevent the recurrence of the situation of encroachment. It is not uncommon for a wide range of corrective measures to be available to the tribunal. However, this range of measures will be narrowed once account is taken of an additional criterion: the corrective measures must be related to the protection of the interests and rights of the child whose situation has been referred to the tribunal.

(c) *The Corrective Measures Ordered Must Be Related to the Protection of the Interests and Rights of the Child Whose Situation Has Been Referred to the Tribunal*

[87] Third, any preventive corrective measure must not only be effective but also be related to preventing the recurrence of the situation of encroachment for the child whose situation has been referred to the tribunal. This requirement flows from the legislative intent discerned from s. 91 para. 4 of the *YPA*, which is that the tribunal be able to order corrective measures only to protect the interests and right of the child whose situation has been referred to it. Its effect is to limit the range of preventive corrective measures deemed effective by the tribunal to those that seek first and foremost to protect the interests and rights of the child before it, so as to provide a practical remedy for the encroachment upon the child's rights (see *Protection de la jeunesse – 123979*, at para. 25). The corrective measure must be primarily intended to protect the interests and rights of the child whose situation has been referred to the tribunal (see C.A. reasons, at para. 76). It must be related to events experienced by the child whose situation has been referred to the tribunal in environments where the child has spent or might spend time, on the basis of the evidence and the context.

[88] At this stage, to order a corrective measure whose scope is related to the protection of the child's interests and rights, the tribunal must confine itself to ordering a corrective measure that reflects the risk of harm faced by the child, *as shown by the evidence*. As the concurring judge of the Court of Appeal noted, the tribunal must avoid the trap of intellectual shortcuts and generalizations not supported by the evidence. For

example, if the tribunal wishes its order to be directed specifically at persons, bodies or institutions, it must limit itself to naming those that, in light of the evidence, could potentially contribute to the recurrence of the encroachment upon the child's rights. Moreover, if the tribunal is of the view that there is a risk that other persons, bodies or institutions may expose the child to the same situation of encroachment in the future, but that the evidence does not allow it to identify them, it may make an order that will follow the child through the system. However, it may not make an order directed at all persons, bodies or institutions in the judicial district concerned or in Quebec.

[89] To effectively protect the child whose rights have been encroached upon, the preventive corrective measures will sometimes have to be broad in scope. This will be the case where the evidence shows that a corrective measure directed strictly at one or more identifiable individuals would not serve to protect the child effectively in the future.

[90] When broad corrective measures are required, at least two types of measures can be contemplated. First, the tribunal may order a corrective measure specifically directed at persons, bodies or institutions that, in light of the evidence, could potentially contribute to the recurrence of the encroachment upon the child's rights. This will include the persons, bodies and institutions that, according to the evidence, were at the source of the situation of encroachment experienced by the child and that the child might interact with or spend time at in the future. Second, the tribunal may order a measure that will follow the child through the system. Such a corrective

measure may be ordered either as an alternative to or in addition to the first type of measure, in light of the evidence in the record, the circumstances of the case and the need to protect the child for the future. While everything is a question of context, it can be expected that, in many cases, a hybrid corrective measure — combining the two types of measures — will be what guarantees the fullest and most effective protection for the child in the future.

[91] It follows from the above that the wording of a corrective measure does not necessarily have to name the child whose rights have been encroached upon for that order to be sufficiently related to the protection of the child's interests and rights. To hold otherwise would be an error of law. To verify whether an order has been validly made under s. 91 para. 4, one must "look to the substance of the order and not merely to its wording" (*CN*, at p. 1145). Therefore, although the concurring judge of the Court of Appeal was correct in stating that a measure can [TRANSLATION] "relat[e] to the child whose rights were wronged, even if her name is not included in the order" (para. 46), such a measure must, to be valid, be directed only at persons, bodies or institutions that, in light of the evidence, could potentially contribute to the recurrence of the encroachment upon the child's rights.

[92] Moreover, the fact that a preventive corrective measure benefits a large number of children because of the way it is worded is of no relevance in determining whether the measure was validly imposed. A preventive corrective measure related to the interests and rights of the child whose situation has been referred to the tribunal

may very well have positive indirect and incidental consequences for a large number of children (see *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 63). I would add that this is particularly true where the corrective measure must be broad in scope in order to effectively help to prevent the recurrence of the situation of encroachment for the child.

(d) *The Budgetary Impact of the Corrective Measure Is Not a Criterion for the Validity of the Order*

[93] Lastly, I am of the view that the magnitude of the budgetary impact of the corrective measure is not in itself a criterion for the validity of the order. I agree with the concurring judge of the Court of Appeal that the majority erred in stating that a corrective measure that was necessary to prevent a child from being subjected to a situation of encroachment again would nonetheless be invalid if the budgetary impact of the measure were too significant. The majority also noted [TRANSLATION] "the importance of raising the issue of approximate costs for those seeking or contesting [preventive] orders [made under s. 91 para. 4] so that the court hearing such applications may assess the impact of the order and, accordingly, whether the court is allowed to make it" (para. 81).

[94] In addition to the fact that such a validity criterion has no basis in the *YPA*, its application to preventive orders made under s. 91 para. 4 would entail considerable practical difficulties. Indeed, it would be unduly burdensome to ask the parties to deal with the issue of the approximate costs of the orders being debated. This could well

lengthen and complicate the proceedings, whether by encouraging the parties to produce expert evidence on the issue or by prompting speculative debates on it. In every case, it would only add another barrier to access to justice in the youth protection system, a situation that would be contrary to the protection of the interests and rights of vulnerable children and their families (see Bernheim and Coupienne, at pp. 276-78).

(e) *Conclusion*

[95] In summary, at least three validity criteria govern the exercise of the tribunal's power to order preventive corrective measures under s. 91 para. 4 of the *YPA*. These criteria are based on the limits built into this enabling provision. For a preventive corrective measure to be ordered, the child whose situation has been referred to the tribunal must be at risk of being subjected to the situation of encroachment again. If this is the case, the corrective measure chosen by the tribunal must be among the limited range of measures that can effectively help to prevent the recurrence of the situation of encroachment and that are also related to the protection of the interests and rights of the child whose situation has been referred to the tribunal. The magnitude of the budgetary impact of the corrective measure is not in itself a criterion for the validity of the order.

[96] Where a broad preventive measure is necessary, it may take a variety of forms. For example, it may be limited to the persons, bodies and institutions that, according to the evidence, could potentially contribute to the recurrence of the

encroachment upon the child's rights; it may follow the child through the system; or it may be a hybrid of these two forms of measures.

[97] It can be expected that, in many cases, a relatively wide range of preventive corrective measures will be available to the tribunal. If so, it will be up to the tribunal to choose the corrective measure or measures it considers to be the most appropriate to protect the interests and rights of the child whose situation has been referred to it, having regard to the evidence in the record and the submissions of the parties concerned. Such a discretionary decision is generally entitled to deference. Unless the tribunal made a palpable and overriding error in assessing the evidence or it is shown that the tribunal did not exercise the discretion conferred by s. 91 para. 4 judiciously, the preventive measure ordered by the tribunal must be upheld and an appellate court cannot intervene (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10 and 36; *Barendregt*, at paras. 100-104; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 41; *Hydro-Québec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595, at para. 33). On the other hand, where the appellate court finds an error in the tribunal's interpretation of s. 91 para. 4, the error must be reviewed on a standard of correctness. For example, if the tribunal erred by clearly seeking to make orders that would benefit children other than the one whose situation had been referred to it, this would constitute an error of law (see *Housen*, at para. 8; *Vavilov*, at para. 37; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 30; *Carroll-Byrne*, at para. 41).

(4) Review of the Orders

[98] The four corrective measures challenged by the DYP were ordered to prevent abusive or inadequate restraint and isolation measures from being used again. In the tribunal's view, those restraint and isolation measures infringed the young person's right to have any use of control measures against her be minimal, exceptional and guided by a procedure (*Act respecting health services and social services*, CQLR, c. S-4.2, s. 118.1).

[99] With regard to the abusive or inadequate restraint and isolation measures, the tribunal found, among other things, that the young person — who was dealing with significant mental health disorders — had been subjected to more than a hundred restraint measures over a period of about five months because of acts that were dangerous to her or others, and that she had suffered injuries as a result of those restraint measures. On one occasion in particular, her head was completely covered with a sweater to prevent her from spitting in the intervention officers' faces, which caused her to hyperventilate. The tribunal stated that, during the same period, more than a hundred withdrawal measures, lasting from less than a minute to more than seven hours, had also been used against the young person. The tribunal noted that she had [TRANSLATION] "spent an unreasonable amount of time isolated in a tiny, often dingy, concrete room" (para. 302), in which she had sometimes beat her head against the walls. These are facts that the DYP does not dispute, as she limits the debate to the lawfulness of the corrective measures ordered.

[100] At the time the tribunal decided the applications for a declaration of encroachment upon rights, it was established that the young person was at risk of being subjected again to the situations of encroachment identified by the tribunal. At that time, the tribunal declared that the young person's security and development were still in danger (at para. 330), extended the order of January 17, 2018, requiring that she be placed at an RCYPAP (at para. 331), and entrusted her situation to the DYP (para. 338). In reviewing the four impugned orders, I will therefore focus special attention on the other two validity criteria set out above.

(a) *Orders Directed at the Individualized Treatment Units*

[101] The tribunal ordered that "the youth workers, educators and intervention officers who work in the individualized treatment units be able to receive specific training on mental health" (para. 340) and that these units "be able to obtain support from a healthcare professional specializing in mental health" (para. 341). Finding that these orders were not sufficiently related to the protection of the young person's interests and rights, the Superior Court judge varied their wording. He narrowed the scope of the first order by specifying that only the youth workers, educators and intervention officers [TRANSLATION] "who will be responsible for X in the individualized treatment units" could receive the mental health training (paras. 65 and 76). He narrowed the second order by specifying that only the individualized treatment units [TRANSLATION] "that will be responsible for X" could obtain support from a healthcare professional specializing in mental health (para. 76; see also paras. 65-66).

The judges of the Court of Appeal unanimously affirmed the Superior Court's decision. I agree with their decision, apart from endorsing the suggestion that the order, to be valid, necessarily had to name the child expressly.

[102] The young person stayed in just one individualized treatment unit ("ITU"), ITU B, which is a rehabilitation unit for young people with mental health and behavioural disorders. A minimum of three educators are in the unit during the day to look after the young people. The tribunal concluded that, in that unit, the young person had not received all the supervision and support needed from the youth workers [TRANSLATION] "because the unit was then very 'lively' and the various youth workers were overwhelmed" (para. 301). The tribunal also found that when restraint measures were necessary, they were implemented by security guards from a private company who had very little experience and were not trained to meet the specific needs of young people with mental health disorders. When the educators left the unit around 11:00 p.m., security guards took over for the night. Their mandate was to supervise the young people and ensure their safety. Further, the tribunal noted that the turnover of security guards was high, since most of them were police technology students who were only there on a short-term basis. However, nothing in the judgment suggests that these findings of fact concerning ITU B could be generalized to other identifiable ITUs where the young person might spend time in the future.

[103] In that context, while it was reasonable to believe that, by targeting all "individualized treatment units", the corrective measures ordered would both be able

to effectively help to prevent the recurrence of the situation of encroachment, the tribunal nonetheless erred by not limiting their scope so that they were related to preventing the recurrence of the situation of encroachment for the young person. Nothing in the evidence adduced supported the conclusion that such broad orders were necessary to protect the young person's interests and rights in the future. In this sense, the orders exceeded the tribunal's powers.

[104] I agree with the judges of the Court of Appeal that the Superior Court properly intervened to narrow the scope of these orders so that they were related to the protection of the young person's interests and rights. I would note, however, that there was no reason why the Superior Court could not also have achieved this objective by varying the wording of the two orders in another way. I will provide two examples that illustrate the range of preventive corrective measures available. First, the Superior Court judge could have transformed the order for mental health training into a hybrid corrective measure directed specifically at the youth workers, educators and intervention officers from ITU B, as well as any other youth worker, educator and intervention officer from any other ITU that would be responsible for the young person in the future. Second, the judge could also have ordered that, in the event of a transfer to another ITU (other than ITU B), the young person could be taken charge of only by an ITU (1) where the youth workers, educators and intervention officers responsible for the young person would have mental health training, and (2) that would have support from a health professional specializing in mental health.

(b) *Orders Directed at the CISSS A*

[105] The tribunal ordered the CISSS A to implement a protocol within a reasonable time period to set out the steps to be taken when a child spits during an intervention. The tribunal also ordered the CISSS A to adapt all isolation rooms so that they were safer and their walls were covered with a material that prevented injury. Finding that these orders were also not sufficiently related to the protection of the young person's interests and rights, the Superior Court judge varied them to make them relate specifically to the young person. The majority of the Court of Appeal upheld the Superior Court judge's decision to expressly limit the orders to the young person's situation. The concurring judge of the Court of Appeal held that the Superior Court judge should not have intervened to narrow in this way the scope of the order to implement a protocol setting out the steps to be taken when a child spits. He also held, with regard to the order requiring that the isolation rooms be made safer, that it should have been limited to the isolation rooms in units A and B. For my part, I cannot agree with the reasons of either the majority or the concurring judge of the Court of Appeal.

[106] With regard to the order to implement a protocol establishing the steps to be taken when a child spits during an intervention, this is a corrective measure that was ordered in connection with an incident experienced by the young person when she resided in an intensive supervision unit ("ISU"), ISU A. While she was in a state of personality disorganization, restraint measures were used to take her to the withdrawal block. While being moved, the young person refused to cooperate and spat in the face

of one of the officers. The educator on site then used an article of clothing to completely cover the young person's head and thus prevent her from spitting on the officers. The tribunal noted that, at the time, the head of ISU A believed that the officers had [TRANSLATION] "the right to cover a young person's head during transport to avoid being spit on" (para. 215). The tribunal found that none of the intervention units of the RCYPAPs of the CISSS A — including the RCYPAPs where the young person had spent time in the past and those where she might spend time in the future — had a protocol establishing the steps to be taken when a child spits. In this case, the young person spent time in four different RCYPAP units over a period of about 14 months (one ISU, one ITU, one regular rehabilitation unit and one intensive supervision rehabilitation unit) (para. 2); she exhibited self-destructive and difficult behaviour at each of those RCYPAPs (paras. 23, 26, 89, 95 and 110); and there may have been obstacles to her spending time at certain RCYPAPs (paras. 52 and 99). There was therefore a real risk that she would spend time at one or more of those RCYPAPs. However, certain variables undermined the foreseeability and consistency of such stays. The tribunal also found that the internal memos that prohibited covering a child's head were not complied with by everyone. Moreover, similar incidents had occurred in other RCYPAP units of the CISSS A where the young person had spent time in the past and/or might spend time in the future. The DYP testified that this was an unacceptable practice that should not be used again (para. 223). The tribunal noted that, months after the incident, alternative measures to protect the security guards were still not in place.

[107] In that context, the tribunal exceeded its powers by ordering the CISSS A to implement a protocol that set out the steps to be taken when a child spits during an intervention. It is certainly possible that such a corrective measure would effectively help to prevent the recurrence of the situation of encroachment. However, the order as worded was not related to preventing the recurrence of the situation of encroachment for the young person. The measure should have been more specific and circumscribed by reference to the evidence and the context. The tribunal did not confine itself to ordering a measure that reflected the risk of harm faced by the young person, because that measure would apply to all CISSS A service centres, including: local community service centres; hospital centres; child and youth protection centres; residential and long-term care centres; and rehabilitation centres (see *An Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies*, CQLR, c. O-7.2, Sch. I). Yet it is clear from the tribunal's findings of fact that only the RCYPAPs where the young person had spent time and where she might spend time in the future could potentially contribute to the recurrence of the encroachment upon her rights. As an appellate court, the Superior Court owed deference to those findings of fact made by the tribunal (*Québec (Protection de la jeunesse) v. C.P.*, 2000 CanLII 11372 (Que. C.A.)). It was not out of the question that the young person might spit when receiving services from a local community service centre or a hospital centre. However, there was nothing to indicate that the young person was at risk of having her rights encroached upon again in those other service centres. Consequently, in light of the evidence and the context, the scope of the order

made by the tribunal went beyond protecting the interests and rights of the young person whose situation had been referred to it.

[108] It was therefore appropriate to vary the order made by the tribunal. As the judges of the Court of Appeal wrote, the Superior Court judge was clearly correct in intervening to narrow the scope of the order. However, the proposed variation missed the mark. The order made by the Superior Court judge had the same problem as the one made by the tribunal: it was overbroad. Even with the more specific words [TRANSLATION] "when X spits", the order failed to recognize that, according to the findings of fact, the situation of encroachment and its recurrence were tied — and limited — to the RCYPAPs where the young person had spent time and might spend time in the future. In light of the findings of fact, the order should have been directed at the RCYPAPs of the CISSS A and at any other RCYPAP that would be responsible for the young person. It would have been a hybrid order. By being directed at "any other RCYPAP that would be responsible for the young person", the order would have followed the young person through the system if she spent time at other RCYPAPs that were part of other CISSSs (other than the CISSS A). Of course, the evidence and the context did not provide a basis for ordering all Quebec CISSSs outright to implement a protocol. However, an RCYPAP would have had to implement a protocol if two conditions were met: (1) the young person had to spend time at that RCYPAP, and (2) the RCYPAP did not already have a protocol in place. Alternatively, I note that, among the range of available measures, it would also have been acceptable for the

tribunal to order that, in the event of a transfer, the young person could be transferred only to an RCYPAP where a protocol was already in place.

[109] With regard to the order requiring that the isolation rooms be made safer, this corrective measure was ordered in response to the injuries suffered by the young person during periods of isolation. The tribunal judge visited the withdrawal blocks in ISU A and ITU B. Further to that visit, she noted that the rooms in both units were [TRANSLATION] "small" and that there were "bare floors and bare walls", which were "made of concrete" (para. 184). She noted that in ITU B, the walls were [TRANSLATION] "in a sorry state" and the paint on them was "dingy" (para. 184). She observed that the isolation rooms were so small that [TRANSLATION] "[a] child who is in there can only sit or lie on the floor" (para. 184). Moreover, the tribunal found that during the young person's many periods of isolation in ISU A and ITU B, she had injured herself by banging her head against the concrete walls or hitting them with her hands hard enough to require medical care. However, nothing in the judgment supports the conclusion that these findings of fact could be generalized to all rehabilitation units at all RCYPAPs of the CISSS A — which the concurring judge of the Court of Appeal properly noted.

[110] In that context, while the corrective measure ordering the CISSS A to make all of the isolation rooms safer would undoubtedly have helped to prevent the recurrence of the situation of encroachment, it nevertheless exceeded the tribunal's powers because it was not sufficiently anchored in the evidence and the context. As regards the order that should have been made, the one proposed by the Superior Court

judge and affirmed by the majority of the Court of Appeal cannot be upheld, because it is imprecise. As for the order suggested by the concurring judge of the Court of Appeal, it is not sufficiently anchored in the tribunal's findings of fact. While in the abstract there was nothing to prevent the tribunal from ordering the CISSS A to make all of the isolation rooms in units A and B safer, here the findings of fact do not indicate that all of the isolation rooms in those units had to be made safer to ensure that the young person had access to a safe isolation room at all times. Indeed, the tribunal made no finding of fact concerning the number of isolation rooms per unit or their occupancy level. Similarly, there is no finding of fact from which inferences on this point can be drawn. I am therefore of the view that the tribunal's order should have been varied to direct the CISSS A to have at least one isolation room, covered with a material that prevented injury, available for the young person at all times in units A and B and in the other units that would become responsible for her. The DYP and the CISSS A would then have had to assess whether, to comply with that order, it was necessary to make more than one, or even all, of the isolation rooms in the units in question safer. Alternatively, I note that, among the range of available measures, it would also have been acceptable for the tribunal to order that, in the event of a transfer, the young person could be transferred only to an RCYPAP where at least one safe isolation room — whose walls were covered with a material that prevented injury — was available.

(5) Tribunal's Power To Make Recommendations

[111] Where the tribunal concludes that the rights of a child in difficulty have been encroached upon by persons, bodies or institutions, it may intervene to prevent the recurrence of the situation of encroachment (see *Protection de la jeunesse – 123979*, at para. 22). In such circumstances, it may be appropriate for the tribunal to make a non-binding recommendation if it considers this to be warranted in light of the evidence. I will explain.

[112] It is true that the Court of Québec is a statutory tribunal and that, in cases involving encroachment upon rights, it can make only decisions or orders that are provided for by statute (see *YPA*, ss. 90 et seq.). It cannot, of course, exceed that jurisdiction. However, its power to make recommendations is anchored in the *YPA*: it flows from the text, scheme and object of that statute. Its existence is expressly contemplated by s. 91 para. 2 of the *YPA*. While a power of this kind is not referred to in s. 91 para. 4, which deals specifically with encroachment upon rights, a large and liberal interpretation of the provision, in keeping with the proper approach to remedial legislation, leads me to conclude that the power nevertheless applies in circumstances where rights have been encroached upon. Support for the existence of this power can also be found in a practice that is well established in the Quebec jurisprudence on encroachment upon rights (see, e.g., *Protection de la jeunesse – 236587*, 2023 QCCQ 12263, at paras. 8 et seq.; *Protection de la jeunesse – 211624*, 2021 QCCQ 2868, at para. 96; see also *Protection de la jeunesse – 123979*, at para. 26). Indeed, in this case, the Superior Court judge expressed the view that [TRANSLATION] "the conclusions of a general nature" arrived at by the tribunal "could be stated as recommendations"

(para. 8). Moreover, although this Court is not bound by a party's admissions on a question of law, I take note of two admissions. First, counsel for the respondent admits that the tribunal [TRANSLATION] "can make recommendations" in a case involving encroachment upon rights (transcript, at pp. 94-95). Before the Superior Court, the respondent had herself asked that recommendations be substituted for the impugned orders, that is, the ones set out at paras. 340-41 and 345-46 of the tribunal's judgment (Sup. Ct. reasons, at para. 11). Second, the intervener the Attorney General of Quebec admits that the tribunal is not precluded from [TRANSLATION] "making recommendations" in a case involving encroachment upon rights (I.F., at para. 60). These two admissions corroborate what the jurisprudence already tells us: where rights have been encroached upon, the tribunal has a power to make recommendations that it derives from the text, scheme and object of the *YPA*.

[113] The tribunal's power to make recommendations is particularly useful where the circumstances do not lend themselves to stating a conclusion in the form of an order under s. 91 para. 4 of the *YPA*. According to author Mario Provost, [TRANSLATION] "the validity of orders that are broader in scope is open to question. . . . Since the Act has not expanded the power of this statutory tribunal, some argue that conclusions of a general nature should be 'recommended' rather than 'ordered'" (*Droit de la protection de la jeunesse* (3rd ed. 2022), at p. 289; M. Provost, "La protection de la jeunesse", in T. Gagné-Dubé et al., eds., *Droit de la famille québécois* (loose-leaf), at ¶54-310). This is correct. Where the three criteria for the validity of a corrective measure ordered for preventive purposes are not all met, the tribunal still has the power

to make a recommendation anchored in the evidence concerning the encroachment upon rights. This power to make a recommendation thus allows the tribunal to point out the existence of a problem relating to an encroachment upon the child's rights and to encourage the authorities to address it.

[114] It is obviously preferable for the tribunal to be cautious in exercising its power to make recommendations. As author Jean-François Boulais correctly observes, [TRANSLATION] "if the recommendation is not followed, it is the judge's moral authority that is undermined" (*Loi sur la protection de la jeunesse, texte annoté* (5th ed. 2003), at p. 445). Indeed, when the authority named in the recommendation [TRANSLATION] "disregards the recommendation[,] . . . the Court's credibility is affected" (*Protection de la jeunesse*, [1985] AZ-50942189 (Que. Y.C.), at p. 2). That being said, the tribunal has all the discretion it needs to develop a recommendation based on the situation of encroachment experienced by the child whose situation has been referred to it, as shown by the evidence. Because the Youth Division of the Court of Québec is the judicial tribunal that has the most intimate knowledge of the youth protection system and that participates in its implementation on a daily basis, it is particularly well placed to exercise this power to make recommendations (see Costanzo and Paré, at pp. 151 and 153-54).

[115] It is therefore true, in this case, that the tribunal's concerns as reflected at paras. 340-41 and 345-46 of its judgment could have been expressed as recommendations. At the time it rendered its judgment, the tribunal did have the power

to make non-binding recommendations based on those concerns, provided that these recommendations were anchored in the evidence. This was an available and acceptable option at the time.

[116] I add that the tribunal was clearly concerned about the situation experienced by the young person during her time in various CISSS A units. After having an opportunity to hear the parties, various professionals from the rehabilitation, security and psychosocial services sectors, as well as the DYP, the tribunal concluded that some of the encroachments upon the young person's rights resulted from institutional or systemic problems that affected other children in Quebec's youth protection system. The authorities concerned — in keeping with the mission assigned to them by the *YPA* of protecting children whose security or development is or may be in danger — would be well advised to take note of the tribunal's conclusions and to consider what action they can take to ensure that the encroachments upon rights experienced by the young person are not experienced by others.

B. *Right of the CISSS A To Be Heard or Duly Called*

[117] A secondary question arises with respect to art. 17 *C.C.P.*, which gives the CISSS A the right to be heard or duly called. Like its predecessor, art. 5 of the former *Code of Civil Procedure*, CQLR, c. C-25, art. 17 *C.C.P.* codifies a fundamental principle of natural justice: the maxim *audi alteram partem*. The first paragraph states that "[t]he court cannot rule on an application, or take a measure on its own initiative, which affects the rights of a party unless the party has been heard or duly called."

[118] After raising the question themselves while the case was under advisement and requesting submissions from the parties, the judges of the Court of Appeal all expressed the view that the orders could not be made against the CISSS A because it was not [TRANSLATION] "formally party to the proceedings" at first instance (para. 50; see also para. 82). In their opinion, to hold otherwise would violate the [TRANSLATION] "principle that courts make orders against properly summoned parties" and would be an error of law (para. 52; see also para. 82). The Court of Appeal therefore found that the guiding principle of art. 17 para. 1 *C.C.P.* had been violated. On that basis, it varied the two orders so that they were made against the DYP rather than the CISSS A (paras. 54 and 83).

[119] The CDPDJ does not agree. It asks this Court to restore the orders against the CISSS A. According to it, even if the Court were to find that the CISSS A should have been joined to the proceedings as a party or impleaded party, the Court of Appeal still erred in intervening because, it says, the CISSS A was not significantly prejudiced by that omission. The intervener X agrees with the CDPDJ's argument. As for the interveners A and B, they also maintain that the Court of Appeal erred in intervening, but for different reasons: they take the view that the CISSS A was a party to the proceedings through the DYP and that the expression "director of youth protection" was sufficient to clearly identify and designate the CISSS A.

[120] The DYP has not made any argument on this question. That being said, she asks that we dismiss the appeal and thus that we not vary the Court of Appeal's

disposition. It should be noted, however, that before the Court of Appeal, the DYP, like the CDPDJ, requested that the orders be maintained against the CISSS A (C.A. reasons, at para. 51: [TRANSLATION] "All the parties requested that the orders be maintained against the [CISSS A]" (emphasis added)).

[121] I cannot accept the position put forward by the CDPDJ. Even if it is assumed that a breach of the right to be heard or duly called (and therefore of art. 17 para. 1 *C.C.P.*) can be remedied by showing an absence of prejudice — a question that should be left for another day — I am unable to infer that the CISSS A was not prejudiced. The appeal record as it stands is rather scanty on this point. First, it does not allow us to address the legal question of whether absence of prejudice may be a relevant consideration where a court of law is determining whether there has been a breach of the *audi alteram partem* rule and, if so, what remedy it should grant (if any). Second, the appeal record also does not allow us to address the question of whether the CISSS A was prejudiced. The Court does not have full submissions on these questions or even a complete picture of the proceedings at first instance. In the circumstances, it is enough to say that the CDPDJ has not satisfied me that the CISSS A was not prejudiced. I would therefore affirm the Court of Appeal's choice to intervene so that the orders were made against the DYP (paras. 54 and 83). That being said, while I agree with the result reached by the Court of Appeal, I do not fully endorse its reasons. According to that court, [TRANSLATION] "[i]t is an error of law to make orders against a person who is not [formally] party to the matter" (para. 52; see also paras. 50 and 82). In my view, it should instead have been found that it is an error of law to make orders

against a person "unless the party has been heard or duly called" (art. 17 para. 1 *C.C.P.*). Finally, because this was a case in which a young person's interests were at stake and because the decision rendered would affect the interests of the CISSS A, the tribunal could have required the attendance of the CISSS A and heard it after it was called (art. 50 *C.C.P.*).

VI. Disposition

[122] I would allow the appeal in part. If not for the fact that the young person reached the age of majority during the appeal proceedings, I would have restored the order made at para. 345 of the tribunal's judgment, with two exceptions: first, the order would have been directed at the DYP rather than the CISSS A, and second, the scope of the order would have been limited to the RCYPAPs of the CISSS A and the other RCYPAPs to which the young person would be entrusted. I would also have varied the wording of the order made at para. 346 to direct the DYP, and not the CISSS A, to have at least one isolation room, covered with a material that prevented injury, available for the young person at all times in units A and B of the CISSS A and in the other RCYPAP units to which she would be entrusted. These are the orders "that the tribunal should have made" at paras. 345-46 of its judgment, although I recognize that other alternative orders were available and acceptable and could therefore have been made (*YPA*, s. 112; see also ss. 128 and 129; *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 45; *Protection de la jeunesse – 123979*, at para. 27). However, since the young person is no longer the subject of social intervention under the *YPA* and never will be again given that she is

now an adult, no order will be made (*Protection de la jeunesse – 10174*, 2010 QCCA 1912, [2010] R.J.Q. 2291, at para. 94 *in limine*; *Protection de la jeunesse – 18935*, 2018 QCCQ 10532, at paras. 22-23; *Protection de la jeunesse – 211323*, 2021 QCCQ 2238, at para. 24; *Protection de la jeunesse – 211624*, at para. 79). No recommendation will be made either. Given the circumstances of this appeal, no costs should be awarded.

Appeal allowed in part, without costs.

Solicitors for the appellant: Bitzakidis, Clément-Major, Fournier, Montréal.

Solicitors for the respondent: IMK, Montréal; Étude légale du CISSS A.

Solicitors for the intervener the Attorney General of Quebec: Bernard, Roy (Justice-Québec), Direction du contentieux, Montréal.

Solicitors for the interveners A and B: Pringle & Associés, Laval.

Solicitor for the intervener X: Centre communautaire juridique de la Rive-Sud, Longueuil.

Solicitors for the intervener the Canadian Civil Liberties Association: McCarthy Tétrault, Montréal.

Solicitor for the intervener the British Columbia Civil Liberties Association: Larochelle Law, Whitehorse.

TAB 21

Her Majesty The Queen *Appellant*

v.

D.A.I. *Respondent*

and

Women's Legal Education and Action Fund, DisAbled Women's Network Canada, Criminal Lawyers' Association (Ontario) and Council of Canadians with Disabilities *Interveners*

Indexed as: R. *v.* D.A.I.

2012 SCC 5

File No.: 33657.

2011: May 17; 2012: February 10.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Testimonial competence — Adults with mental disabilities — Whether adult witnesses with mental disabilities must demonstrate understanding of nature of obligation to tell truth in order to be deemed competent to testify — Whether finding of testimonial competence without demonstration of understanding of obligation to tell truth breaches accused's right to fair trial — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

The Crown alleges that the complainant, a 26-year-old woman with the mental age of a three- to six-year-old, was repeatedly sexually assaulted by her mother's partner during the four years that he lived in the home. It sought to call the complainant to testify about the alleged assaults. After a *voir dire* to determine the complainant's capacity to testify, the trial judge found that she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would

Sa Majesté la Reine *Appelante*

c.

D.A.I. *Intimé*

et

Fonds d'action et d'éducation juridiques pour les femmes, Réseau d'action des femmes handicapées du Canada, Criminal Lawyers' Association (Ontario) et Conseil des Canadiens avec déficiences *Intervenants*

Répertorié : R. *c.* D.A.I.

2012 CSC 5

N° du greffe : 33657.

2011 : 17 mai; 2012 : 10 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Preuve — Habilité à témoigner — Adultes ayant une déficience intellectuelle — Les adultes ayant une déficience intellectuelle doivent-ils démontrer qu'ils comprennent la nature de l'obligation de dire la vérité pour être réputés habiles à témoigner? — La conclusion que le témoin est habile à témoigner sans qu'il ne soit démontré qu'il comprend l'obligation de dire la vérité porte-t-elle atteinte au droit de l'accusé à un procès équitable? — Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Le ministère public prétend que la plaignante, une femme âgée de 26 ans ayant l'âge mental d'un enfant de trois à six ans, a été agressée sexuellement de façon répétée par le conjoint de sa mère au cours des quatre années où il a vécu avec elles. La poursuite a tenté de faire témoigner la plaignante à propos des agressions alléguées. À l'issue d'un voir-dire afin de déterminer si la plaignante était habile à témoigner, le juge du procès a conclu qu'elle n'avait pas démontré qu'elle comprenait l'obligation de dire la vérité. À l'issue d'un autre voir-dire, le juge du procès a également exclu les déclarations extrajudiciaires que la plaignante avait faites à

compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed, the acquittal set aside and a new trial ordered.

Per McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The question in issue is whether the trial judge correctly interpreted the requirements of s. 16 of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. Section 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct abstract inquiries into whether the witness understands the difference between truth and falsity, the obligation to give true evidence in court, and what makes a promise binding. The plain words of s. 16(3) focus on the concrete acts of communicating and promising. Judges should not add other elements to the dual requirements imposed by s. 16(3). This approach does not transform the promise into an empty gesture. Adults with mental disabilities may have a practical understanding of the difference between the truth and a lie and know they should tell the truth without being able to explain what telling the truth means in abstract terms. When such a witness promises to tell the truth, the seriousness of the occasion and the need to say what really happened is reinforced.

Insofar as the authorities suggest that s. 16(3) requires an abstract understanding of the obligation to tell the truth, they should be rejected. That requirement was based on a version of s. 16 that explicitly required that the witness "understands the duty of speaking the truth". Although Parliament deleted that requirement in 1987, courts continued to require proof that child witnesses understood the duty to tell the truth. Parliament responded by enacting s. 16.1(7), which expressly forbade such inquiries of child witnesses. However, the existence of the s. 16.1(7) ban does not require us to infer that mentally disabled adults are to be questioned on the obligation to tell the truth. First, because s. 16(3)

la police et à son enseignante au motif que ces déclarations n'étaient pas dignes de foi et que leur admission en preuve compromettrait le droit de l'accusé à un procès équitable. Les autres éléments de preuve soulevaient de graves soupçons quant à la conduite de l'accusé, mais la preuve de la poursuite s'est effondrée et l'accusé a été acquitté. La Cour d'appel de l'Ontario a confirmé ce résultat.

Arrêt (les juges Binnie, LeBel et Fish sont dissidents) : Le pourvoi est accueilli, l'acquittement est annulé et la tenue d'un nouveau procès est ordonnée.

La juge en chef McLachlin et les juges Deschamps, Abella, Charron, Rothstein et Cromwell : La question en litige est de savoir si le juge du procès a correctement interprété les prescriptions de l'art. 16 de la *Loi sur la preuve au Canada* relativement à l'habilité à témoigner des personnes âgées de 14 ans ou plus (adultes) ayant une déficience intellectuelle. Le paragraphe 16(3) impose deux conditions relativement à l'habilité à témoigner d'un adulte ayant une déficience intellectuelle : (1) la capacité de communiquer les faits dans son témoignage et (2) une promesse de dire la vérité. Il n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite à la personne afin de voir si elle comprend la différence entre la vérité et la fausseté, l'obligation de dire la vérité devant le tribunal, et ce qui rend une promesse obligatoire. Le libellé explicite du par. 16(3) met l'accent sur les actes concrets que sont la communication et la promesse. Les juges ne devraient pas ajouter d'autres éléments aux deux conditions qu'impose le par. 16(3). Une telle approche ne vide pas de son sens la promesse de dire la vérité. Des adultes ayant une déficience intellectuelle peuvent concrètement faire la différence entre la vérité et le mensonge et savoir qu'ils doivent dire la vérité sans être capables d'expliquer en termes abstraits ce que signifie dire la vérité. Lorsqu'un tel témoin promet de dire la vérité, cela confirme le caractère sérieux de la situation et la nécessité de dire ce qui s'est vraiment produit.

Dans la mesure où les autorités prétendent que le par. 16(3) exige une compréhension, dans l'abstrait, de l'obligation de dire la vérité, elles doivent être rejetées. Cette exigence découlait d'une version de l'art. 16 qui prévoyait explicitement que le témoin « compren[ne] le devoir de dire la vérité ». Bien que le législateur ait éliminé cette exigence en 1987, les tribunaux ont maintenu l'exigence d'établir que les enfants qui témoignent comprennent l'obligation de dire la vérité. En réponse, le législateur a adopté le par. 16.1(7), qui interdit explicitement de tels interrogatoires lorsque des enfants sont en cause. Toutefois, l'interdiction prévue au par. 16.1(7) ne nous oblige pas à déduire que les adultes ayant une

only required a promise to tell the truth, Parliament had no need to ban such questioning of adult witnesses with mental disabilities. Second, s. 16(3) required only a promise to tell the truth, so there was no need for Parliament to enact a similar provision with respect to s. 16(3). Third, the enactment of s. 16.1(7) did not imply that the earlier judicial interpretation of s. 16(3) as it applied to children had been endorsed for adult witnesses. No inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children, and the re-enactment of s. 16(3) does not imply that Parliament accepted the judicial interpretation that prevailed at the time of the re-enactment. Fourth, the fact that s. 16 does not have a provision equivalent to s. 16.1(7) does not mean that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth — s. 16(3) sets two requirements for the competence of adults with mental disabilities, and nothing further need be imported. Fifth, there is no need to prove that, unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, they must be subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify.

The underlying policy concerns — bringing the abusers to justice, ensuring fair trials and preventing wrongful convictions — also support allowing adults with mental disabilities to testify. With respect to the first concern, rejecting the evidence of alleged victims on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms would exclude reliable and relevant evidence, immunize an entire category of offenders from criminal responsibility for their acts, and further marginalize the already vulnerable victims of sexual predators. With respect to the second, allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth does not render a trial unfair. Generally, the reliability threshold is met by establishing that the witness has the capacity to understand and answer the questions put to her and by bringing home the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness will tell the truth — the trial process seeks a basic indication of reliability. That, along with the rules governing admissibility and weight of the

déficience intellectuelle doivent être interrogés sur l'obligation de dire la vérité. Premièrement, parce que le par. 16(3) exigeait simplement une promesse de dire la vérité, il n'était pas nécessaire que le législateur interdise de tels interrogatoires dans le cas d'adultes ayant une déficience intellectuelle. Deuxièmement, étant donné que le par. 16(3) exigeait simplement une promesse de dire la vérité, il n'était pas nécessaire que le législateur adopte une disposition similaire en ce qui concerne le par. 16(3). Troisièmement, l'adoption du par. 16.1(7) ne permettait pas d'inférer que l'interprétation judiciaire du par. 16(3) relativement aux enfants s'appliquait aux adultes. Aucune inférence quant au sens du par. 16(3) ne découle de la simple adoption du par. 16.1(7) relativement aux enfants, et la nouvelle édiction du par. 16(3) ne permet pas d'inférer que le législateur a adopté l'interprétation judiciaire de la disposition qui prévalait à l'époque de la nouvelle édiction. Quatrièmement, l'absence, à l'art. 16, d'une disposition équivalente au par. 16.1(7) ne signifie pas que les adultes ayant une déficience intellectuelle doivent démontrer qu'ils comprennent la nature de l'obligation de dire la vérité afin de pouvoir témoigner — le par. 16(3) énonce deux conditions relatives à l'habilité à témoigner des adultes ayant une déficience intellectuelle, et il n'y a rien d'autre à y incorporer. Cinquièmement, il n'est pas nécessaire d'établir, sauf s'il peut être démontré qu'ils sont comme les enfants, ou leur ressemblent, que les adultes ayant une déficience intellectuelle doivent subir un interrogatoire pour que l'on vérifie, avant de déterminer s'ils sont habiles à témoigner, qu'ils comprennent la nature de l'obligation de dire la vérité.

Les considérations de politique générale qui sous-tendent la question, à savoir traduire en justice les agresseurs et garantir la tenue d'un procès équitable pour l'accusé ainsi que prévenir les déclarations de culpabilité injustifiées, militent également en faveur de permettre aux adultes ayant une déficience intellectuelle de témoigner. En ce qui concerne la première considération, rejeter le témoignage de victimes alléguées au motif qu'elles ne peuvent pas expliquer en termes philosophiques la nature de l'obligation de dire la vérité équivaudrait à écarter des témoignages fiables et pertinents, à dégager une catégorie entière de contrevenants de toute responsabilité criminelle relativement à leurs actes, et à marginaliser davantage les victimes déjà vulnérables des prédateurs sexuels. Pour ce qui est de la deuxième considération, permettre à l'adulte ayant une déficience intellectuelle de témoigner dans le cas où il est capable de communiquer les faits dans son témoignage et de promettre de dire la vérité ne rend pas le procès inéquitable. En règle générale, le seuil de fiabilité est satisfait s'il est établi que le témoin a la faculté de comprendre les questions qui lui sont posées et d'y

evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused has a fair trial.

When applying s. 16(3) in the context of the *Canada Evidence Act*, eight considerations are appropriate. First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues. Second, the *voir dire* should be brief, but not hasty. It is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner. Fourth, persons familiar with the proposed witness in her everyday situation understand her best. They may be called as fact witnesses to provide evidence on her development. Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence? Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

répondre, et si le témoin comprend qu'après avoir prêté serment ou fait une promesse ou une affirmation solennelle, il doit dire la vérité. Rien ne garantit qu'un témoin dira la vérité — on recherche simplement dans le cadre du procès un indice élémentaire de fiabilité. Cela, combiné aux règles régissant l'admissibilité et le poids de la preuve, permet de garantir qu'un verdict de culpabilité soit étayé par des éléments de preuve exacts et crédibles et que le procès de l'accusé soit équitable.

Lorsqu'il s'agit d'appliquer le par. 16(3) dans le contexte de la *Loi sur la preuve au Canada*, il faut tenir compte de huit considérations. Premièrement, le voir-dire relatif à l'habilité à témoigner d'un témoin éventuel constitue une enquête indépendante : il ne peut être combiné à un voir-dire relatif à d'autres questions. Deuxièmement, le voir-dire devrait être bref, mais non précipité. Il est préférable d'entendre toute la preuve pertinente disponible pouvant raisonnablement être prise en considération avant d'empêcher une personne de témoigner. Troisièmement, la source principale de preuve lorsqu'il s'agit de déterminer si une personne est habile à témoigner est la personne elle-même. Son interrogatoire devrait être autorisé. Pour interroger un adulte ayant une déficience intellectuelle, il faut tenir compte de ses besoins particuliers et prendre les mesures d'adaptation qui s'imposent; les questions devraient être formulées patiemment, de façon claire et simple. Quatrièmement, les personnes de l'entourage qui connaissent personnellement le témoin éventuel sont les mieux placées pour comprendre son état quotidien. Elles peuvent être appelées, à titre de témoins des faits, à témoigner sur son développement. Cinquièmement, une preuve d'expert peut être produite si elle satisfait aux critères d'admissibilité; on préfère cependant toujours le témoignage d'experts ayant eu un contact personnel et régulier avec le témoin éventuel. Sixièmement, le juge du procès doit répondre à deux questions durant le voir-dire relatif à l'habilité à témoigner : a) le témoin éventuel comprend-il la nature du serment ou de l'affirmation solennelle, et b) est-il capable de communiquer les faits dans son témoignage? Septièmement, pour répondre à la deuxième question relative à la capacité de la personne de communiquer les faits dans son témoignage, le juge du procès doit vérifier de façon générale si la personne est capable de relater des faits concrets en comprenant les questions qui lui sont posées et en y répondant. Il peut être utile de se demander si la personne est en mesure de différencier entre de vraies et de fausses affirmations factuelles de tous les jours. Finalement, la personne peut témoigner sous serment ou affirmation solennelle si elle satisfait aux deux volets du critère, ou, si elle satisfait uniquement au deuxième volet, en promettant de dire la vérité.

In the instant case, the trial judge erred in failing to consider the second part of the test under s. 16. This error of law led him to rule the complainant incompetent. This error cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference.

Per Binnie, LeBel and Fish JJ. (dissenting): The majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons by turning Parliament's direction permitting a person "whose mental capacity is challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness

Section 16 mandates a single inquiry which presents the trial judge dealing with a witness whose mental capacity is challenged with three options. Section 16(2) provides that, if the challenged witness is able to communicate the evidence and understands the nature of an oath or a solemn declaration in terms of ordinary, everyday social conduct, he or she shall testify under oath or solemn affirmation. If the challenged witness is able to communicate the evidence but does not understand the nature of an oath or a solemn affirmation, s. 16(3) provides that he or she may provide unsworn testimony on promising to tell the truth. If the challenged witness does not satisfy either criterion, s. 16(4) provides that the individual with a mental disability shall not testify.

There is agreement with the majority that promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. It cannot be correct, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a prophylactic effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand the seriousness of the situation and the importance of being careful and correct, there is no prophylactic effect, and the fair trial interests of the accused under s. 16, as enacted in 1987, are unfairly prejudiced.

In 2005, when Parliament amended the *Canada Evidence Act* to prohibit asking child witnesses "any questions regarding their understanding of the nature

En l'espèce, le juge du procès a commis une erreur en n'examinant pas le deuxième volet du critère établi à l'art. 16. Cette erreur de droit l'a amené à conclure que la plaignante n'était pas habile à témoigner. Des commentaires formulés par le juge du procès à d'autres étapes de l'instruction ou le principe de la déférence judiciaire ne peuvent corriger cette erreur.

Les juges Binnie, LeBel et Fish (dissidents) : Les juges majoritaires diluent de façon inacceptable la protection que le législateur voulait accorder aux accusés en transformant la directive du législateur, qui permet à une personne « dont la capacité mentale est mise en question » de témoigner « en promettant de dire la vérité », en une formalité vide de sens — le témoin éventuel ne fait que prononcer les mots « je promets » sans que l'on vérifie s'il accorde de l'importance à sa promesse.

L'article 16 ne requiert qu'une seule enquête qui présente au juge du procès trois possibilités à l'égard d'une personne dont la capacité mentale est mise en question. Selon le par. 16(2), si cette personne est capable de communiquer les faits dans son témoignage et comprend la nature du serment ou de l'affirmation solennelle au sens de la conduite sociale ordinaire de la vie quotidienne, elle témoignera sous serment ou affirmation solennelle. Si la personne est capable de communiquer les faits dans son témoignage mais ne comprend pas la nature du serment ou de l'affirmation solennelle, le par. 16(3) prévoit qu'elle peut témoigner sans prêter serment en promettant de dire la vérité. Si la personne dont la capacité mentale est mise en question ne satisfait à ni l'une ni l'autre de ces exigences, le par. 16(4) prévoit qu'elle ne peut témoigner.

Il y a accord avec les juges de la majorité pour dire que la promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique. On ne saurait toutefois affirmer qu'un juge du procès ne peut pas tenter de déterminer — en termes concrets de la vie quotidienne — si un tel effet prophylactique existe effectivement dans le cas d'une personne dont la capacité mentale est mise en question. Si cette personne est à ce point déficiente qu'elle ne comprend pas le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte, il n'y a aucun effet prophylactique et le droit de l'accusé à un procès équitable aux termes de l'art. 16 adopté en 1987 subit une atteinte injustifiée.

En 2005, lorsque le législateur a modifié la *Loi sur la preuve au Canada* pour interdire que l'on ne pose aux enfants appelés à témoigner « [a]ucune question sur

of the promise to tell the truth" (s. 16.1(7)), the empirical evidence before Parliament related exclusively to children. No such empirical studies were carried out with respect to adults with mental disabilities. In their case, no "don't ask" provision was proposed, let alone adopted.

There is agreement with the majority that the words "on promising to tell the truth" in s. 16(3) must bear the same meaning as "to promise to tell the truth" in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) "don't ask" rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words "promising to tell the truth" in s. 16(3), and thus treat adults with mental disabilities as equivalent for the purposes of s. 16 to children without mental disabilities. The fact that psychiatrists speak of persons with mental disabilities in terms of mental ages does not mean that an adult with mental age of six is on the same footing as a six-year-old child with no mental disability whatsoever — a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. No evidence was led to suggest equivalence and judicial notice cannot be taken of alleged "facts" that are neither notorious nor easily verifiable from undisputed sources.

On a competency *voir dire* where the mental capacity of an adult is challenged, and the adult is herself called as a proposed witness, the court may admit evidence from fact witnesses personally familiar with the complainant's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses would not be in a position to express an expert opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box. However, ultimately, the judge must reach his or her own considered opinion about the mental capacity of the proposed witness prior to admitting the testimony.

In this case, the trial judge had serious concerns about the complainant's ability to communicate the evidence. The complainant's answers to a series of simple

la compréhension de la nature de la promesse » (par. 16.1(7)), la preuve empirique soumise au législateur se rapportait exclusivement aux enfants. Aucune étude empirique de ce genre n'a été effectuée relativement aux adultes ayant une déficience intellectuelle. Dans le cas de ces adultes, aucune règle interdisant de poser des questions n'a été proposée, et encore moins adoptée.

Il y a accord avec les juges de la majorité pour dire que les mots « en promettant de dire la vérité » au par. 16(3) doivent avoir le même sens que les mots « promettre [. . .] de dire la vérité » au par. 16.1(6). Cela étant, les juges majoritaires doivent incorporer, au par. 16(3) applicable uniquement aux adultes ayant une déficience intellectuelle, la règle du par. 16.1(7) interdisant de poser des questions, qui s'applique uniquement aux enfants, afin d'atténuer l'expression « en promettant de dire la vérité » au par. 16(3) et de traiter sur un pied d'égalité, pour le besoin de l'art. 16, les adultes ayant une déficience intellectuelle et les enfants n'ayant pas de déficience intellectuelle. Le fait pour les psychiatres de classer en fonction de l'âge mental les personnes ayant une déficience intellectuelle ne signifie pas qu'un adulte ayant l'âge mental d'un enfant de six ans soit sur un pied d'égalité avec un enfant âgé de six ans n'ayant aucune déficience intellectuelle — un enfant de six ans ayant la capacité mentale d'un enfant de six ans n'a pas une déficience intellectuelle. Aucun élément de preuve laissant croire que cette équivalence existe n'a été soumis et nous ne pouvons pas prendre connaissance d'office de « faits » allégués qui ne sont ni notoires, ni facilement vérifiables en ayant recours aux sources incontestées.

Dans le cadre d'un voir-dire relatif à l'habilité à témoigner, où la capacité mentale d'une personne adulte est mise en question et cette personne est assignée à témoigner, le tribunal peut admettre les dépositions de témoins des faits qui connaissent bien les habilités du témoin éventuel à s'exprimer et à comprendre, ainsi que ses limites, et ce, afin d'aider le tribunal à mieux saisir les capacités de la personne. Ces témoins ne seraient pas en mesure d'exprimer une opinion d'expert, mais ils pourraient témoigner à propos de ce qu'ils ont eux-mêmes directement observé chez le témoin éventuel. La preuve pourrait, si le juge du procès l'estime utile, aider le juge ou le jury à apprécier les réponses (ou l'absence de réponse) que lui donne la personne qui témoigne. Cependant, c'est le juge qui, en fin de compte, doit former sa propre opinion éclairée au sujet de la capacité mentale du témoin éventuel.

En l'espèce, le juge du procès avait de sérieuses réserves quant à la capacité de la plaignante de communiquer les faits dans son témoignage. Les réponses de la

and concrete questions left him fully satisfied that she did not understand what a promise to tell the truth involves. Much turned on the significance of the complainant's repeated "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether the complainant was actually able to "compute" her responses to what she was being asked. There was no allegation of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events and the crucible of cross-examination was useless because there was no secure method of testing her credibility. Her inability to deal with simple questions would mean her evidence would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial. Sitting on appeal from this determination, and not having had the advantage of observing and questioning the complainant, there is no valid basis for this Court to reverse the trial judge's assessment of her mental capacity.

The trial judge's conclusion that the complainant lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, his conclusion that her testimony lacked sufficient reliability. It was neither surprising nor an error however that the trial judge's reasoning on the threshold reliability in his hearsay ruling was quite similar to his reasoning on the s. 16 *voir dire*, and given his advantage in seeing and hearing the complainant, his exclusion of her out-of-court statements should equally be upheld by this Court.

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By McLachlin C.J.

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plaignante à une série de questions simples et concrètes ont entièrement convaincu le juge qu'elle ne comprenait pas ce que la promesse de dire la vérité signifie. L'instance reposait en grande partie sur l'importance des réponses de la plaignante lorsqu'elle répétait « je ne sais pas ». De toute évidence, il s'agissait d'un avantage important pour le juge du procès d'être témoin de l'enchaînement des questions et des réponses et de déterminer si la plaignante était réellement capable de « computer » les questions posées et d'y répondre. La bonne foi de la plaignante n'était aucunement en cause, mais elle aurait quand même pu se tromper pour ce qui est de percevoir ou de se rappeler les faits, et l'épreuve du contre-interrogatoire était inutile puisqu'il n'y avait aucun moyen sûr de vérifier sa crédibilité. Son incapacité de comprendre des questions simples et d'y répondre signifiait que son témoignage ne pourrait effectivement être attaqué par la défense, ce qui porterait atteinte à l'intérêt de la société et au droit de l'accusé à un procès équitable. Siégeant en appel de cette décision, et n'ayant pas eu l'avantage d'observer et d'interroger la plaignante, il n'y a aucune raison valable d'infirmer l'appréciation, par le juge, de sa capacité mentale.

Le fait que le juge du procès ait conclu que la plaignante n'avait pas la capacité de percevoir, de se souvenir et de raconter ce qui s'est passé et de comprendre la différence entre la vérité et la fausseté l'a amené, mais pas de façon automatique, à conclure que le témoignage de la plaignante n'était pas suffisamment fiable. Il n'était pas surprenant, et ce n'était pas une erreur, que le raisonnement du juge du procès sur la question du seuil de fiabilité dans sa décision relative au ouï-dire ait été très semblable à son raisonnement sur le voir-dire prévu à l'art. 16. Comme il a eu l'avantage de voir et d'entendre la plaignante, la Cour devrait aussi maintenir la décision du juge du procès d'exclure ses déclarations extrajudiciaires.

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General of Quebec v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831; *R. v. Caron* (1994), 72 O.A.C. 287; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By Binnie J. (dissenting)

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, MacPherson et Armstrong), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, qui a confirmé une décision du juge McKinnon, 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Pourvoi accueilli, les juges Binnie, LeBel et Fish sont dissidents.

Jamie C. Klukach and *John Semenoff*, for the appellant.

Jamie C. Klukach et *John Semenoff*, pour l'appelante.

Howard L. Krongold and *Leonardo Russomanno*, for the respondent.

Howard L. Krongold et *Leonardo Russomanno*, pour l'intimé.

Joanna L. Birenbaum, for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada.

Joanna L. Birenbaum, pour les intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada.

Joseph Di Luca and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

Joseph Di Luca et *Erin Dann*, pour l'intervenante Criminal Lawyers' Association (Ontario).

David M. Wright and *Helga D. Van Iderstine*, for the intervener the Council of Canadians with Disabilities.

David M. Wright et *Helga D. Van Iderstine*, pour l'intervenant le Conseil des Canadiens avec déficiences.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

[1] THE CHIEF JUSTICE — Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.

[2] Parliament has addressed this challenge by a series of amendments to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that modify the normal rules of testimonial capacity for children and adults with mental disabilities. This Court has considered the provisions relating to children on a number of occasions. This appeal involves the provisions relating to adults with mental disabilities.

[3] At the heart of this case is a young woman, K.B., aged 26, with the mental age of a three- to six-year-old. The Crown alleges that she was repeatedly sexually assaulted by her mother's partner at the time, D.A.I. The prosecution sought to call the young woman to testify about the alleged assaults. It also sought to adduce evidence through her school teacher and a police officer of what she told them.

[4] The trial judge excluded this evidence, on the ground that K.B. was not competent to testify in a court of law (A.R., vol. I, at p. 2). As a result, the case collapsed and D.A.I. was acquitted (2008 CanLII 21725 (Ont. S.C.J.)). The Ontario Court of Appeal affirmed the acquittal (2010 ONCA 133, 260 O.A.C. 96).

[5] I respectfully disagree. In my view, the trial judge made a fundamental error of law in

Version française du jugement de la juge en chef McLachlin et des juges Deschamps, Abella, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE EN CHEF — L'agression sexuelle est un fléau. Trop souvent, ses victimes sont les personnes les plus vulnérables de notre société — les enfants et les personnes ayant une déficience intellectuelle. Or, les règles de preuve et la procédure en matière criminelle, qui sont fondées sur la norme du témoin moyen, peuvent compliquer la tâche de ces victimes qui sont appelées à témoigner dans des cours de justice. Le droit est confronté au défi de permettre que la vérité soit révélée tout en protégeant le droit de l'accusé à un procès équitable et en évitant toute possibilité de déclarations de culpabilité injustifiées.

[2] Le législateur a relevé ce défi en apportant, dans la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, une série de modifications aux règles relatives à l'habilité à témoigner afin d'accommoder les enfants et les adultes ayant une déficience intellectuelle. La Cour a examiné à plusieurs reprises les dispositions ayant trait aux enfants. Dans ce pourvoi, elle examine les dispositions relatives aux adultes ayant une déficience intellectuelle.

[3] La présente affaire met en cause une jeune femme, K.B., âgée de 26 ans, qui a l'âge mental d'un enfant de trois à six ans. Le ministère public prétend qu'elle a été agressée sexuellement de façon répétée par le conjoint de sa mère à l'époque, D.A.I. La poursuite a tenté de faire témoigner la jeune femme à propos des agressions alléguées. Elle a également tenté de présenter en preuve les révélations faites par K.B. à son institutrice et à un policier.

[4] Le juge du procès a exclu ces éléments de preuve au motif que K.B. n'était pas habile à témoigner dans une cour de justice (d.a., vol. I, p. 2). Par conséquent, la preuve de la poursuite s'est effondrée et D.A.I. a été acquitté (2008 CanLII 21725 (C.S.J. Ont.)). La Cour d'appel de l'Ontario a confirmé l'acquittement (2010 ONCA 133, 260 O.A.C. 96).

[5] En toute déférence pour l'opinion contraire, je ne souscris pas à cette décision. Selon moi, le juge

interpreting and applying the provisions of the *Canada Evidence Act* governing the testimonial competence of adult witnesses with mental disabilities. This error of law vitiates the trial judge's ruling that K.B. could not be allowed to testify. Subsequent evidence on other matters cannot overcome this fatal defect. I would therefore set aside the acquittal of D.A.I. and order a new trial.

I. Factual Background

[6] The complainant, K.B., was 22 at trial and 19 at the time of the alleged assault, but possessed the mental age of a three- to six-year-old. She lived with her mother and her mother's partner, D.A.I., as well as her sister. During the four years he was in the home, D.A.I. developed a close relationship with K.B.

[7] Sometime after D.A.I. separated from K.B.'s mother and left the home, K.B. told her special education teacher about a "game" that she and D.A.I. used to play together which involved D.A.I. touching her. She later repeated this statement to the police. K.B., through bodily gestures, described the game as involving touching her breasts and vagina. In her statement to the police, she indicated that D.A.I. had touched her vagina, buttocks and breasts beneath her pajamas, and that this had happened many times.

[8] At the preliminary inquiry, K.B. was ruled competent to testify on the basis that she was able to communicate the evidence. Her videotaped statement to the police was admitted as her examination-in-chief and she was cross-examined.

[9] The issue of K.B.'s testimonial capacity was raised at trial, and the trial judge held a *voir dire* to determine whether she could be allowed to testify. K.B. and Dr. K., the defence's expert witness, were the only ones to testify during the *voir dire* on competence. The Crown's examination of K.B.

du procès a commis une erreur de droit fondamentale dans l'interprétation et l'application des dispositions de la *Loi sur la preuve au Canada* régissant l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle. Cette erreur de droit vicie la décision du juge du procès de ne pas permettre à K.B. de témoigner. Une preuve produite ultérieurement relativement à d'autres questions ne peut remédier à ce vice fatal. Je suis donc d'avis d'annuler l'acquittement de D.A.I. et d'ordonner la tenue d'un nouveau procès.

I. Le contexte factuel

[6] La plaignante, K.B., était âgée de 22 ans au moment du procès et de 19 ans au moment où elle aurait été agressée, mais elle avait l'âge mental d'un enfant de trois à six ans. Elle vivait avec sa mère et le conjoint de cette dernière, D.A.I., ainsi qu'avec sa sœur. Au cours des quatre années où il a vécu à la maison, D.A.I. a établi une relation étroite avec K.B.

[7] Quelque temps après que D.A.I. se soit séparé de la mère de K.B. et ait quitté la maison, K.B. a parlé à son enseignante spécialisée d'un « jeu » auquel elle se livrait avec D.A.I. et dans lequel ce dernier la touchait. Plus tard, elle a fait à la police une déclaration qui allait dans le même sens. K.B. a décrit par des gestes le jeu dans lequel l'intimé touchait ses seins et son vagin. Dans sa déclaration à la police, elle a mentionné que D.A.I. avait touché son vagin, ses fesses et ses seins sous son pyjama, et que cela s'était produit à plusieurs reprises.

[8] À l'enquête préliminaire, K.B. a été jugée habile à témoigner parce qu'elle était capable de communiquer les faits dans son témoignage. La déclaration enregistrée sur bande vidéo qu'elle a faite à la police a été admise à titre d'interrogatoire principal et elle a été contre-interrogée.

[9] La question de la capacité à témoigner de K.B. ayant été soulevée, le juge du procès a tenu un voir-dire afin de déterminer si K.B. pouvait être autorisée à témoigner. K.B. et le D[r] K., le témoin expert de la défense, ont été les seules personnes à témoigner durant le voir-dire sur la question de l'habilité

demonstrated that she understood the difference between telling the truth and lying in concrete situations. However, the trial judge went beyond this to question K.B. on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court. K.B. was unable to respond adequately to these more abstract questions, to which she frequently answered "I don't know" (A.R., vol. I, at pp. 117-19). Dr. K., a psychiatrist, testified for the defence. Dr. K's opinion was formed without personal contact with K.B. It was based on school and medical records, as well as on K.B.'s behaviour in her videotaped statement and during the *voir dire*. Dr. K. expressed the view that K.B. had "serious difficulty in differentiating the concept of truth and lie", noted her low tolerance for frustration, and said, "I don't think she ha[d] the ability to think what you're asking and come up with an answer" (*ibid*., at pp. 159 and 161).

à témoigner. L'interrogatoire de K.B. par le ministère public a démontré qu'elle comprenait la différence entre la vérité et le mensonge dans des situations concrètes. Cependant, le juge du procès est allé plus loin en interrogeant K.B. afin d'établir si elle comprenait la nature de la vérité et du mensonge, des obligations morales et religieuses, et des conséquences juridiques liées au fait de mentir au tribunal. K.B. n'a pas pu répondre adéquatement à ces questions plus abstraites, répétant à plusieurs reprises : [TRADUCTION] « Je ne sais pas » (d.a., vol. I, p. 117-119). Le D[r] K., un psychiatre, a témoigné pour la défense. Son opinion était formée sans qu'il ait eu de contact personnel avec K.B. mais en se fondant sur des dossiers scolaires et médicaux de K.B. ainsi que sur le comportement de cette dernière sur la bande vidéo de sa déclaration et durant le voir-dire. De l'avis du D[r] K., K.B. avait [TRADUCTION] « beaucoup de mal à différencier le concept de la vérité et celui du mensonge »; il a mentionné qu'elle avait une faible tolérance à la frustration et il a dit ce qui suit : « Je ne crois pas qu'elle a la capacité de penser à ce que vous demandez et de donner une réponse » (*ibid*., p. 159 et 161).

[10] At the end of the *voir dire* on competence, the trial judge refused to hear from K.B.'s teacher of six years, Ms. W., and ruled that K.B. was incompetent to testify. K.B. was held incompetent because she had "not satisfied the prerequisite that she understands the duty to speak to the truth", which the trial judge took to be required by s. 16(3) of the *Canada Evidence Act*: "She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies" (*ibid*., at p. 3).

[10] À l'issue du voir-dire relatif à l'habilité à témoigner, le juge du procès a refusé d'entendre le témoignage de la personne qui enseignait à K.B. depuis six ans, M[me] W. Il a conclu que K.B. n'était pas habile à témoigner parce qu'elle n'avait [TRADUCTION] « pas satisfait à la condition préalable voulant qu'elle comprenne l'obligation de dire la vérité », ce qui, selon lui, est une condition exigée par le par. 16(3) de la *Loi sur la preuve au Canada* : « Elle est incapable de dire ce que comportent la vérité et le mensonge, ou de dire ce que sont les conséquences découlant de la vérité ou de mensonges » (*ibid*., p. 3).

[11] A second *voir dire* was held to decide on the Crown's application for admitting K.B.'s out-of-court statements to the police and to her teacher, Ms. W. The teacher testified that K.B. would not intentionally lie, but that her ability to understand was more developed than her ability to express herself: "This causes a lot of frustration for [K.B.], she frequently responds to questions by saying 'I don't know'" (*ibid*., at p. 176; see also pp. 184-85).

[11] Le juge du procès a tenu un deuxième voir-dire pour statuer sur la demande présentée par le ministère public en vue de faire admettre en preuve les déclarations extrajudiciaires faites par K.B. à la police et à son enseignante, M[me] W. L'enseignante a indiqué dans son témoignage que K.B. ne mentirait pas intentionnellement, mais que sa capacité à comprendre était plus développée que sa capacité à s'exprimer : [TRADUCTION] « Cela lui [K.B.]

Also, evidence was led corroborating K.B.'s allegations. A family friend testified that, while he was in D.A.I.'s room for another purpose, he found a Polaroid photo of K.B. with her breasts exposed and another photo of two unidentified people having sex. D.A.I.'s explanation of the first photo was that K.B. had flashed him while he was taking a photo of her. K.B.'s sister also testified that she had found such photos. However, she did not report it to her mother and the photos were not available at trial. K.B.'s sister also said she once saw D.A.I. touch K.B.'s breasts while she was lying on her bed.

[12] The *voir dire* on hearsay admissibility was concluded by the trial judge's dismissal of the Crown's application. The trial judge rejected K.B.'s out-of-court statements to Ms. W. and to the police, holding that K.B.'s hearsay evidence was inadmissible because it was "unreliable, and its admission would seriously compromise the accused's right to a fair trial" (2008 CanLII 21726 (Ont. S.C.J.), at para. 57).

[13] At trial, the judge concluded that while the remainder of the evidence raised "some serious suspicions" about D.A.I.'s conduct, it was too scant to support a conviction (para. 11). The case essentially collapsed because of the trial judge's ruling that K.B. was not competent to testify.

[14] The question we must decide is whether the trial judge correctly interpreted the requirements of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. If he applied too high a standard, his decision to preclude K.B. from testifying must be set aside and the case remitted for a new trial.

cause beaucoup de frustration, elle répond souvent aux questions en disant "je ne sais pas" » (*ibid*., p. 176; voir aussi p. 184-185). Des éléments de preuve étayant les prétentions de K.B. ont également été soumis. Un ami de la famille a affirmé dans son témoignage qu'il avait trouvé dans la chambre de D.A.I. une photo au polaroïd de K.B. la montrant les seins nus et une autre photo montrant deux inconnus ayant des rapports sexuels. D.A.I. a expliqué que la première photo avait été prise par accident — que K.B. avait soudainement montré ses seins pendant qu'il prenait une photo d'elle. La sœur de K.B. a également indiqué avoir trouvé des photos de ce genre. Toutefois, elle ne l'a pas dit à sa mère et les photos n'ont pas été produites au procès. La sœur de K.B. a également dit avoir déjà vu D.A.I. toucher les seins de K.B. pendant qu'elle était étendue sur son lit.

[12] À l'issue du voir-dire relatif à l'admissibilité de la preuve par ouï-dire, le juge du procès a rejeté la demande du ministère public. Il a rejeté les déclarations extrajudiciaires faites par K.B. à M^me^ W. et à la police, affirmant que la preuve par ouï-dire de K.B. était inadmissible parce qu'elle n'était [TRADUCTION] « pas digne de foi, et que son admission en preuve compromettrait sérieusement le droit de l'accusé à un procès équitable » (2008 CanLII 21726 (C.S.J. Ont.), par. 57).

[13] Le juge du procès a conclu que, bien que la preuve ait soulevé [TRADUCTION] « de graves soupçons » quant à la conduite de D.A.I., elle ne permettait pas d'étayer une déclaration de culpabilité (par. 11). La preuve de la poursuite s'est effondrée essentiellement en raison de la conclusion du juge du procès selon laquelle K.B. n'était pas habile à témoigner.

[14] Nous devons décider si le juge du procès a correctement interprété les prescriptions de la *Loi sur la preuve au Canada* relativement à l'habilité à témoigner des personnes âgées de 14 ans ou plus (adultes) ayant une déficience intellectuelle. S'il a appliqué une norme trop élevée, sa décision d'empêcher K.B. de témoigner doit être annulée et l'affaire doit être renvoyée pour un nouveau procès.

II. Legal Analysis

A. *Testimonial Competence: A Threshold Requirement*

[15] Before turning to s. 16(3) of the *Canada Evidence Act*, it is important to distinguish between three different concepts that are sometimes confused: (1) the witness's competence to testify; (2) the admissibility of his or her evidence; and (3) the weight of the witness's testimony. The evidentiary rules governing all three concepts share a common purpose: ensuring that convictions are based on solid evidence and that the accused has a fair trial. However, each concept plays a distinct role in achieving this goal.

[16] The first concept, and the one most relevant to this appeal, is the principle of competence to testify. Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law. The purpose of this principle is to exclude at the outset worthless testimony, on the ground that the witness lacks the basic capacity to communicate evidence to the court. Competence is a threshold requirement. As a matter of course, witnesses are presumed to possess the basic "capacity" to testify. However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.

[17] The second concept is admissibility. The rules of admissibility determine what evidence given by a competent witness may be received into the record of the court. Evidence may be inadmissible for various reasons. Only evidence that is relevant to the case may be considered by the judge or jury. Evidence may also be inadmissible if it falls under an exclusionary rule, for example the confessions rule or the rule against hearsay evidence. Among the purposes of the rules of admissibility are improving the accuracy of fact finding, respecting policy considerations, and ensuring the fairness of the trial.

II. Analyse juridique

A. *L'habilité à témoigner : une condition préliminaire*

[15] Avant de passer à l'examen du par. 16(3) de la *Loi sur la preuve au Canada*, il importe de faire une distinction entre trois notions différentes qui sont parfois confondues : (1) l'habilité du témoin à témoigner; (2) l'admissibilité de son témoignage; (3) la force probante de celui-ci. Les règles de preuve régissant ces trois notions poursuivent un même objectif : garantir que les déclarations de culpabilité soient fondées sur une preuve solide et que l'accusé ait un procès équitable. Toutefois, chaque notion joue un rôle distinct dans l'atteinte de cet objectif.

[16] La première notion — la plus pertinente dans ce pourvoi — est le principe de l'habilité à témoigner. L'habilité porte sur la question de savoir si un témoin éventuel a la capacité de faire une déposition dans une cour de justice. Ce principe a pour objet d'exclure d'entrée de jeu la déposition n'ayant aucune valeur au motif que le témoin n'est pas en mesure de communiquer les faits dans son témoignage à la cour. L'habilité est une condition préliminaire. Ordinairement, les témoins sont présumés « habiles » à témoigner. Toutefois, dans le cas d'enfants ou d'adultes ayant une déficience intellectuelle, la partie qui met en question la capacité d'un éventuel témoin de faire une déposition peut être appelée à démontrer qu'il existe des motifs de douter de cette capacité.

[17] La deuxième notion est l'admissibilité. Les règles d'admissibilité déterminent quels éléments de preuve donnés par un témoin habile peuvent être consignés au dossier de la cour. Un témoignage peut être inadmissible pour diverses raisons. Le juge ou le jury ne peuvent prendre en compte que les témoignages pertinents dans l'instance. Le témoignage peut également être inadmissible s'il est visé par une règle d'exclusion, par exemple la règle des confessions ou la règle interdisant le ouï-dire. Les règles d'admissibilité visent notamment l'amélioration de l'exactitude des conclusions de fait, le respect des considérations de politique générale, et l'assurance que le procès est équitable.

[18] The third concept — the responsibility of the trier of fact to decide what evidence, if any, to accept — is based on the assumption that the witness is competent and the rules of admissibility have been properly applied. Fulfillment of these requirements does not establish that the evidence should be accepted. It is the task of the judge or jury to weigh the probative value of each witness's evidence on the basis of factors such as demeanour, internal consistency, and consistency with other evidence, and to thus determine whether the witness's evidence should be accepted in whole, in part, or not at all. Unless the trier of fact is satisfied that the prosecution has established all elements of the offence beyond a reasonable doubt, there can be no conviction.

[19] Together, the rules governing competence, admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused person has a fair trial. The point for our purposes is a simple one: the requirement of competence is only the first step in the evidentiary process. It is the initial threshold for receiving evidence. It seeks a minimal requirement — a basic ability to provide truthful evidence. A finding of competence is not a guarantee that the witness's evidence will be admissible or accepted by the trier of fact.

B. *The Requirements for Competence of Adult Witnesses With Mental Disabilities: Section 16 of the Canada Evidence Act*

[20] Against this background, I come to the provision at issue in this case, s. 16(3) of the *Canada Evidence Act*, which governs the capacity to testify of adults with mental disabilities. Section 16 provides:

16. (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age

[18] La troisième notion — la responsabilité qui incombe au juge des faits de décider quels éléments de preuve, s'il en est, doivent être retenus — est fondée sur la prémisse que le témoin est habile à témoigner et que les règles d'admissibilité ont été correctement appliquées. Le respect de ces exigences n'établit pas que les éléments de preuve doivent être retenus. C'est au juge ou au jury qu'il revient d'apprécier la valeur probante de la déposition de chaque témoin au regard de facteurs comme le comportement, la cohérence et la compatibilité avec d'autres éléments de preuve et, donc, de déterminer si la déposition de la personne doit être retenue en entier, en partie ou pas du tout. Sauf si le juge des faits est convaincu que la poursuite a établi hors de tout doute raisonnable tous les éléments de l'infraction, il ne peut y avoir aucune déclaration de culpabilité.

[19] Ensemble, les règles régissant l'habilité à témoigner, l'admissibilité et le poids de la preuve permettent de garantir qu'un verdict de culpabilité est étayé par des éléments de preuve exacts et crédibles et que le procès de l'accusé est équitable. L'aspect important pour les besoins de l'analyse est simple : la condition relative à l'habilité à témoigner n'est que la première étape du processus de présentation de la preuve. C'est la première condition qui doit être satisfaite pour qu'un témoignage soit recevable. Elle repose sur une exigence minimale — une aptitude élémentaire à fournir un témoignage sincère. La seule conclusion que la personne est habile à témoigner ne garantit pas que sa déposition sera admissible ou retenue par le juge des faits.

B. *Les conditions relatives à l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle : l'art. 16 de la Loi sur la preuve au Canada*

[20] Dans ce contexte, j'examine maintenant la disposition litigieuse en l'espèce, le par. 16(3) de la *Loi sur la preuve au Canada*, qui régit l'habilité à témoigner des adultes ayant une déficience intellectuelle. L'article 16 prévoit ce qui suit :

16. (1) [Témoin dont la capacité mentale est mise en question] Avant de permettre le témoignage d'une

or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is able to communicate the evidence.

(2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[21] Section 16(1) sets out what a judge must do when a challenge is raised. First, the judge must determine "whether the person understands the nature of an oath or a solemn declaration" and "whether the person is able to communicate the evidence" (s. 16(1)). If these requirements are met, the witness testifies under oath or affirmation, as other witnesses do (s. 16(2)). If these requirements are not met, the judge moves on to s. 16(3). Section 16(3) provides that "[a] person . . . who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may . . . testify on promising to tell the truth."

personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

a) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;

b) d'autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) [Témoignage sous serment] La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est capable de communiquer les faits dans son témoignage témoigne sous serment ou sous affirmation solennelle.

(3) [Témoignage sur promesse de dire la vérité] La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut, malgré qu'une disposition d'une loi exige le serment ou l'affirmation, témoigner en promettant de dire la vérité.

(4) [Inaptitude à témoigner] La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) [Charge de la preuve] La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle.

[21] Le paragraphe 16(1) énonce ce qu'un juge doit faire lorsque la capacité mentale d'un éventuel témoin est mise en question. Premièrement, le juge doit déterminer si la personne « comprend la nature du serment ou de l'affirmation solennelle » et si elle « est capable de communiquer les faits dans son témoignage » (par. 16(1)). Si ces conditions sont satisfaites, la personne témoigne sous serment ou sous affirmation solennelle, tout comme les autres témoins (par. 16(2)). Si ces conditions ne sont pas remplies, le juge passe au par. 16(3), selon lequel une « personne [. . .] qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut [. . .] témoigner en promettant de dire la vérité ».

[22] In brief, s. 16(1) provides that an adult witness whose competence to testify is challenged should testify under oath or affirmation, if the witness "understands the nature of an oath or a solemn affirmation" and can "communicate the evidence". Here K.B. did not meet the first requirement. The inquiry therefore moved to s. 16(3), which states that if an adult witness cannot take the oath or affirm under s. 16(1), then she must be permitted to testify *if she is "able to communicate the evidence" and promises to tell the truth*.

[23] On its face, s. 16 says that in a case such as this where the witness cannot take the oath or affirm, the judge has only one further issue to consider — whether the witness can communicate the evidence. If the answer to that question is yes, the judge must then ask the witness whether she promises to tell the truth. If she does, she is competent to testify. It is not necessary to inquire into whether the witness understands the duty to tell the truth.

[24] The respondent argues, however, that the plain words of s. 16(3) do not suffice. They must be supplemented, he says, by the requirement that an adult witness with mental disabilities who cannot take an oath or affirm must not only be able to communicate the evidence and promise to tell the truth, but must also *understand the nature of a promise to tell the truth*.

[25] I cannot accept this submission. The words of an Act are to be interpreted in their entire context: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The wording of s. 16(3), its history, its internal logic and its statutory context all point to the conclusion that s. 16(3) should be read as it stands, without reading in a further requirement that the witness demonstrate an understanding of the nature of the obligation to tell the truth. All that is required is that the witness be able to communicate the evidence and in fact promise to tell the truth.

[22] En bref, le par. 16(1) prévoit qu'une personne adulte dont l'habilité à témoigner est mise en question doit témoigner sous serment ou sous affirmation solennelle, si elle « comprend la nature du serment ou de l'affirmation solennelle » et si elle est capable de « communiquer les faits dans son témoignage ». En l'espèce, K.B. n'a pu satisfaire à cette première condition. Le juge a donc poursuivi en examinant le par. 16(3), selon lequel une personne adulte qui ne comprend pas la nature du serment ou de l'affirmation solennelle au sens du par. 16(1), mais *qui est « capable de communiquer les faits dans son témoignage »,* peut témoigner *en promettant de dire la vérité.*

[23] À première vue, l'art. 16 prévoit que, dans un cas tel celui qui nous occupe, où la personne ne peut prêter serment ni faire une affirmation solennelle, le juge n'a plus qu'une autre question à examiner — à savoir si la personne est capable de communiquer les faits dans son témoignage. Si tel est le cas, le juge doit alors demander à la personne si elle promet de dire la vérité. Dans l'affirmative, elle est habile à témoigner. Il n'est pas nécessaire de vérifier si elle comprend l'obligation de dire la vérité.

[24] Toutefois, l'intimé prétend que le libellé explicite du par. 16(3) n'est pas suffisant. Il doit être complété, selon lui, par l'ajout de la condition suivant laquelle un adulte ayant une déficience intellectuelle qui ne peut prêter serment ni faire une affirmation solennelle doit non seulement être capable de communiquer les faits dans son témoignage et promettre de dire la vérité, mais doit également *comprendre la nature de la promesse de dire la vérité.*

[25] Je ne peux pas accepter cette prétention. Il faut interpréter les termes d'une loi dans leur contexte global : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21. Le libellé du par. 16(3), son historique, sa logique interne et son contexte législatif nous amènent à conclure que le par. 16(3) doit être interprété littéralement, sans qu'il soit besoin d'exiger que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité. La disposition exige seulement que la personne soit capable de communiquer les faits dans son témoignage et qu'elle promette de dire la vérité.

[26] First, as already mentioned, this interpretation goes beyond the words used by Parliament. To insist that the witness demonstrate understanding of the nature of the obligation to tell the truth is to import a requirement into the section that Parliament did not place there. The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 44. However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.

[27] Second, the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth.

[28] This history suggests that Parliament intended to eliminate an understanding of the abstract nature of the oath or solemn affirmation as a prerequisite for testimonial capacity. Failure to show that the witness *could demonstrate an understanding of the obligation to tell the truth* was no

[26] Premièrement, comme je l'ai déjà mentionné, cette interprétation va au-delà des mots employés par le législateur. En insistant pour que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité, on introduit dans la disposition une condition que le législateur n'y a pas énoncée. Suivant le principe fondamental de l'interprétation des lois, il faut examiner le libellé explicite de la disposition. En cas d'ambiguïté, il peut être nécessaire d'avoir recours à des facteurs externes pour la dissiper : R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 44. Toutefois, le législateur a clairement indiqué les conditions requises pour conclure qu'un adulte ayant une déficience intellectuelle est habile à témoigner. L'article 16 ne comporte aucune ambiguïté.

[27] Deuxièmement, l'historique de l'art. 16 étaye le point de vue selon lequel le législateur voulait éliminer les obstacles qui, avant les modifications apportées en 1987 (L.C. 1987, ch. 24), avaient empêché des adultes ayant une déficience intellectuelle de témoigner. Les modifications ont changé la règle de common law en vertu de laquelle seules les personnes ayant prêté serment pouvaient témoigner. Pour prêter serment ou faire une affirmation solennelle, une personne doit comprendre l'obligation de dire la vérité : *R. c. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Des adultes ayant une déficience intellectuelle pourraient ne pas avoir cette faculté. Afin d'écarter cet obstacle, le législateur a prévu à l'égard des personnes de cette catégorie un autre fondement de l'habilité à témoigner. Le paragraphe 16(1) de la disposition de 1987 conservait encore le serment ou l'affirmation solennelle comme première possibilité dans le cas des adultes ayant une déficience intellectuelle, mais le par. 16(3) prévoyait que ces personnes étaient habiles à témoigner si elles étaient simplement capables de communiquer les faits dans un témoignage et si elles promettaient de dire la vérité.

[28] Cet historique donne à penser que le législateur voulait éliminer la condition préalable selon laquelle la personne, pour être habile à témoigner, devait comprendre la nature abstraite du serment ou de l'affirmation solennelle. Le défaut d'établir que la personne *pouvait démontrer qu'elle comprenait*

longer the end of the matter. Provided the witness (1) was able to *communicate the evidence*, and (2) promised to tell the truth, she should be allowed to testify.

[29] The drafters of s. 16(3) did not intend this provision to require an abstract understanding of the duty to tell the truth (see Appendix A). The original text of Bill C-15, which adopted the 1987 amendments, was changed by the Legislative Committee on Bill C-15 precisely to avoid that interpretation. The version of s. 16(3) first put before Parliament allowed testimony on promising to tell the truth if the witness was "sufficiently intelligent that the reception of the evidence is justified". A discussion was held on the meaning of "sufficient intelligence", after which the Committee concluded that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying. The Committee, fearing that this would open the door to abstract inquiries, ultimately replaced "sufficient intelligence" by "able to communicate the evidence". The deliberations that followed emphasized the practical ability to communicate the evidence. There was no suggestion that ability to communicate the evidence accompanied by a promise to tell the truth implicitly imposed a requirement that the witness demonstrate a more abstract understanding of the duty to tell the truth.

[30] The historic background against which s. 16(3) was enacted explains why Parliament might have wished in 1987 to lower the requirements of testimonial competence for adults with mental disabilities, who are nonetheless capable of communicating the evidence. While adults with mental disabilities received little consideration in the pre-1987 case law, the inappropriateness of questioning children on abstract understandings of the truth had been noted and criticized. In *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), Dickson J. *ad hoc* (as he then was) rejected the practice of examining child witnesses on their religious beliefs and the philosophical meaning of truth. Meanwhile,

l'obligation de dire la vérité ne mettait plus fin à la question. Dès lors qu'elle (1) était capable de *communiquer les faits dans son témoignage* et qu'elle (2) promettait de dire la vérité, la personne devait être autorisée à témoigner.

[29] Les rédacteurs du par. 16(3) ne voulaient pas que cette disposition exige une compréhension abstraite de l'obligation de dire la vérité (voir annexe A). C'est précisément pour éviter une telle interprétation que le Comité législatif sur le projet de loi C-15 a modifié le texte original du projet de loi C-15 par lequel les modifications de 1987 ont été adoptées. La première version du par. 16(3) soumise au Parlement prévoyait qu'une personne pouvait témoigner en promettant de dire la vérité si elle était « suffisamment intelligente pour que le recueil de son témoignage soit justifié ». Après une discussion sur la signification de l'expression « suffisamment intelligente », le Comité a conclu qu'il fallait uniquement que le témoin apprécie la différence morale entre dire la vérité et mentir pour qu'il soit suffisamment intelligent. De crainte que cela n'ouvre la porte à des interrogatoires dans l'abstrait, le Comité a remplacé ces mots par « capable de communiquer les faits dans son témoignage ». Les délibérations qui ont suivi ont mis l'accent sur l'aptitude, en pratique, de communiquer les faits dans un témoignage. Rien n'indiquait que l'aptitude à communiquer les faits dans un témoignage, accompagnée d'une promesse de dire la vérité, exigeait implicitement du témoin qu'il comprenne de façon plus abstraite l'obligation de dire la vérité.

[30] Le contexte historique dans lequel le par. 16(3) a été adopté explique pourquoi le législateur a pu souhaiter, en 1987, assouplir les conditions relatives à l'habilité à témoigner imposées aux adultes ayant une déficience intellectuelle qui sont néanmoins capables de communiquer les faits dans leur témoignage. Bien qu'on ait accordé peu d'importance aux adultes ayant une déficience intellectuelle dans la jurisprudence antérieure à 1987, on avait souligné qu'il ne convenait pas de poser à des enfants des questions sur la compréhension qu'ils avaient, dans l'abstrait, de la vérité. Dans *R. c. Bannerman* (1966), 48 C.R. 110 (C.A. Man.), le juge Dickson *ad hoc* (plus tard Juge

awareness of the sexual abuse of children and adults with mental disabilities was growing. To rule out the evidence of children and adults with mental disabilities at the stage of competence — the effect of the requirement of an abstract understanding of the nature of the obligation to tell the truth — meant their stories would never be told and their cases never prosecuted. These concerns explain why Parliament moved to simplify the competence test for adult witnesses with mental disabilities.

[31] Third, and flowing from this history, the internal logic of s. 16 negates the suggestion that "promising to tell the truth" in s. 16(3) must be read as implying an understanding of the obligation to tell the truth. Two procedures are provided by s. 16. The preferred option is testimony under oath or affirmation (s. 16(1)), and the alternative procedure is testimony on a promise to tell the truth (s. 16(3)). If the witness is required under s. 16(3) to demonstrate that she understands the obligation to tell the truth, s. 16(3) adds little, if anything, to s. 16(1). In both cases, the witness is required to articulate abstract concepts of the nature of truth and the nature of the obligation to tell the truth in court. The result is essentially to render s. 16(3) a dead letter and to negate the dual structure of the provision. This runs against the principle of statutory interpretation that Parliament does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[32] Fourth, s. 16(4) indicates that ability to communicate the evidence is the only quality that an adult with mental disabilities must possess in order to testify under s. 16(3). Section 16(4) provides that

en chef du Canada) a rejeté la pratique consistant à poser à des enfants des questions sur leurs croyances religieuses et sur le sens philosophique de la vérité. Entre-temps, on prenait de plus en plus conscience de la violence sexuelle envers les enfants et les adultes ayant une déficience intellectuelle. En raison de l'exclusion, à l'étape de l'examen de l'habilité à témoigner, des dépositions des enfants et des adultes ayant une déficience intellectuelle — la conséquence de l'obligation, pour ces derniers, de démontrer une compréhension abstraite de la nature de l'obligation de dire la vérité — ils ne pouvaient jamais faire le récit de leur expérience et aucune poursuite n'était entreprise. C'est en raison de ces problèmes que le législateur a simplifié le critère relatif à l'habilité à témoigner des personnes adultes ayant une déficience intellectuelle.

[31] Troisièmement, en lien avec cet historique, la logique interne de l'art. 16 contredit la thèse suivant laquelle les mots « en promettant de dire la vérité » qui figurent au par. 16(3) doivent être interprétés comme supposant une compréhension de l'obligation de dire la vérité. L'article 16 prévoit deux façons de procéder. Le témoignage sous serment ou affirmation solennelle constitue la solution privilégiée (par. 16(1)), l'autre possibilité étant le témoignage fait en promettant de dire la vérité (par. 16(3)). Si la personne est tenue, en vertu du par. 16(3), de démontrer qu'elle comprend l'obligation de dire la vérité, ce paragraphe n'ajoute rien, ou bien peu, au par. 16(1). Dans les deux cas, la personne doit formuler les concepts abstraits que sont la nature de la vérité et la nature de l'obligation de dire la vérité devant le tribunal. Cette interprétation a essentiellement pour résultat que le par. 16(3) devient lettre morte et que la structure en deux volets de la disposition est réduite à néant. Cela va à l'encontre du principe de l'interprétation des lois selon lequel le législateur ne parle pas en vain : *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838.

[32] Quatrièmement, le par. 16(4) indique que la capacité de communiquer les faits dans son témoignage est la seule qualité qu'un adulte ayant une déficience intellectuelle doit posséder afin de

the proposed witness is unable to testify if she neither understands the nature of an oath or solemn affirmation nor is able to communicate the evidence. It follows that the witness is competent to testify if she is able to communicate the evidence; she may testify on promising to tell the truth under s. 16(3). The qualities envisaged in s. 16 as basis for testimonial competence are mentioned in s. 16(4). Imposing an additional qualitative requirement to understand the nature of a promise to tell the truth would flout the utility of s. 16(4).

pouvoir témoigner en vertu du par. 16(3). Le paragraphe 16(4) prévoit que le témoin éventuel est incapable de témoigner s'il ne comprend pas la nature du serment ou de l'affirmation solennelle et s'il n'est pas capable de communiquer les faits dans son témoignage. Il s'ensuit que la personne est habile à témoigner si elle est capable de communiquer les faits dans son témoignage; elle peut témoigner en promettant de dire la vérité aux termes du par. 16(3). Les qualités envisagées à l'art. 16 comme fondement de l'habilité à témoigner sont mentionnées au par. 16(4). L'imposition de la condition supplémentaire — comprendre la nature de la promesse de dire la vérité — équivaudrait à faire fi de l'utilité du par. 16(4).

[33] Fifth, the legislative context speaks against reading s. 16(3) as requiring that an adult witness with mental disabilities understand the nature of the obligation to tell the truth. If this requirement is added to s. 16(3), the result is a different standard for the competence of adults with mental disabilities under s. 16(3) and children under s. 16.1 (enacted in 2005 (S.C. 2005, c. 32) pursuant to the "Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada's Criminal Justice System" (Child Witness Project, March 2005) (the "Bala Report")). As will be discussed more fully below, s. 16(3) governing the competence of adults with mental disabilities, and ss. 16.1(3), (5) and (6) governing the competence of children, set forth essentially the same requirements. Broadly speaking, both condition testimonial capacity on: (1) the ability to communicate or answer questions; and (2) a promise to tell the truth. While it was open to Parliament to enact different requirements for children and adults with the minds of children, consistency of Parliamentary intent should be assumed, absent contrary indications. No explanation has been offered as to why Parliament would consider a promise to tell the truth a meaningful procedure for children, but an empty gesture for adults with mental disabilities.

[33] Cinquièmement, le contexte législatif va à l'encontre d'une interprétation du par. 16(3) exigeant qu'un adulte ayant une déficience intellectuelle comprenne la nature de l'obligation de dire la vérité. L'ajout de cette exigence au par. 16(3) créerait pour les adultes ayant une déficience intellectuelle une norme relative à l'habilité à témoigner différente de la norme prévue pour les enfants au par. 16.1 (adopté en 2005 (L.C. 2005, ch. 32) comme suite au mémoire « Brief on Bill C-2 : Recognizing the Capacities & Needs of Children as Witnesses in Canada's Criminal Justice System » (Child Witness Project, mars 2005) (le « rapport Bala »)). Comme je l'expliquerai davantage plus loin, le par. 16(3) régissant l'habilité à témoigner des adultes ayant une déficience intellectuelle, ainsi que les par. 16.1(3), (5) et (6) relatifs à l'habilité à témoigner des enfants, énoncent essentiellement les mêmes exigences. De façon générale, dans les deux dispositions, l'habilité à témoigner dépend des éléments suivants : (1) la capacité de communiquer ou de répondre aux questions; (2) la promesse de dire la vérité. Bien qu'il ait été loisible au législateur d'adopter des exigences différentes selon qu'il s'agisse d'enfants ou d'adultes ayant les capacités mentales d'un enfant, il faut présumer la constance de l'intention législative en l'absence d'indications contraires. Aucune explication n'a été avancée quant à savoir pourquoi le législateur estimerait que la promesse de dire la vérité est une solution valable pour les enfants mais vide de sens pour les adultes ayant une déficience intellectuelle.

[34] The foregoing reasons make a strong case that s. 16(3) should be read as requiring only two requirements for competence of an adult with mental disabilities: (1) ability to communicate the evidence; and (2) a promise to tell the truth. However, two arguments have been raised in opposition to this interpretation: first, without a further requirement of an understanding of the obligation to tell the truth, a promise to tell the truth is an "empty gesture"; second, Parliament's failure in 2005 to extend to adults with mental disabilities the s. 16.1(7) prohibition on the questioning of children means that it intended this questioning to continue for adults. I will examine each argument in turn.

[35] The first argument is that unless an adult witness with mental disabilities is required to demonstrate that she understands the nature of the obligation to tell the truth, the promise is an "empty gesture". However, this submission's shortcoming is that it departs from the plain words of s. 16(3), on the basis of an assumption that is unsupported by any evidence and contrary to Parliament's intent. Imposing an additional qualitative condition for competence that is not provided in the text of s. 16(3) would demand compelling demonstration that a promise to tell the truth cannot amount to a meaningful procedure for adults with mental disabilities. No such demonstration has been made. On the contrary, common sense suggests that the act of promising to tell the truth may be useful, even in the absence of the witness's ability to explain what telling the truth means in abstract terms.

[36] Promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. A witness who is able to communicate the evidence, as required by s. 16(3), is necessarily able to relate events. This in turn implies an understanding of what really happened — i.e. the truth — as

[34] Les motifs qui précèdent exposent de façon convaincante que, suivant l'interprétation du par. 16(3) qui s'impose, un adulte ayant une déficience intellectuelle est habile à témoigner s'il satisfait à deux exigences seulement : (1) la capacité de communiquer les faits dans son témoignage; (2) la promesse de dire la vérité. Toutefois, deux arguments ont été soulevés à l'encontre de cette interprétation. Premièrement, sans exiger en plus que la personne comprenne l'obligation de dire la vérité, la promesse de dire la vérité reste « vide de sens ». Deuxièmement, si le législateur a omis, en 2005, d'appliquer aux adultes ayant une déficience intellectuelle l'interdiction prévue au par. 16.1(7) de poser des questions à des enfants, c'est parce qu'il voulait que l'on continue de poser des questions aux adultes. Je vais examiner successivement chacun de ces arguments.

[35] Selon le premier argument, la promesse de dire la vérité « est vide de sens » si le témoin adulte ayant une déficience intellectuelle n'est pas tenu de démontrer qu'il comprend la nature de l'obligation de dire la vérité. Toutefois, cette prétention comporte une lacune en ce qu'elle s'écarte du libellé explicite du par. 16(3) car elle repose sur une hypothèse qui n'est étayée par aucun élément de preuve et qui est contraire à l'intention du législateur. L'imposition, relativement à l'habilité à témoigner, d'une condition qualitative supplémentaire que ne prévoit pas le texte du par. 16(3) exigerait une démonstration convaincante qu'une promesse de dire la vérité n'offre pas une façon valable d'obtenir le témoignage d'un adulte ayant une déficience intellectuelle. Cette démonstration n'a pas été faite. Au contraire, le bon sens donne à penser que la promesse de dire la vérité peut être utile, même si la personne n'a pas la faculté d'expliquer en termes abstraits ce que signifie dire la vérité.

[36] La promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique. Une personne qui est capable de communiquer les faits dans son témoignage, comme l'exige le par. 16(3), est nécessairement capable de relater des

opposed to fantasy. When such a witness promises to tell the truth, this reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in s. 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child's promise, without more, is an empty gesture. Why should it be otherwise for an adult with the mental ability of a child?

[37] The second argument raised in support of the proposition that "promising to tell the truth" in s. 16(3) implies a requirement that the witness must show that she understands the nature of the obligation to tell the truth is that Parliament has not enacted a ban on questioning adult witnesses with mental disabilities on the nature of the obligation to tell the truth, as it did for child witnesses in 2005 in s. 16.1(7). To understand this argument, we must briefly trace the history of s. 16.1.

[38] In 2005, following the Bala Report, Parliament once more modified the *Canada Evidence Act*'s provisions on testimonial competence, but this time only with respect to children. The central focus of the 2005 legislation relating to the *Canada Evidence Act* was the competence of *child* witnesses, with the aim of altering the restrictive gloss the case law had placed on the previous provisions relating to the capacity of children to testify. Chief among this case law was *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), which insisted that a child understand the nature of the obligation to tell the truth before the child could testify. Section 16.1, in unequivocal language, rejected this requirement. It stated:

16.1 (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

événements. Cela sous-entend que la personne comprend ce qui s'est vraiment passé — c'est-à-dire la vérité — par opposition à l'imaginaire. Lorsqu'une telle personne promet de dire la vérité, cela confirme le caractère sérieux de la situation et la nécessité de dire la vérité. En ce qui concerne le témoignage des enfants dont il est question à l'art. 16.1, le législateur a conclu que la promesse de dire la vérité était tout ce qui était exigé de la part d'un enfant capable de répondre aux questions. Le législateur n'a pas envisagé que la promesse faite par un enfant, sans rien d'autre, est vide de sens. Pourquoi en serait-il autrement pour un adulte ayant la capacité mentale d'un enfant?

[37] Selon le deuxième argument soulevé à l'appui de l'affirmation selon laquelle les mots « en promettant de dire la vérité » figurant au par. 16(3) sous-entendent que la personne doit démontrer qu'elle comprend la nature de l'obligation de dire la vérité, le législateur n'a pas adopté une interdiction de poser aux adultes ayant une déficience intellectuelle des questions quant à la nature de l'obligation de dire la vérité, comme il l'a fait pour les enfants en 2005, au par. 16.1(7). Pour bien saisir cet argument, il nous faut relater brièvement l'historique de l'art. 16.1.

[38] En 2005, comme suite au rapport Bala, le législateur a encore une fois modifié les dispositions de la *Loi sur la preuve au Canada* portant sur l'habilité à témoigner, mais cette fois uniquement en ce qui a trait aux enfants. La loi de 2005 relative à la *Loi sur la preuve au Canada* portait principalement sur la compétence des *enfants* à rendre témoignage et visait à modifier l'interprétation restrictive, dans la jurisprudence, des dispositions antérieures relatives à l'habilité des enfants à témoigner. La décision la plus importante dans cette jurisprudence était *R. c. Khan* (1988), 42 C.C.C. (3d) 197 (C.A. Ont.), laquelle exigeait d'un enfant qu'il comprenne la nature de l'obligation de dire la vérité avant de pouvoir témoigner. L'article 16.1, qui a rejeté cette exigence en termes non équivoques, est libellé comme suit :

16.1 (1) [Témoin âgé de moins de quatorze ans] Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

(2) [Témoin non assermenté] Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) [Témoignage admis en preuve] Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) [Charge de la preuve] La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) [Enquête du tribunal] Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) [Promesse du témoin] Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) [Question sur la nature de la promesse] Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) [Effet] Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

[39] Section 16.1, like s. 16(3) governing adult witnesses with mental disabilities, imposed two preconditions for the testimony of children: (1) that the child be able to understand and respond to questions (s. 16.1(5)); and (2) that the child promise to tell the truth (s. 16.1(6)). But, taking direct aim at *Khan*'s insistence that children be questioned on their understanding of the nature of the obligation to tell the truth, s. 16.1(7) went on to state explicitly that children not "*be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court*".

[39] Tout comme le par. 16(3) régissant le témoignage des adultes ayant une déficience intellectuelle, l'art. 16.1 a imposé deux conditions préalables au témoignage des enfants : (1) l'enfant doit être capable de comprendre les questions et d'y répondre (par. 16.1(5)); (2) l'enfant doit promettre de dire la vérité (par. 16.1(6)). Mais, pour contrer l'arrêt *Khan* qui insistait pour que les enfants soient interrogés sur leur compréhension de la nature de l'obligation de dire la vérité, le législateur a énoncé explicitement au par. 16.1(7) qu'« *[a]ucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.* »

[40] The argument is that if Parliament had intended adult witnesses with mental disabilities to be competent to testify simply on the basis of the ability to communicate and the making of a promise, it would have enacted a ban on questioning them on their understanding of the nature of the obligation to tell the truth, as it did for child witnesses under s. 16.1(7). The absence of such a provision, it is said, requires us to draw the inference that Parliament intended that *adult* witnesses with mental disabilities *must* be questioned on the obligation to tell the truth.

[41] First, this argument overlooks the fact that Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children.

[42] Moreover, it is apparent from the Parliamentary works on Bill C-2 that s. 16.1(7) was intended to confirm the existing formal requirement of a promise alone, and not to modify the law: see Appendix B. The record of the standing House of Commons committee which studied Bill C-2 contains a discussion between Joe Comartin and Professor Nicholas Bala, during a debate on the phrasing of s. 16.1(7), which revealed that the original intent of s. 16(3) was to allow children and adults with mental disabilities to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence:

[Prof. Nicholas Bala:] . . . the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

[40] L'intimé plaide que si le législateur avait voulu que les adultes ayant une déficience intellectuelle soient habiles à témoigner tout simplement s'ils sont capables de communiquer les faits dans leur témoignage en promettant de dire la vérité, il aurait interdit expressément qu'ils soient interrogés sur leur compréhension de la nature de l'obligation de dire la vérité, comme il l'a fait pour les enfants au par. 16.1(7). L'absence d'une telle disposition, prétend-on, nous oblige à déduire que le législateur voulait que les *adultes* ayant une déficience intellectuelle soient *inévitablement* interrogés sur l'obligation de dire la vérité.

[41] Premièrement, cet argument ne tient pas compte du fait que, en adoptant en 2005 les modifications à la *Loi sur la preuve au Canada*, le législateur visait exclusivement les enfants. Les modifications ont été apportées comme suite au rapport Bala traitant des problèmes associés à la poursuite des actes criminels perpétrés contre les enfants. Les débats de la Chambre des communes portant sur l'art. 16.1 attestent que les modifications de 2005 avaient exclusivement trait aux enfants.

[42] En outre, il ressort des travaux parlementaires portant sur le projet de loi C-2 que le par. 16.1(7) visait à confirmer l'exigence formelle existante d'une promesse seulement, et non pas à modifier l'état du droit : voir l'annexe B. On trouve, aux procès-verbaux du comité parlementaire permanent de la Chambre des communes qui a étudié le projet de loi C-2, un échange entre Joe Comartin et le professeur Nicholas Bala survenu au cours d'un débat portant sur la formulation du par. 16.1(7); cet échange révèle que, à l'origine, le par. 16(3) devait permettre aux enfants et aux adultes ayant une déficience intellectuelle de témoigner en ne faisant que promettre de dire la vérité, dès qu'ils étaient jugés capables de communiquer les faits dans leur témoignage :

[Prof. Nicholas Bala :] . . . ma préoccupation découle du fait que la loi actuelle a été interprétée de façon très étroite par les juges. Quand on consulte les transcriptions — j'ai été témoin en 1988, quand les dispositions sont entrées en vigueur — je crois que les gens ont pensé : « Eh bien, nous n'avons pas besoin d'être explicites à cet endroit, car les juges comprendront. »

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"? [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

[43] This view was confirmed by Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of the Department of Justice Canada, during her opening statement to the Standing Senate Committee on Legal and Constitutional Affairs:

[Ms. Catherine Kane:] . . . These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the Evidence in an effort to permit children's evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional*

Évidemment, nous devons faire confiance à notre magistrature au sujet d'un grand nombre de questions, mais, pour certains enjeux, je crois qu'il est important de les orienter le plus possible. Je crains qu'un juge lise ceci — et nous avons une imposante jurisprudence qui reflète cela — et se dis[e] : « Bon, je ne peux t'interroger pour déterminer si tu comprends la nature de la promesse, mais est-ce que je peux te poser des questions sur le sens de la vérité? » Le Parlement prévoit explicitement, au paragraphe 16.1(6), qu'ils seront tenus de promettre de dire la vérité. On ne peut interroger les enfants sur la nature de la promesse, mais est-ce qu'on peut leur poser des questions sur le sens de « vérité » et de « mensonge »? [Je souligne; p. 7.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile*, nº 26, 1re sess., 38e lég., 24 mars 2005)

[43] Cette opinion a été confirmée par Mme Catherine Kane, directrice du Centre de la politique concernant les victimes du ministère de la Justice du Canada, au cours de sa déclaration d'ouverture devant le Comité sénatorial permanent des Affaires juridiques et constitutionnelles :

[Mme Catherine Kane :] . . . Ces modifications ont été apportées en 1988 pour rendre plus facilement acceptables les témoignages des enfants. Cependant, d'après la manière dont cette disposition a été interprétée dans certains procès, nous n'avons pas encore observé d'acceptation sans réserve de témoignages d'enfants.

Si ces deux critères sont respectés, un enfant témoigne sous serment ou sous affirmation solennelle. Cependant, si l'enfant ne comprend pas la nature du serment ou de l'affirmation mais est capable de communiquer la preuve, celle-ci est reçue sur promesse de dire la vérité. C'est la loi actuelle. Bien que cela puisse paraître logique à première vue, les interprétations et applications de ces dispositions ne reflètent pas l'intention du Parlement de modifier la Loi sur la preuve de manière à ce que les témoignages des enfants soient plus facilement acceptés.

Tel qu'il est interprété par les tribunaux, l'article 16 stipule qu'avant qu'un enfant soit autorisé à témoigner, il doit être assujetti à un interrogatoire pour déterminer son degré d'entendement de l'obligation de dire la vérité et du concept d'une promesse, et ses capacités de communiquer. [Je souligne; p. 105-106.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et*

Affairs, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Therefore, it cannot be inferred that Parliament's failure to extend the express ban on questioning in s. 16.1(7) to adult witnesses shows an intent to permit such questioning of adult witnesses with mental disabilities.

[44] Second, as already mentioned, the wording of s. 16(3) governing the competence of adult witnesses had since 1987 required only a promise to tell the truth. There was no need for Parliament to add a provision on questioning an adult witness's understanding of the nature of the obligation to tell the truth in s. 16(3). The fact that Parliament did so 18 years later for children's evidence under s. 16.1(7) reflects concern with the fact that courts in children's cases, such as *Khan*, were continuing to engage in this type of questioning, instead of accepting a simple promise to tell the truth. It does not evince an intention that Parliament intended the words "promising to tell the truth" to have different meanings in ss. 16(3) and 16.1(6).

[45] Third, the argument that the enactment of s. 16.1(7) for children but not for adults endorsed as applicable to adult witnesses the earlier judicial interpretation of the provisions relating to children does not take into account s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

45. (1) [Repeal does not imply enactment was in force] The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

(2) [Amendment does not imply change in law] The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

constitutionnelles, nº 18, 1re sess., 38e lég., 7 juillet 2005)

Par conséquent, on ne peut conclure que l'omission du législateur d'appliquer aux adultes l'interdiction explicite de poser des questions qui figure au par. 16.1(7) révèle une intention de permettre que des questions soient posées aux adultes ayant une déficience intellectuelle.

[44] Deuxièmement, comme je l'ai déjà mentionné, le libellé du par. 16(3) régissant l'habilité des adultes à témoigner exigeait uniquement, depuis 1987, une promesse de dire la vérité. Il n'était pas nécessaire que le législateur ajoute au par. 16(3) une disposition interdisant que l'on interroge un adulte pour vérifier s'il comprend la nature de l'obligation de dire la vérité. Le fait que le législateur ait, 18 ans plus tard, ajouté une telle disposition au par. 16.1(7) relativement au témoignage des enfants traduit son inquiétude de voir que, dans les affaires relatives à des enfants, comme l'affaire *Khan*, les tribunaux permettaient toujours ce type d'interrogatoire plutôt que d'accepter une simple promesse de dire la vérité. Cela ne démontre pas que le législateur voulait que les mots « en promettant de dire la vérité » aient des significations différentes au par. 16(3) et au par. 16.1(6).

[45] Troisièmement, l'argument selon lequel l'adoption du par. 16.1(7) relativement aux enfants et non aux adultes a confirmé que l'interprétation judiciaire des dispositions ayant trait aux enfants s'applique aux adultes ne tient pas compte de l'art. 45 de la *Loi d'interprétation* fédérale, L.R.C. 1985, ch. I-21, qui prévoit ce qui suit :

45. (1) [Absence de présomption d'entrée en vigueur] L'abrogation, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration portant que le texte était auparavant en vigueur ou que le Parlement, ou toute autre autorité qui l'a édicté, le considérait comme tel.

(2) [Absence de présomption de droit nouveau] La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles.

(3) [Repeal does not declare previous law] The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

(4) [Judicial construction not adopted] A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

[46] Section 45(3) of the *Interpretation Act* provides that the amendment of an enactment (in this case the adoption of s. 16.1(7)) shall not be deemed to involve any declaration as to the meaning of the previous law (in this case s. 16(3)). Therefore, no inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children.

[47] Additionally, s. 45(4) of the *Interpretation Act* states that the re-enactment of a provision (in this case, s. 16 with respect to adults with mental disabilities) is not sufficient to infer that Parliament adopted the provision's judicial interpretation which prevailed at the time of the re-enactment. It follows that the fact that s. 16 was re-enacted for adults with mental disabilities in 2005 does not, alone, imply that Parliament intended to countenance the judicial interpretation of this section which required understanding the obligation to tell the truth.

[48] Fourth, the argument that the absence of the equivalent of s. 16.1(7) in s. 16(3) means that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth is logically flawed. The argument rests on the premise that s. 16(3), unless amended, requires an inquiry into the witness's understanding of the obligation to tell the truth. On this basis, it asserts that, unless the ban on questioning in s. 16.1(7) dealing with children is read into s. 16(3), such questioning must be conducted. Thus, my colleague Binnie J. states that "[t]he Crown invites us, in effect, to apply the 'don't ask' rule governing

(3) [Absence de déclaration sur l'état antérieur du droit] L'abrogation ou la modification, en tout ou en partie, d'un texte ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit.

(4) [Absence de confirmation de l'interprétation judiciaire] La nouvelle édiction d'un texte, ou sa révision, refonte, codification ou modification, n'a pas valeur de confirmation de l'interprétation donnée, par décision judiciaire ou autrement, des termes du texte ou de termes analogues.

[46] Le paragraphe 45(3) de la *Loi d'interprétation* prévoit que la modification d'un texte (en l'espèce, l'adoption du par. 16.1(7)) ne constitue pas ni n'implique une déclaration sur l'état antérieur du droit (en l'espèce, le par. 16(3)). Ainsi, aucune inférence quant au sens du par. 16(3) ne découle de la simple adoption du par. 16.1(7) relativement aux enfants.

[47] De plus, le par. 45(4) de la *Loi d'interprétation* prévoit que la nouvelle édiction d'une disposition (en l'espèce, l'art. 16 relativement aux adultes ayant une déficience intellectuelle) ne permet pas d'inférer que le législateur a adopté l'interprétation judiciaire de la disposition qui prévalait à l'époque de la nouvelle édiction. Il s'ensuit que le fait que l'art. 16 ait été édicté de nouveau en 2005 en ce qui concerne les adultes ayant une déficience intellectuelle ne donne pas en soi à penser que le législateur voulait favoriser l'interprétation judiciaire de cet article qui exigeait que la personne comprenne l'obligation de dire la vérité.

[48] Quatrièmement, l'argument selon lequel l'absence, au par. 16(3), d'une disposition équivalente au par. 16.1(7) signifie que les adultes ayant une déficience intellectuelle doivent démontrer qu'ils comprennent la nature de l'obligation de dire la vérité n'est pas logique. Cet argument repose sur l'hypothèse selon laquelle le par. 16(3), s'il n'est pas modifié, exige que l'on vérifie si la personne comprend l'obligation de dire la vérité. Sur ce fondement, on fait valoir que les adultes doivent être interrogés à moins que l'interdiction de poser des questions aux enfants qui figure au par. 16.1(7) ne soit considérée comme incluse au par. 16(3). Ainsi,

children to adults whose mental capacity is challenged" (para. 127).

[49] The fallacy in this argument is the starting assumption that s. 16(3) requires importing a "don't ask" rule. As explained earlier, it does not. Section 16(3) sets two requirements for the competence of adults with mental disabilities: the ability to communicate the evidence and a promise to tell the truth. It is self-sufficient. Nothing further need be imported.

[50] Fifth, and following from the previous point, the argument relies on the assumption that unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, adult witnesses with mental disabilities must be treated differently, and subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify. Thus Binnie J. states that before s. 16(3) can be read as importing the "don't ask" rule, it is for the Crown to establish that there is no difference between children and adults with mental disabilities on the test of what reasonable people would accept. He opines that an assertion of equivalency is "pure assertion on a key issue" (para. 130).

[51] There are several answers to this "equivalency" argument. First, like the previous argument, it rests on the mistaken assumption that the Crown asks us to import a "don't ask" rule into s. 16(3). The plain words of s. 16(3) do not require an understanding of the obligation to tell the truth, and it is for the party seeking to depart from the text of s. 16(3) to demonstrate that adults with mental disabilities should be treated differently from children. Second, the argument suffers from inconsistency. It claims that the equivalency of the vulnerabilities of these two groups of witnesses is "pure assertion

selon mon collègue le juge Binnie, « [l]e ministère public nous invite, en réalité, à appliquer aux adultes dont la capacité mentale est mise en question la règle interdisant de poser des questions aux enfants » (par. 127).

[49] Cet argument est fallacieux car il suppose au départ qu'il faut incorporer au par. 16(3) une règle interdisant de poser des questions. Comme je l'ai déjà expliqué, ce n'est pas le cas. Le paragraphe 16(3) énonce deux conditions relatives à l'habilité à témoigner des adultes ayant une déficience intellectuelle : la capacité de communiquer les faits dans leur témoignage et la promesse de dire la vérité. Cette disposition est complète en soi. Il n'y a rien d'autre à y incorporer.

[50] Cinquièmement, et dans la lignée de ce qui précède, l'argument repose sur l'hypothèse voulant que, sauf s'il peut être démontré que les adultes ayant une déficience intellectuelle sont comme les enfants, ou leur ressemblent, alors ils doivent être traités différemment et doivent subir un interrogatoire pour que l'on vérifie, avant de déterminer s'ils sont habiles à témoigner, qu'ils comprennent la nature de l'obligation de dire la vérité. Ainsi, le juge Binnie affirme que, avant que l'on incorpore au par. 16(3) la règle interdisant de poser des questions, le ministère public doit démontrer qu'il n'existe aucune différence entre les enfants et les adultes ayant une déficience intellectuelle selon le critère de ce qu'accepteraient des personnes raisonnables. Il est d'avis qu'une prétention d'équivalence n'est que « pure prétention relativement à une question clé » (par. 130).

[51] Il existe plusieurs façons de répondre à cet argument de l'« équivalence ». Premièrement, à l'instar de l'argument précédent, il repose sur l'hypothèse erronée voulant que le ministère public nous demande d'incorporer au par. 16(3) une règle interdisant de poser des questions. Le libellé explicite du par. 16(3) n'exige pas que la personne comprenne l'obligation de dire la vérité, et il appartient à la partie qui cherche à dévier du texte du par. 16(3) de démontrer que les adultes ayant une déficience intellectuelle doivent être traités différemment des enfants. Deuxièmement, l'argument est incohérent.

on a key issue", but at the same time claims that the previous judge-made law for children (*Khan*) should apply to adult witnesses with mental disabilities. Third, one may question how equivalency, were it needed, should be established: Is the proper approach to competence what reasonable people would conclude, or judicial opinion informed by assessment of the situation and expert opinion?

[52] The final and most compelling answer to the equivalency argument is simply this: When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? Parliament, by applying essentially the same test to both under s. 16(3) and s. 16.1(3) and (6) of the *Canada Evidence Act*, implicitly finds no difference. In my view, judges should not import one.

[53] I conclude that s. 16(3) of the *Canada Evidence Act*, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.

C. *The Jurisprudence*

[54] I have concluded that s. 16(3), on its plain words and in its context, reveals only two requirements for an adult with mental disabilities to have the capacity to testify: (1) that the witness be able to communicate the evidence, and (2) that the person promise to tell the truth. It is necessary next to consider whether the jurisprudence requires a different result. My colleague Binnie J. argues that the cases, and in particular *Khan*, require that "promising to

D'une part, selon cet argument, l'équivalence entre ces deux groupes de témoins vulnérables n'est que « pure prétention relativement à une question clé », mais d'autre part, toujours selon cet argument, le droit jurisprudentiel relatif aux enfants (*Khan*) devrait s'appliquer aux adultes ayant une déficience intellectuelle. Troisièmement, il faut se demander de quelle façon établir l'équivalence, si elle est nécessaire : la démarche qu'il convient d'adopter à l'égard de l'habilité à témoigner est-elle ce qu'une personne raisonnable pourrait conclure, ou ce que le juge peut conclure en se fondant sur une appréciation de la situation et les opinions d'experts?

[52] La réponse finale, et la plus convaincante, à l'argument de l'équivalence est tout simplement celle-ci : en ce qui concerne l'habilité à témoigner, on peut se demander quelle est la différence, précisément, entre un adulte ayant la capacité mentale d'un enfant de six ans et un enfant de six ans ayant la capacité mentale d'un enfant de six ans. En appliquant essentiellement le même critère aux par. 16(3), 16.1(3) et 16.1(6) de la *Loi sur la preuve au Canada*, le législateur conclut implicitement qu'il n'y a aucune différence. Selon moi, les juges ne devraient pas en introduire une.

[53] Je conclus que le par. 16(3) de la *Loi sur la preuve au Canada*, interprété correctement, prévoit deux conditions pour qu'un adulte ayant une déficience intellectuelle témoigne : il doit être capable de communiquer les faits dans son témoignage et promettre de dire la vérité. Il n'y a pas lieu d'incorporer à la disposition une condition supplémentaire voulant que la personne démontre qu'elle comprend la nature de l'obligation de dire la vérité.

C. *La jurisprudence*

[54] J'ai conclu que suivant le libellé explicite et le contexte du par. 16(3), seulement deux conditions sont requises pour qu'un adulte ayant une déficience intellectuelle soit habile à témoigner : (1) la personne doit être en mesure de communiquer les faits dans son témoignage, et (2) la personne doit promettre de dire la vérité. Il faut ensuite se demander si la jurisprudence exige un résultat différent. Mon collègue le juge Binnie prétend

tell the truth" in s. 16(3) must be read as impliedly importing an additional requirement — an understanding of the nature of the obligation engaged by the promise. With respect, I cannot agree.

[55] It is necessary at the outset to describe what *Khan* decided. *Khan* was concerned with the predecessor of s. 16, which was first enacted in 1893 (S.C. 1893, c. 31, s. 25) and dealt only with children. The provision required that the proposed witness "understan[d] the duty of speaking the truth". This phrase was deleted when the provision was amended in 1987. Explaining the statutory requirement that the witness must "understan[d] the duty of speaking the truth" in *Khan*, Robins J.A. stated:

> To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [Emphasis added; p. 206.]

[56] This oft-cited statement of the law proved difficult to apply. The first sentence suggests that the threshold for testimonial competence is low, based on truth telling in "everyday social conduct". This suggests that the judge need only be satisfied that the witness understands the difference between truth and falsehood in relation to everyday matters and activities — not in some abstract metaphysical sense. The second sentence in this passage from *Khan*, specifically the phrases "knows that it is wrong to lie" and "understands the necessity to tell the truth" (emphases added), move beyond everyday social conduct into more abstract, philosophical realms. In *obiter*, Robins J.A. opined that the same test should be applied to the post-1987 section, on the grounds that without the requirement

que la jurisprudence, et notamment l'arrêt *Khan*, exige que les mots « en promettant de dire la vérité » qui figurent au par. 16(3) soient interprétés comme incorporant implicitement une condition supplémentaire — que la personne comprenne la nature de l'obligation qui découle de la promesse. En toute déférence, je ne puis souscrire à cette opinion.

[55] D'entrée de jeu, il est nécessaire d'exposer la décision dans l'arrêt *Khan*. L'arrêt portait sur la disposition antérieure à l'art. 16, adoptée pour la première fois en 1893 (S.C. 1893, ch. 31, art. 25), qui n'avait trait qu'aux enfants. La disposition exigeait du témoin éventuel qu'il « compren[ne] le devoir de dire la vérité ». Ces mots ont été supprimés lorsque la disposition a été modifiée en 1987. Expliquant l'exigence prévue par la loi selon laquelle le témoin doit « comprend[re] le devoir de dire la vérité », le juge Robins de la Cour d'appel a déclaré ce qui suit dans *Khan* :

> [TRADUCTION] Pour satisfaire aux normes moins sévères applicables au témoignage qui n'est pas donné sous serment, il suffit que l'enfant comprenne le devoir de dire la vérité au sens de la conduite sociale ordinaire de la vie quotidienne. On peut en faire la preuve par une série de questions simples permettant de déterminer si l'enfant comprend la différence entre la vérité et le mensonge, s'il sait qu'il n'est pas bien de mentir, s'il comprend la nécessité de dire la vérité et promet de le faire. [Je souligne; p. 206.]

[56] L'application de cet énoncé du droit maintes fois cité s'est révélée difficile. La première phrase donne à penser que le critère relatif à l'habilité à témoigner est peu exigeant; il suffit de dire la vérité au sens de la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne ». Cela donne à penser que le juge doit simplement être convaincu que le témoin comprend la différence entre la vérité et le mensonge dans le contexte de la vie quotidienne — et non pas dans un contexte métaphysique abstrait. La deuxième phrase figurant dans ce passage tiré de *Khan*, plus précisément les mots « sait qu'il n'est pas bien de mentir » et « comprend la nécessité de dire la vérité » (je souligne), vont plus loin que la conduite sociale ordinaire de la vie quotidienne. Ils relèvent du domaine plus abstrait

that the witness understand what a promise is and the importance of keeping it, the promise would be an "empty gesture".

[57] In *R. v. Farley* (1995), 23 O.R. (3d) 445, the Ontario Court of Appeal adopted this *obiter dictum* and applied it to the post-1987 version of s. 16(3), the provision applicable in this case. Other provincial courts of appeal followed suit: *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182. In *R. v. Rockey*, [1996] 3 S.C.R. 829, a minority of this Court, *per* McLachlin J., held that a child was incompetent to testify on the basis of his inability to *communicate* the evidence, referring to *Farley* with approval; the question of whether s. 16(3) incorporated the *Khan* test was not at issue in that case. Appellate courts continue to require demonstration of an understanding of the duty to speak the truth under s. 16(3): *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.); *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (Nfld.); *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. In the case at bar, the Ontario Court of Appeal affirmed that view, upholding the trial judge's insistence on the understanding of the duty to speak the truth not merely in "everyday social conduct", but on an understanding of the duty *abstracted* from everyday situations.

[58] This is the first case in which this Court has been squarely called upon to interpret s. 16(3) of the *Canada Evidence Act* and confront the legacy of the *obiter dicta* in *Khan*. In my view, the test proposed in *Khan* is unhelpful and inapplicable, insofar as it is read as requiring or condoning an

de la philosophie. Dans une remarque incidente, le juge Robins a exprimé l'avis que le même critère devrait être appliqué à la disposition adoptée en 1987, car la promesse serait un « geste vide de sens » si l'on n'exigeait pas du témoin qu'il comprenne ce qu'est une promesse et l'importance de la respecter.

[57] Dans l'arrêt *R. c. Farley* (1995), 23 O.R. (3d) 445, la Cour d'appel de l'Ontario a adopté cette remarque incidente et l'a appliquée à la version de 1987 du par. 16(3), la disposition applicable en l'espèce. D'autres cours d'appel provinciales ont emboîté le pas : *R. c. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. c. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. c. S.M.S.* (1995), 160 R.N.-B. (2e) 182. Dans *R. c. Rockey*, [1996] 3 R.C.S. 829, la juge McLachlin, au nom des juges minoritaires de la Cour, a cité avec approbation l'arrêt *Farley* pour conclure qu'un enfant était inhabile à témoigner en raison de son incapacité à *communiquer* les faits dans son témoignage; la question de savoir si le par. 16(3) incorporait le critère formulé dans l'arrêt *Khan* n'a pas été soulevée dans cette affaire. Les tribunaux d'appel exigent toujours que la personne démontre qu'elle comprend l'obligation de dire la vérité en vertu du par. 16(3) : *R. c. Ferguson* (1996), 112 C.C.C. (3d) 342 (C.-B.); *R. c. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (T.-N.); *R. c. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. c. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. c. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. c. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. En l'espèce, la Cour d'appel de l'Ontario a confirmé ce point de vue, en approuvant l'accent mis par le juge du procès sur la nécessité pour la personne de comprendre l'obligation de dire la vérité non pas seulement dans la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne », mais également que la personne comprenne l'obligation *sans égard* aux situations de tous les jours.

[58] Il s'agit en l'espèce de la première affaire dans laquelle la Cour est directement appelée à interpréter le par. 16(3) de la *Loi sur la preuve au Canada* et est confrontée à l'héritage laissé par les remarques incidentes formulées dans *Khan*. Selon moi, le critère proposé dans *Khan* n'est d'aucune

abstract inquiry into the nature of the obligation to tell the truth.

[59] First and foremost, *Khan* was concerned with a substantially different pre-1987 version of s. 16, which was adopted in 1893 and which explicitly required that the proposed witness "understands the duty of speaking the truth". The current provision requires only that the witness be able to communicate the evidence and promise to tell the truth. It speaks only of two practical, less abstract, requirements — the ability to communicate the evidence and a promise to tell the truth. In short, *Khan* imposed a requirement to demonstrate understanding of the nature of the obligation to tell the truth, based on the phrase "understands the duty of speaking the truth". That phrase has been removed from the current s. 16(3). It follows that *Khan* simply does not apply to this case, and that the *obiter dictum* in *Khan* suggesting that it does should be rejected. In 1987, Parliament deleted the requirement of understanding the nature of the duty to tell the truth. Judges should not bring it back in.

[60] Second, the *Khan* test, as already noted, is ambivalent. It first suggests that all that is required is an understanding of the duty to speak the truth "in terms of ordinary everyday social conduct" (p. 206). However, it then goes on to illustrate this test in terms abstracted from everyday social conduct. In my view, the former approach is preferable.

[61] This lower threshold recognizes that witnesses of limited mental ability, whether by reason of age or disability, understand and articulate events in the concrete terms of the world around them. The capacity to abstract from the concrete and draw generalizations about conduct unrelated to concrete situations typically develops at a later, more advanced stage of mental development. A

utilité et est inapplicable, dans la mesure où il est interprété comme exigeant ou justifiant un interrogatoire dans l'abstrait sur la nature de l'obligation de dire la vérité.

[59] D'abord et avant tout, l'arrêt *Khan* portait sur une version très différente, antérieure à 1987, de l'art. 16. Cette version, adoptée en 1893, exigeait explicitement que le témoin éventuel « compren[ne] le devoir de dire la vérité ». La disposition actuelle exige seulement que la personne soit capable de communiquer les faits dans son témoignage et promette de dire la vérité. Elle n'impose que deux conditions pratiques, moins abstraites — la capacité de communiquer les faits dans son témoignage et une promesse de dire la vérité. En bref, en se fondant sur les mots « comprend le devoir de dire la vérité », la cour dans l'arrêt *Khan* a imposé l'obligation pour la personne de démontrer qu'elle comprend la nature de l'obligation de dire la vérité. Ces mots ont été radiés dans la version actuelle du par. 16(3). Il s'ensuit que l'arrêt *Khan* ne s'applique tout simplement pas en l'espèce et qu'il faut rejeter la remarque incidente formulée dans *Khan* donnant à penser que cet arrêt s'applique toujours. En 1987, le législateur a supprimé l'exigence pour la personne de comprendre la nature de l'obligation de dire la vérité. Les juges ne devraient pas la réintroduire.

[60] Deuxièmement, le critère formulé dans l'arrêt *Khan*, comme je l'ai déjà signalé, est ambivalent. Il laisse d'abord entendre que le par. 16(3) exige seulement une compréhension du devoir de dire la vérité [TRADUCTION] « au sens de la conduite sociale ordinaire de la vie quotidienne » (p. 206). Toutefois, il poursuit en décrivant ce critère en termes qui font abstraction de la conduite sociale ordinaire de la vie quotidienne. Pour ma part, je préfère la première approche.

[61] Selon ce critère moins exigeant, les personnes ayant une capacité mentale limitée, en raison de leur âge ou d'une incapacité, comprennent concrètement les événements dans le monde qui les entoure et sont en mesure de les décrire. La capacité de considérer les choses dans l'abstrait et de faire des généralisations à propos de comportements non liés à des situations concrètes apparaît

child or adult with mental disabilities may be able to distinguish between what is true and false or right and wrong in a particular situation, yet lack the ability to articulate in general language the reasons for this understanding. To insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations, may result in the witness's evidence being excluded, even though it is reliable.

[62] Third, as discussed above, Parliament's response to *Khan*'s insistence on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to, was to expressly forbid such inquiries in the case of children by enacting s. 16.1(7) in 2005. Why then, one may ask, should courts struggle to read a contrary purpose into the plain language of s. 16, which requires only a concrete inquiry into whether the proposed witness can communicate the evidence and a promise to tell the truth?

[63] I conclude that, insofar as the authorities suggest that "promising to tell the truth" in s. 16(3) should be read as requiring an abstract inquiry into an understanding of the obligation to tell the truth, they should be rejected. All that is required is that the witness be able to communicate the evidence and promise to tell the truth.

D. *Policy Considerations*

[64] I have concluded that s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. Mentally limited people may well understand the difference between the truth and

généralement à un stade plus avancé du développement mental. Un enfant ou un adulte ayant une déficience intellectuelle peut, dans une situation donnée, être capable de distinguer le vrai du faux, ou le bien du mal, mais ne pas pouvoir formuler en langage ordinaire les raisons de cette compréhension. Insister sur la formulation de la nature de l'obligation de dire la vérité, sans égard à des situations particulières, peut avoir pour conséquence que le témoignage de la personne soit exclu, même s'il est fiable.

[62] Troisièmement, comme je l'ai déjà mentionné, en adoptant le par. 16.1(7) en 2005 en réponse à l'accent mis dans l'arrêt *Khan* sur la compréhension, en termes abstraits, du devoir de dire la vérité et des questions d'ordre métaphysique que cet accent engendrait, le législateur a interdit explicitement ces interrogatoires lorsque des enfants sont en cause. Il faut alors se demander pourquoi les tribunaux s'évertueraient à donner un sens contraire au libellé clair de l'art. 16, lequel oblige seulement le juge à vérifier si, concrètement, le témoin éventuel est capable de communiquer les faits dans son témoignage et s'il promet de dire la vérité.

[63] Je conclus que dans la mesure où les autorités prétendent que les mots « en promettant de dire la vérité » figurant au par. 16(3) devraient être interprétés comme obligeant le juge de s'assurer que la personne comprend, dans l'abstrait, ce qu'est l'obligation de dire la vérité, leurs décisions doivent être rejetées. Tout ce qui est exigé, c'est que le témoin soit capable de communiquer les faits dans son témoignage et qu'il promette de dire la vérité.

D. *Considérations de politique générale*

[64] J'ai conclu que le par. 16(3) impose deux conditions relativement à l'habilité à témoigner d'un adulte ayant une déficience intellectuelle : (1) la capacité de communiquer les faits dans son témoignage et (2) une promesse de dire la vérité. Il n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite à la personne afin de voir si elle comprend d'une manière générale la différence entre la vérité et la fausseté et l'obligation de dire la vérité devant le tribunal. Des

a lie and know they should tell the truth, without being able to articulate in general terms the nature of truth or why and how it fastens on the conscience in a court of law. Section 16(3), in assessing the witness's capacity, focuses on the concrete acts of communicating and promising. The witness is not required to explain the difference between the truth and a lie, or what makes a promise binding. I have argued that this result follows from the plain words of s. 16 of the *Canada Evidence Act*, and that judges should not by implication add other elements to the dual requirements of an ability to communicate evidence and a promise to tell the truth imposed by s. 16(3).

[65] The discussion of the proper interpretation of s. 16(3) of the *Canada Evidence Act* would not be complete, however, without addressing the policy concerns underlying the issue. Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity — a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.

[66] The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the

personnes ayant des capacités intellectuelles limitées peuvent bien faire la différence entre la vérité et le mensonge et savoir qu'elles doivent dire la vérité, sans être capables d'énoncer en termes généraux la nature de la vérité ou pourquoi et en quoi cela fait appel à la conscience dans une cour de justice. En ce qui a trait à l'appréciation de la capacité du témoin, le par. 16(3) met l'accent sur les actes concrets que sont la communication et la promesse. Le témoin n'a pas à expliquer la différence entre la vérité et le mensonge, ou ce qui rend une promesse obligatoire. J'ai indiqué que cela découle du libellé explicite de l'art. 16 de la *Loi sur la preuve au Canada*, et que les juges ne devraient pas ajouter implicitement d'autres éléments aux conditions de capacité de communiquer les faits dans son témoignage et de promesse de dire la vérité qu'impose le par. 16(3).

[65] L'analyse relative à l'interprétation correcte du par. 16(3) de la *Loi sur la preuve au Canada* ne serait toutefois pas complète sans que soient abordées les considérations de politique générale qui sous-tendent cette question. Deux principes susceptibles de s'opposer entrent en jeu. Le premier est le besoin social de traduire en justice ceux qui agressent sexuellement des personnes ayant des capacités mentales limitées — un groupe vulnérable trop facilement exploité. Le deuxième est la nécessité de garantir la tenue d'un procès équitable pour l'accusé et de prévenir les déclarations de culpabilité injustifiées.

[66] La première considération de politique générale va de soi et demande peu de précision. Les personnes ayant une déficience intellectuelle sont des proies faciles pour les agresseurs sexuels. Dans le passé, les victimes d'agressions sexuelles ayant une déficience intellectuelle ont souvent été empêchées de témoigner, non pas parce qu'elles ne pouvaient pas relater ce qui s'était passé, mais parce qu'elles n'étaient pas capables d'exprimer en termes abstraits la différence entre la vérité et le mensonge et la nature de l'obligation qu'impose la promesse de dire la vérité. Comme je l'ai déjà expliqué, ces personnes sont peut-être capables de dire la vérité et, en fait, de comprendre que lorsqu'elles promettent de dire la vérité, elles doivent dire la vérité.

obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.

Rejeter leur témoignage au motif qu'elles ne peuvent pas expliquer en termes philosophiques la nature de l'obligation de dire la vérité, ce que même les personnes ayant une intelligence normale peuvent avoir de la difficulté à faire, équivaut à écarter des témoignages fiables et pertinents et à empêcher que soient traduits en justice des auteurs de crimes contre des personnes ayant une déficience intellectuelle.

[67] The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.

[67] L'incapacité d'intenter des poursuites relativement à ces crimes afin que justice soit faite, quelle que soit l'issue de la cause, peut avoir un effet dévastateur pour la famille de la victime, et pour la victime elle-même. Mais le préjudice ne s'arrête pas là. En fixant des critères trop exigeants relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle, on permet à des contrevenants d'agresser sexuellement ces personnes presque impunément, ce qui compromet l'un des *desiderata* fondamentaux de la règle de droit, à savoir que la loi doit être susceptible d'application. Ainsi, une catégorie entière de contrevenants se trouvent dégagés de toute responsabilité criminelle relativement à leurs actes et l'on marginalise davantage les victimes déjà vulnérables des prédateurs sexuels. À défaut de véritables possibilités que des poursuites soient intentées, ces victimes sont laissées sans défense face à leurs agresseurs.

[68] What then of the policy considerations on the other side of the equation? Here again, the starting point is clear. The *Canadian Charter of Rights and Freedoms* guarantees a fair trial to everyone charged with a crime. This right cannot be abridged; an unfair trial can never be condoned.

[68] Qu'en est-il alors des considérations de politique générale relatives à l'autre aspect de l'équation? Là encore, le point de départ est clair. La *Charte canadienne des droits et libertés* garantit la tenue d'un procès équitable à toute personne accusée d'un acte criminel. Ce droit ne peut pas être enfreint; un procès inéquitable n'est jamais acceptable.

[69] It is neither necessary nor wise to enter on the vast subject of what constitutes a fair trial. One searches in vain for exhaustive definitions in the jurisprudence. Rather, the approach taken in the jurisprudence is to ask whether particular rules or occurrences render a trial unfair. It is from that perspective that we must approach this issue in this case.

[69] Il n'est ni nécessaire ni sage d'aborder le vaste sujet de ce qui constitue un procès équitable. On cherchera en vain des définitions exhaustives dans la jurisprudence. L'approche retenue par les tribunaux consiste plutôt à déterminer si des règles ou des faits particuliers rendent un procès inéquitable. C'est dans cette optique qu'il nous faut aborder ce sujet en espèce.

[70] The question is this: Does allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth render a trial unfair? In my view, the answer to this question is no.

[71] The common law, upon which our current rules of evidence are founded, recognized a variety of rules governing the capacity to testify in different circumstances. The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury. Generally speaking, this threshold of reliability is met by establishing that the witness has the capacity to understand and answer the questions put to her, and by bringing home to the witness the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness — even those of normal intelligence who can take the oath or affirm — will in fact tell the truth, all the truth, or nothing but the truth. What the trial process seeks is merely a basic indication of reliability.

[72] Many cases, including *Khan*, have warned against setting the threshold for the testimonial competence too high for adults with mental disabilities: *R. v. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. This reflects the fact that such witnesses may be capable of giving useful, relevant and reliable evidence. It also reflects the fact that allowing the witness to testify is only the first step in the process. The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. The result may be that the trier of fact does not accept the witness's evidence, accepts only part of her evidence, or reduces the weight accorded to her evidence. This is a task that judges and juries perform routinely in a myriad of cases involving witnesses of unchallenged as well as challenged mental ability.

[70] La question est la suivante : le fait de permettre à une personne adulte ayant une déficience intellectuelle de témoigner lorsqu'elle peut communiquer les faits dans son témoignage et qu'elle promet de dire la vérité rend-il un procès inéquitable? Selon moi, il faut répondre non à cette question.

[71] La common law, le fondement de nos règles de preuve actuelles, prévoit diverses règles régissant l'habilité à témoigner dans différentes circonstances. Le fil d'or qui unit ces règles différentes et variables est le principe selon lequel le témoignage doit satisfaire à un seuil minimal de fiabilité pour qu'il soit présenté à un juge ou un jury. En règle générale, ce seuil de fiabilité est satisfait s'il est établi que le témoin a la faculté de comprendre les questions qui lui sont posées et d'y répondre, et si le témoin comprend qu'après avoir prêté serment ou fait une promesse ou une affirmation solennelle, il doit dire la vérité. Rien ne garantit qu'un témoin — même un témoin doué d'une intelligence normale qui peut prêter serment ou faire une affirmation solennelle — dira vraiment la vérité, toute la vérité et rien que la vérité. On recherche simplement dans le cadre du procès un indice élémentaire de fiabilité.

[72] De nombreuses décisions, notamment l'arrêt *Khan*, ont mis en garde contre le danger de fixer des exigences trop élevées relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle : *R. c. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. Cela traduit le fait que ces personnes peuvent être capables de rendre un témoignage utile, pertinent et fiable, et qu'en leur permettant de témoigner, elles franchissent seulement la première étape du processus. La déposition du témoin sera vérifiée par contre-interrogatoire. Le juge des faits examinera le comportement du témoin et sa façon de répondre aux questions. Il peut arriver que le juge des faits écarte la déposition de cette personne, qu'il ne la retienne qu'en partie ou qu'il y accorde une importance moindre. Il s'agit d'une tâche que les juges et les jurés effectuent couramment dans d'innombrables affaires mettant en cause des témoins dont les capacités mentales peuvent être, ou ne pas être, mises en question.

[73] The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this. Once the witness is allowed to testify, the ultimate protection of the accused's right to a fair trial lies in the rules governing admissibility of evidence and in the judge's or jury's duty to carefully assess and weigh the evidence presented. Together, these additional safeguards offer ample protection against the risk of wrongful conviction.

[73] La prescription selon laquelle le témoin doit être capable de communiquer les faits dans son témoignage et doit promettre de dire la vérité satisfait au seuil peu exigeant relatif à l'habilité à témoigner dans les cas comme celui en l'espèce. Dès lors que la personne est autorisée à témoigner, la protection du droit de l'accusé à un procès équitable repose ultimement sur les règles régissant l'admissibilité de la preuve et sur l'obligation du juge ou du jury d'examiner et d'apprécier soigneusement la preuve. Ensemble, ces mesures de sauvegarde supplémentaires offrent une protection adéquate contre le risque de déclaration de culpabilité injustifiée.

E. *Summary of the Section 16(3) Test*

[74] To recap, s. 16(3) of the *Canada Evidence Act* imposes two conditions for the testimonial competence of adults with mental disabilities:

(1) the witness must be able to communicate the evidence; and

(2) the witness must promise to tell the truth.

Inquiries into the witness's understanding of the nature of the obligation this promise imposes are neither necessary nor appropriate. It is appropriate to question the witness on her ability to tell the truth in concrete factual circumstances, in order to determine if she can communicate the evidence. It is also appropriate to ask the witness whether she in fact promises to tell the truth. However, s. 16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling.

[75] The following observations may be useful when applying s. 16(3) in the context of s. 16 of the *Canada Evidence Act*.

[76] First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may

E. *Résumé du critère prévu au par. 16(3)*

[74] Pour résumer, le par. 16(3) de la *Loi sur la preuve au Canada* impose deux conditions relativement à l'habilité à témoigner des adultes ayant une déficience intellectuelle :

(1) la personne doit être capable de communiquer les faits dans son témoignage;

(2) la personne doit promettre de dire la vérité.

Il n'est ni nécessaire ni opportun de vérifier si la personne comprend la nature de l'obligation que cette promesse comporte. Il convient de poser à la personne des questions sur son aptitude à dire la vérité dans des circonstances factuelles concrètes, afin de déterminer si elle peut communiquer les faits dans son témoignage. Il convient également de demander à la personne si elle promet de dire la vérité. Toutefois, le par. 16(3) n'exige pas qu'un adulte ayant une déficience intellectuelle démontre qu'il comprend la nature de la vérité *in abstracto* ou qu'il comprend les concepts moraux et religieux liés au devoir de dire la vérité.

[75] Les observations suivantes peuvent être utiles lorsqu'il s'agit d'appliquer le par. 16(3) dans le contexte de l'art. 16 de la *Loi sur la preuve au Canada*.

[76] Premièrement, le voir-dire relatif à l'habilité à témoigner d'un témoin éventuel constitue une

not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements.

[77] Second, although the *voir dire* should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.

[78] Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

[79] Fourth, the members of the proposed witness's surrounding who are personally familiar with her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on her development.

[80] Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

[81] Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?

[82] Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to

enquête indépendante : il ne peut être combiné à un voir-dire relatif à d'autres questions, comme celui de l'admissibilité des déclarations extrajudiciaires du témoin éventuel.

[77] Deuxièmement, un voir-dire devrait être bref, mais il est préférable d'entendre toute la preuve pertinente disponible pouvant raisonnablement être prise en considération avant d'empêcher une personne de témoigner. Il ne faut pas conclure trop rapidement à l'inhabilité d'une personne à témoigner.

[78] Troisièmement, la source principale de preuve lorsqu'il s'agit de déterminer si une personne est habile à témoigner est la personne elle-même. Son interrogatoire devrait être autorisé. Pour interroger un adulte ayant une déficience intellectuelle, il faut tenir compte de ses besoins particuliers et prendre les mesures d'adaptation qui s'imposent; les questions devraient être formulées patiemment, de façon claire et simple.

[79] Quatrièmement, les personnes de l'entourage qui connaissent personnellement le témoin éventuel sont les mieux placées pour comprendre son état quotidien. Elles peuvent être appelées, à titre de témoins des faits, à témoigner sur son développement.

[80] Cinquièmement, une preuve d'expert peut être produite si elle satisfait aux critères d'admissibilité; on préfère cependant toujours le témoignage d'experts ayant eu un contact personnel et régulier avec le témoin éventuel.

[81] Sixièmement, le juge du procès doit répondre à deux questions durant le voir-dire relatif à l'habilité à témoigner : a) le témoin éventuel comprend-il la nature du serment ou de l'affirmation solennelle, et b) est-il capable de communiquer les faits dans son témoignage?

[82] Septièmement, pour répondre à la deuxième question relative à la capacité de la personne de communiquer les faits dans son témoignage, le juge du procès doit vérifier de façon générale si la personne est capable de relater des faits concrets en

ask if she can differentiate between true and false everyday factual statements.

[83] Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

III. Application

[84] During the *voir dire* on K.B.'s testimonial capacity, the Crown posed a line of questions going to whether she could tell the difference between true and false factual statements in concrete circumstances. These were relevant to K.B.'s basic ability to communicate the evidence:

MR. SEMENOFF:

Q. How old are you now, [K.B.]?

A. I'm 22, you know that.

Q. 22? When's your birthday?

A. [Birth date].

Q. [Birth date]. Are you going to school now or are you done with school?

A. I'm not done in school yet.

Q. What school do you go to, [K.B.]?

A. [Name of school].

Q. How long -- do you know how long you've been going to [name of school]?

A. I don't know.

Q. Did you go to any school before you went to [name of school]?

A. From [name of previous school].

Q. From [name of previous school]. Okay.

comprenant les questions qui lui sont posées et en y répondant. Il peut être utile de se demander si la personne est en mesure de différencier entre de vraies et de fausses affirmations factuelles de tous les jours.

[83] Finalement, la personne peut témoigner sous serment ou affirmation solennelle si elle satisfait aux deux volets du critère. Si elle satisfait uniquement au deuxième volet du critère, elle peut témoigner en promettant de dire la vérité.

III. Application

[84] Au cours du voir-dire relatif à l'habilité de K.B. à témoigner, le ministère public a posé à K.B. une série de questions en vue de déterminer si elle pouvait dire la différence entre de vraies et de fausses affirmations factuelles dans des situations concrètes. Ces questions étaient pertinentes quant à la faculté élémentaire de K.B. à communiquer les faits dans son témoignage :

[TRADUCTION]

M. SEMENOFF :

Q. Quel âge as-tu actuellement, [K.B.]?

R. J'ai 22 ans, vous le savez.

Q. 22 ans? Quelle est ta date de naissance?

R. [Date de naissance].

Q. [Date de naissance]. Est-ce que tu vas présentement à l'école ou que tu as terminé tes études?

R. Je n'ai pas terminé mes études.

Q. À quelle école vas-tu, [K.B.]?

R. [Nom de l'école].

Q. Depuis combien de temps -- sais-tu depuis combien de temps tu vas à [nom de l'école]?

R. Je ne sais pas.

Q. Es-tu allée à une autre école avant d'aller à [nom de l'école]?

R. [Nom de l'autre école].

Q. [Nom de l'autre école]. D'accord.

Did you have a teacher from that school, a Ms. [W.]?

A. Ms. [R.].

Q. Oh, [R.]. Okay. And I call her Ms. [W.], do you know what her name is, is it [R.] or is it Ms. [W.]?

A. [R.].

Q. Okay.

. . .

Q. [K.B.], if I were to tell you that the room that we're in that the walls in the room are black[,] would that be a truth or a lie, [K.B.]?

A. A lie.

Q. Why would it be a lie?

A. It's different colours in here.

Q. There are different colours in here. What colour are the walls?

A. Purple.

Q. Purple. Okay. If I were to tell you that the gown that I'm wearing that that is black, would that be a truth or a lie?

A. The truth.

Q. And why is that?

A. I don't know.

Q. You don't know. Is it a good thing or a bad thing to tell the truth?

A. Good thing.

Q. Is it a good thing or a bad thing to tell a lie?

A. Bad thing.

(A.R., vol. I, at pp. 111-13)

However, the trial judge went on to question K.B. on her understanding of the meaning of truth, religious concepts, and the consequences of lying.

[THE COURT:]

[Q.] Do you go to church, [K.B.]?

A. No.

As-tu eu dans cette école une enseignante du nom de M^me^ [W.]?

R. M^me^ [R.].

Q. Oh, [R.]. D'accord. Et je l'appelle M^me^ [W.], sais-tu quel est son nom, est-ce [R.], est-ce M^me^ [W.]?

R. [R.].

Q. D'accord.

. . .

Q. [K.B.], si je te disais que la pièce où nous nous trouvons, les murs de cette pièce sont noirs, s'agit-il de la vérité ou d'un mensonge, [K.B.]?

R. Un mensonge.

Q. Pourquoi est-ce un mensonge?

R. Les couleurs sont différentes ici.

Q. Les couleurs sont différentes ici. De quelle couleur sont les murs?

R. Mauve.

Q. Mauve. D'accord. Si je te disais que la toge que je porte présentement est noire, s'agirait-il de la vérité ou d'un mensonge?

R. De la vérité.

Q. Et pourquoi donc?

R. Je ne sais pas.

Q. Tu ne sais pas. Est-il bon ou mauvais de dire la vérité?

R. C'est bon.

Q. Est-il bon ou mal de dire un mensonge?

R. C'est mal.

(d.a., vol. I, p. 111-113)

Toutefois, le juge du procès a poursuivi en posant à K.B. des questions sur sa compréhension de la vérité, sur des concepts religieux et sur les conséquences que comporte le mensonge.

[LA COUR :]

[Q.] Vas-tu à l'église, [K.B.]?

R. Non.

Q. No. Have you ever been taught about God or anything like that?

A. No.

Q. No? All right. What happens if you steal something?

A. I don't know.

Q. You don't know. If you steal something and no one sees it, will anything happen to you? Nothing will happen. Why won't anything happen?

A. I don't know.

Q. You don't know. Tell me what you think about the truth.

A. I don't know.

Q. You don't know. All right. Is it important to tell the truth?

A. I don't know.

Q. You don't know. Tell me what a promise is when you make a --

A. I don't know.

Q. -- promise. What's a promise?

A. I don't know.

Q. You don't know what a promise is. Okay. Have you ever been in court before?

A. Once.

Q. Once? And do you think it's an important thing to be in court?

A. I don't know.

Q. You don't know. All right. Do you know what an oath is, to take an oath?

A. I don't know.

Q. No. Do you have any idea what it means to tell the truth?

A. I don't know.

Q. You don't know. If you tell a lie does anything happen to you? Nothing happens.

A. No.

. . .

Q. Non. Est-ce qu'on t'a déjà parlé de Dieu ou de quelque chose du genre?

R. Non.

Q. Non? D'accord. Qu'est-ce qui se passe si tu voles quelque chose?

R. Je ne sais pas.

Q. Tu ne sais pas. Si tu voles quelque chose et que personne ne te voit, est-ce qu'il arrivera quelque chose? Il n'arrivera rien. Pourquoi est-ce qu'il n'arrivera rien?

R. Je ne sais pas.

Q. Tu ne sais pas. Dis-moi ce que tu penses de la vérité.

R. Je ne sais pas.

Q. Tu ne sais pas. Très bien. Est-il important de dire la vérité?

R. Je ne sais pas.

Q. Tu ne sais pas. Dis-moi ce qu'est une promesse lorsque tu --

R. Je ne sais pas.

Q. -- promets. Qu'est-ce qu'une promesse?

R. Je ne sais pas.

Q. Tu ne sais pas ce qu'est une promesse. D'accord. Es-tu déjà allée devant un tribunal?

R. Une fois.

Q. Une fois? Et crois-tu qu'être devant un tribunal est une chose importante?

R. Je ne sais pas.

Q. Tu ne sais pas. Très bien. Sais-tu ce qu'est un serment, ce que veut dire prêter serment?

R. Je ne sais pas.

Q. Non. Sais-tu ce que signifie dire la vérité?

R. Je ne sais pas.

Q. Tu ne sais pas. Si tu dis un mensonge, est-ce qu'il arrive quelque chose? Il n'arrive rien.

R. Non.

. . .

[THE COURT:]

[Q.] Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

Q. If you tell big lies will you go to jail?

A. No.

(*Ibid.*, at pp. 117-19 and 155-56)

[LA COUR :]

[Q.] Sais-tu pourquoi tu es ici aujourd'hui?

R. Je ne sais pas. Pour parler de [D.A.I.].

Q. Oui, et penses-tu que ce soit vraiment important?

R. Peut-être, oui.

Q. Peut-être oui? Te souviens-tu, plus tôt, quand je t'ai posé des questions à propos d'une promesse?

R. Non.

Q. As-tu déjà fait une promesse à quelqu'un?

R. Je ne sais pas.

Q. As-tu déjà promis d'être gentille, as-tu déjà dit cela? As-tu déjà entendu l'expression « je promets d'être gentille, maman »?

R. D'accord.

Q. Très bien. Alors, sais-tu ce qu'est une promesse, que tu vas agir de la bonne façon? Comprends-tu?

R. D'accord.

Q. Peux-tu me dire si tu comprends ça, [K.B.]?

R. Je ne sais pas.

Q. Est-ce qu'il arrive quelque chose si tu ne tiens pas une promesse?

R. Je ne sais pas.

Q. Tu m'as dit que tu ne vas pas à l'église, n'est-ce pas?

R. Exact.

Q. Et personne ne t'a jamais parlé de Dieu; est-ce exact? Personne ne t'a jamais parlé de Dieu?

R. Non.

Q. Est-ce qu'on t'a jamais dit que si tu dis de gros mensonges, tu vas aller en prison?

R. Exact.

Q. Si tu dis de gros mensonges, tu vas aller en prison?

R. Non.

(*Ibid.*, p. 117-119 et 155-156)

[85] As these passages demonstrate, the trial judge was not satisfied with the Crown's questions on K.B.'s ability to recount events and distinguish between telling the truth and lying in concrete, real-life situations. He went on to question her on the nature of truth, religious obligations and the consequences of failing to tell the truth. Because K.B. was unable to satisfactorily answer these more abstract questions, he ruled that she could not be allowed to promise to tell the truth and refused to allow her to testify.

[86] This ruling was based on an erroneous interpretation of s. 16(3), which the trial judge read as requiring an understanding of the duty to speak the truth. Hence, K.B. was precluded from testifying on promising to tell the truth. The trial judge summed up his conclusions as follows:

> Having questioned [K.B.] at length I am fully satisfied that [K.B.] has not satisfied the prerequisite that she understands the duty to speak to the truth. She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies, and in such circumstances, quite independent of the evidence of [Dr. K.], I am not satisfied that she can be permitted to testify under a promise to tell the truth. [Emphasis added; *ibid.*, at p. 3.]

[87] The fatal error of the trial judge is that he did not consider the second part of the test under s. 16. He failed to inquire into whether K.B. had the ability to communicate the evidence under s. 16(3), insisting instead on an understanding of the duty to speak the truth that is not prescribed by s. 16(3). This error, an error of law, led him to rule K.B. incompetent and hence to the total exclusion of her evidence from the trial. This fundamental error vitiated the trial.

[88] This fundamental flaw in the trial cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference. My colleague Binnie J. suggests that the trial judge's comments during the *voir dire* and hearing on hearsay admissibility (paras. 136, 138 and 139)

[85] Comme le montrent ces passages de l'interrogatoire, le juge du procès n'était pas satisfait des questions posées par le ministère public relativement à la capacité de K.B. de relater des événements et de faire la distinction entre dire la vérité et mentir dans des situations concrètes. Il lui a ensuite posé des questions sur la nature de la vérité, les obligations religieuses et les conséquences découlant du fait de ne pas dire la vérité. Comme K.B. était incapable de répondre de manière satisfaisante à ces questions plus abstraites, il a statué qu'il ne pouvait lui demander de promettre de dire la vérité et a refusé de l'autoriser à témoigner.

[86] Cette conclusion reposait sur une interprétation erronée du par. 16(3) qui, selon le juge du procès, exige une compréhension du devoir de dire la vérité. K.B. n'a donc pas été autorisée à témoigner en promettant de dire la vérité. Le juge du procès a résumé ses conclusions comme suit :

> [TRADUCTION] Après avoir longuement interrogé [K.B.], je suis entièrement convaincu que [K.B.] n'a pas satisfait à la condition préalable voulant qu'elle comprenne le devoir de dire la vérité. Elle est incapable de dire ce que comportent la vérité et le mensonge, ou de dire ce que sont les conséquences découlant de la vérité ou de mensonges. Dans de telles circonstances, tout à fait indépendantes de la déposition du [Dr K.], je ne suis pas convaincu qu'elle peut être autorisée à témoigner en promettant de dire la vérité. [Je souligne; *ibid.*, p. 3.]

[87] Le juge du procès a commis une erreur fatale en n'examinant pas le deuxième volet du critère établi à l'art. 16. Il n'a pas vérifié si, conformément au par. 16(3), K.B. était en mesure de communiquer les faits dans son témoignage et a insisté plutôt sur la nécessité qu'elle comprenne le devoir de dire la vérité, ce que n'exige pas le par. 16(3). Cette erreur, une erreur de droit, l'a amené à conclure que K.B. n'était pas habile à témoigner et à exclure complètement son témoignage du procès. Cette erreur fondamentale a vicié le procès.

[88] Des commentaires formulés par le juge du procès à d'autres étapes de l'instruction ou le principe de la déférence judiciaire ne peuvent corriger ce vice fondamental. Mon collègue le juge Binnie laisse entendre que les commentaires émis par le juge du procès durant le voir-dire et l'audience sur

support his conclusion on the earlier *voir dire* that K.B. was not competent to testify under s. 16(3). However, it is difficult to see how subsequent comments in the course of dealing with other issues could rehabilitate the trial judge's erroneous application of the requirements for competence under s. 16. The *voir dire* on competence and the *voir dire* on the admissibility of hearsay evidence were two different inquiries. The evidence of Ms. W., on which the trial judge relied in making the comments regarding hearsay, was not before the trial judge when he ruled K.B. incompetent to testify. Moreover, the threshold of reliability for hearsay evidence differs from the threshold ability to communicate the evidence for competence; a ruling on testimonial capacity cannot be subsequently justified by comments in a ruling on hearsay admissibility. Had the competence hearing been properly conducted, this might have changed the balance of the trial, including the hearing (if any) on hearsay admissibility. The trial judge's fundamental error in the s. 16 inquiry on competence cannot be corrected by speculation based on comments made in a different inquiry.

[89] Nor does the ruling that K.B. was incompetent, based as it was on a misstatement of the legal test under s. 16(3), attract deference. This amounted to an error of law, to be judged on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-37. The defect in the trial judge's ruling cannot, in my view, be cured.

[90] I would allow the appeal, set aside the acquittal, and direct a new trial.

l'admissibilité de la preuve par ouï-dire (par. 136, 138 et 139) appuient la conclusion qu'il a tirée au voir-dire précédent, conclusion selon laquelle K.B. n'était pas habile à témoigner aux termes du par. 16(3). Il est toutefois difficile de voir comment des commentaires émis subséquemment par le juge du procès alors qu'il traitait d'autres questions pourraient remédier à une application erronée par celui-ci des exigences prévues à l'art. 16 relativement à l'habilité à témoigner. Le voir-dire relatif à l'habilité à témoigner et le voir-dire relatif à l'admissibilité de la preuve par ouï-dire constituaient deux enquêtes différentes. Le juge du procès ne disposait pas du témoignage de M^{me} W. — sur lequel il s'est fondé pour formuler les commentaires concernant le ouï-dire — lorsqu'il a jugé que K.B. n'était pas habile à témoigner. De plus, le seuil de fiabilité applicable à la preuve par ouï-dire diffère du seuil de la capacité à communiquer les faits dans un témoignage, applicable à l'habilité à témoigner; une conclusion sur l'habilité d'une personne à témoigner ne peut être justifiée après coup par des commentaires émis dans une décision sur l'admissibilité d'une preuve par ouï-dire. La tenue d'une audience régulière sur l'habilité à témoigner aurait peut-être modifié l'équilibre du procès, y compris l'audience (le cas échéant) sur l'admissibilité de la preuve par ouï-dire. On ne peut corriger l'erreur fondamentale commise par le juge du procès dans l'enquête relative à l'habilité à témoigner prévue à l'art. 16 en se fondant sur des conjectures tirées de commentaires formulés dans une enquête différente.

[89] La conclusion selon laquelle K.B. n'était pas habile à témoigner, fondée sur une mauvaise formulation du critère juridique applicable aux termes du par. 16(3), ne commande pas non plus la déférence. Il s'agissait là d'une erreur de droit devant être examinée selon la norme de la décision correcte : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26-37. Ce vice dans la décision de première instance ne peut, à mon avis, être corrigé.

[90] Je suis d'avis d'accueillir le pourvoi, d'annuler l'acquittement et d'ordonner la tenue d'un nouveau procès.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

[91] Binnie J. (dissenting) — I agree with the Chief Justice that, in this case, "[t]wo potentially conflicting policies are in play", the first being to "bring to justice" those accused of sexual abuse and the second being "to ensure a fair trial for the accused and to prevent wrongful convictions" (para. 65). In my view, by turning Parliament's direction permitting a person "whose mental capacity is challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness — the majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons.

[92] I prefer the contrary interpretation of s. 16(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, expressed by our Chief Justice herself in her concurring judgment in *R. v. Rockey*, [1996] 3 S.C.R. 829, where, as McLachlin J., drawing a distinction between "the ability to communicate the evidence and the ability to promise to tell the truth" (para. 25), wrote:

> The only inference that can be drawn from this evidence is that while [the potential witness] Ryan understood the difference between what is "so" and "not so", he had no conception of any moral obligation to say what is "right" or "so" in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth. [Emphasis added; para. 27.]

McLachlin J.'s views on the requirements of s. 16(3) were not disagreed with by the majority, and indeed on this point she simply reflected the Court's earlier unanimous opinion in *R. v. Khan*, [1990] 2 S.C.R. 531, at pp. 537-38.

Version française des motifs des juges Binnie, LeBel et Fish rendus par

[91] Le juge Binnie (dissident) — Je souscris à l'opinion de la Juge en chef selon laquelle, en l'espèce, « [d]eux principes susceptibles de s'opposer entrent en jeu » (par. 65). Le premier consiste à « traduire en justice » les personnes accusées d'agression sexuelle, et le deuxième vise à « garantir la tenue d'un procès équitable pour l'accusé et [à] prévenir les déclarations de culpabilité injustifiées » (*ibid.*). Selon moi, en transformant la directive du législateur, qui permet à une personne « dont la capacité mentale est mise en question » de témoigner « en promettant de dire la vérité », en une formalité vide de sens — le témoin éventuel ne fait que prononcer les mots « je promets » sans que l'on vérifie s'il accorde quelque importance à sa promesse — les juges majoritaires diluent de façon inacceptable la protection que le législateur voulait accorder aux accusés.

[92] Je préfère l'interprétation contraire du par. 16(3) de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, que notre Juge en chef elle-même a énoncée dans ses motifs concordants dans *R. c. Rockey*, [1996] 3 R.C.S. 829, où, alors juge puînée, elle a établi une distinction entre la « capacité de communiquer les faits dans son témoignage et celle de promettre de dire la vérité » (par. 25); elle a écrit ce qui suit :

> La seule inférence que l'on peut tirer de ce témoignage est que même si [le témoin éventuel] Ryan comprenait la différence entre ce qui était « exact » et « pas exact », il n'avait aucune idée de l'obligation morale de dire ce qui est « vrai » ou « exact » lorsqu'on témoigne ou dans d'autres situations. Dans ces circonstances, aucun juge n'aurait pu raisonnablement conclure que Ryan était capable de promettre de dire la vérité. [Je souligne; par. 27.]

Dans cette affaire, les juges de la majorité n'avaient pas désapprouvé les propos de la juge McLachlin au sujet des exigences du par. 16(3). En fait, sur ce point, la juge McLachlin reprenait simplement l'opinion unanime que la Cour avait déjà exprimée dans *R. c. Khan*, [1990] 2 R.C.S. 531, p. 537-538.

[93] The majority judgment in the present case repudiates the earlier jurisprudence and the balanced approach it achieved. It entirely eliminates any inquiry into whether the potential witness has any "conception of any moral obligation to say what is 'right'".

[94] I agree with the Chief Justice that "allowing the witness to testify is only the first step in the process" (para. 72). More particularly, my colleague continues:

> The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. [*Ibid*.]

In this case, the exchanges between the challenged witness, K.B., and the trial judge, demonstrated the futility of any such cross-examination. The trial judge noted that K.B. "did not 'compute' questions before giving answers, that she was not processing the information being communicated to her, and that she had serious problems relating to her ability to communicate and to recollect" (2008 CanLII 21726 (Ont. S.C.J.)) (the "hearsay decision"), at para. 7). As a practical matter, it is not possible to cross-examine such a witness meaningfully. The trial judge concluded correctly on this point that "there is no secure method of testing K.B.'s credibility" (para. 56). The result of the majority judgment in this case is to create unfair prejudice to the accused.

[95] What is fundamental, as was emphasized here by the Ontario Court of Appeal, is that the trial judge had the opportunity to observe the witness's demeanour and the way she answers the questions (McLachlin C.J., at para. 72). We do not have that advantage. The trial judge concluded, based on his direct observation, that, in light of the severity of her mental disability, K.B.'s evidence could not be relied upon for the truth-seeking purposes of a criminal trial and it ought to be altogether excluded. In a judge-alone trial, it goes without

[93] Le jugement majoritaire en l'espèce répudie les décisions antérieures ainsi que l'approche équilibrée qu'elles avaient établie. Il écarte complètement l'enquête permettant de vérifier si le témoin éventuel a une « idée de l'obligation morale de dire ce qui est "vrai" ».

[94] Je suis d'accord avec la Juge en chef pour dire qu'« en [. . .] permettant [aux personnes adultes ayant une déficience intellectuelle] de témoigner, elles franchissent seulement la première étape du processus » (par. 72). Plus particulièrement, ma collègue ajoute ce qui suit :

> La déposition du témoin sera vérifiée par contre-interrogatoire. Le juge des faits examinera le comportement du témoin et sa façon de répondre aux questions. [*Ibid*.]

En l'espèce, les échanges entre le juge du procès et K.B., la personne dont la capacité mentale est mise en question, ont démontré la futilité d'un tel contre-interrogatoire. Le juge du procès a souligné que K.B. [TRADUCTION] « ne "computait" pas les questions avant d'y répondre, qu'elle ne traitait pas l'information qui lui était communiquée et qu'elle avait de sérieux problèmes liés à sa capacité de communiquer et de se souvenir » (2008 CanLII 21726 (C.S.J. Ont.) (la « décision relative au ouï-dire »), par. 7). Concrètement, il n'est pas possible de contre-interroger de manière significative un tel témoin. Le juge du procès a correctement conclu sur ce point qu'« il n'y a aucun moyen sûr de vérifier la crédibilité de K.B. » (par. 56). Par conséquent, le jugement des juges majoritaires en l'espèce cause à l'accusé un préjudice inéquitable.

[95] La Cour d'appel de l'Ontario a souligné un aspect fondamental, soit que le juge du procès a eu l'occasion d'examiner le comportement du témoin et sa façon de répondre aux questions (la juge en chef McLachlin, par. 72). Nous ne bénéficions pas de cet avantage. Le juge du procès a conclu, selon ce qu'il a directement observé, que compte tenu de la gravité de la déficience intellectuelle de K.B., on ne pouvait se fier au témoignage de cette dernière pour les besoins de la recherche de la vérité — le but visé par un procès criminel — et que ce témoignage

saying, where the trial judge found that K.B.'s testimony did not meet even a threshold of admissibility, he would not — had the evidence been admitted — have accepted it as the basis for a proper conviction. An acquittal was inevitable.

[96] In the result, despite all the talk in our cases of the need to "defer" to trial judges on their assessment of mental capacity, a deference which, in my opinion, is manifestly appropriate, the majority judgment shows no deference to the views of the trial judge whatsoever and orders a new trial. I am unable to agree. I therefore dissent.

I. Judicial History

A. *Ontario Superior Court of Justice, 2008 CanLII 21726 (the "Hearsay Decision")*

[97] The Chief Justice has set out the substance of the trial judge's ruling. I should add that he found numerous contradictions in K.B.'s testimony. For example, K.B. testified that she had told her mother about D.A.I. touching her, but her mother contradicted this (para. 38). With respect to the out-of-court statements, the trial judge expressed serious concerns about the truth of the statements based on K.B.'s "serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother" (para. 53 (emphasis added)). He also noted the testimony of K.B.'s teacher that K.B.'s mother had told her that she viewed K.B.'s story with "disbelief" (para. 54). Given the close relationship between K.B. and the respondent D.A.I., the trial judge found that "[w]hat may have been innocent in intent has the potential to be misinterpreted" (para. 55).

[98] The trial judge concluded:

devait être complètement exclu. Il va sans dire que, dans un procès devant un juge seul, où le juge du procès a conclu que le témoignage de K.B. ne satisfaisait pas à un critère même minimal d'admissibilité, si le témoignage avait été accepté, il n'aurait pu servir de fondement d'une déclaration de culpabilité. Un verdict d'acquittement était inévitable.

[96] Par conséquent, malgré toutes les décisions dans lesquelles notre Cour signale la nécessité de « faire preuve de retenue » à l'égard de l'appréciation de la capacité mentale par les juges des procès — une retenue manifestement appropriée selon moi —, les juges majoritaires ne font preuve d'aucune retenue à l'égard des opinions du juge du procès et ordonnent la tenue d'un nouveau procès. Il m'est impossible de souscrire à leur décision. J'inscris donc ma dissidence.

I. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2008 CanLII 21726 (la « décision relative au ouï-dire »)*

[97] La Juge en chef a exposé la substance de la décision du juge du procès. J'ajouterais qu'il a relevé plusieurs contradictions dans les réponses de K.B. Par exemple, K.B. a déclaré avoir dit à sa mère que D.A.I. l'avait touchée, mais cette dernière l'a nié (par. 38). En ce qui concerne les déclarations extrajudiciaires, le juge du procès a exprimé d'importantes réserves sur la véracité des déclarations de K.B. en raison des [TRADUCTION] « sérieuses difficultés [de K.B.] à communiquer les faits dans son témoignage, de son incapacité à répondre à des questions relativement simples portant sur ses allégations, de sa confusion quant à savoir si elle avait ou non parlé à sa mère » (par. 53 (je souligne)). Il a aussi signalé que l'enseignante de K.B. a affirmé dans son témoignage que la mère de K.B. lui avait dit « ne pas croire » ces dires de sa fille (par. 54). Vu l'étroite relation entre K.B. et l'intimé, D.A.I., le juge du procès a conclu que « [c]e qui pouvait se vouloir inoffensif risquait d'être mal interprété » (par. 55).

[98] Le juge du procès a conclu comme suit :

I am convinced that to admit K.B.'s statement for its truth would effectively deprive the court of any reliable method of testing its truth. It is clear from the short cross-examination undertaken . . . at the preliminary inquiry, there is no secure method of testing K.B.'s credibility. . . . What the Crown purports to be confirmatory evidence is either ambiguous or itself unreliable. [Emphasis added; para. 56.]

B. *Ontario Court of Appeal, 2010 ONCA 133, 260 O.A.C. 96 (Doherty, MacPherson and Armstrong JJ.A.)*

[99] Doherty and MacPherson JJ.A. applied a "very deferential" standard of review to the trial judge's assessment under s. 16, noting that the trial judge heard not only what the proposed witness said, but also how it was said (paras. 20-21). In their view, Parliament chose to create a new testimonial competence test for children but to limit it so as only to apply to children under 14 (para. 41). For whatever reason, Parliament intended to treat children and adults with a mental disability differently when it comes to testimonial competence (para. 43).

[100] The Court of Appeal also held that the trial judge had correctly rejected the confirmatory evidence tendered by the Crown, namely K.B.'s sister's evidence and the photograph found in the respondent's bedroom (para. 50). He had carefully considered the sister's testimony, but decided that it was unreliable. The trial judge had also found that the respondent's explanation that K.B. flashed him when he took the photograph could have been true. Doherty and MacPherson JJ.A., speaking for a unanimous Court of Appeal, held that both of these conclusions were open to the trial judge (*ibid.*). The appeal was accordingly dismissed.

II. Analysis

[101] The substantial issue in this appeal concerns the correctness of the trial judge's approach to

[TRADUCTION] Je suis convaincu que le fait d'admettre comme véridique la déclaration de K.B. priverait effectivement la cour de toute méthode fiable pour en vérifier la véracité. Il ressort clairement du bref contre-interrogatoire mené [. . .] à l'enquête préliminaire qu'il n'y a aucun moyen sûr de vérifier la crédibilité de K.B. [. . .] Ce que le ministère public estime être une preuve corroborante est ambigu ou sujet à caution. [Je souligne; par. 56.]

B. *Cour d'appel de l'Ontario, 2010 ONCA 133, 260 O.A.C. 96 (les juges Doherty, MacPherson et Armstrong)*

[99] Les juges Doherty et MacPherson ont appliqué une norme de contrôle qui commande [TRADUCTION] « une très grande retenue » à l'égard de l'appréciation faite par le juge du procès aux termes de l'art. 16, soulignant que le juge du procès n'a pas seulement entendu ce que le témoin éventuel a dit, mais aussi comment il l'a dit (par. 20-21). Selon eux, le législateur a choisi de créer pour les enfants un nouveau critère relatif à l'habilité à témoigner, mais de le limiter de sorte qu'il ne s'applique qu'aux enfants de moins de 14 ans (par. 41). Pour une raison ou une autre, le législateur a voulu traiter les enfants différemment des adultes ayant une déficience intellectuelle lorsque l'habilité à témoigner est en cause (par. 43).

[100] La Cour d'appel a également conclu que le juge du procès avait rejeté à bon droit la preuve corroborante présentée par le ministère public, à savoir le témoignage de la sœur de K.B. et la photographie trouvée dans la chambre de l'intimé (par. 50). Le juge a soigneusement examiné le témoignage de la sœur de K.B., mais il a décidé qu'il était sujet à caution. Le juge du procès avait aussi conclu que l'explication de l'intimé — que K.B. lui avait soudainement montré ses seins au moment où il a pris la photographie — pouvait être vraie. Les juges Doherty et MacPherson, au nom d'une formation unanime de la Cour d'appel, ont affirmé qu'il était loisible au juge du procès de tirer ces deux conclusions (*ibid.*). L'appel a donc été rejeté.

II. Analyse

[101] La question importante dans le présent pourvoi porte sur le bien-fondé de la démarche retenue

assessment of the testimonial capacity of the complainant, K.B. The admissibility of her evidence turns on the interpretation of the rules established by Parliament in s. 16 of the *Canada Evidence Act*, which delineates the circumstances in which a proposed witness "of fourteen years of age or older whose mental capacity is challenged" may or may not testify.

[102] A trial judge is faced with three options. If the challenged witness is "able to communicate the evidence" and "understands the nature of an oath or a solemn affirmation", the person "shall testify under oath or solemn affirmation" (s. 16(2)). A person who satisfies the first criterion ("able to communicate the evidence") but not the second (i.e. does not understand "the nature of an oath or a solemn affirmation") may provide unsworn testimony "on promising to tell the truth" (s. 16(3)). A person who does not satisfy either criterion "shall not testify" (s. 16(4)).

[103] The few questions posed by the trial judge touching on religion in this case were relevant to the first option of having K.B. testify under oath or affirmation which, as the Chief Justice recognizes, is the "preferred option" (para. 31). If the trial judge had found that K.B. understood the nature of the oath, he would have been obliged to have her testimony given under oath. It was proper for the trial judge to test K.B.'s ability to satisfy this standard rather than assuming, on account of her mental disability, that she would fail the s. 16(1) test.

[104] As to the second option (unsworn evidence), it is clear that Parliament did not consider an ability to communicate the evidence to be the sole and sufficient condition of admissibility. A person giving unsworn testimony must nevertheless promise to tell the truth, and this additional requirement is not, in my view, an empty formality but is intended to bolster the court's effort to establish the true facts

par le juge du procès pour apprécier l'habilité à témoigner de la plaignante, K.B. L'admissibilité de son témoignage repose sur l'interprétation des règles établies par le législateur à l'art. 16 de la *Loi sur la preuve au Canada*, lequel énonce les circonstances dans lesquelles un témoin éventuel âgé « d'au moins quatorze ans dont la capacité mentale est mise en question » peut ou non témoigner.

[102] Trois possibilités s'offrent au juge du procès. Si la personne dont la capacité mentale est mise en question est « capable de communiquer les faits dans son témoignage » et « comprend la nature du serment ou de l'affirmation solennelle », elle « témoigne sous serment ou sous affirmation solennelle » (par. 16(2)). Une personne qui répond au premier critère (« capable de communiquer les faits dans son témoignage »), mais pas au deuxième (soit qu'elle ne comprend pas « la nature du serment ou de l'affirmation solennelle ») peut témoigner sans prêter serment « en promettant de dire la vérité » (par. 16(3)). Une personne qui ne satisfait à ni l'un ni l'autre de ces critères « ne peut témoigner » (par. 16(4)).

[103] Les quelques questions que le juge du procès a posées en l'espèce relativement à la religion avaient trait à la première possibilité, soit que K.B. témoigne sous serment ou sous affirmation solennelle, ce qui, comme le reconnaît la Juge en chef, constitue la « solution privilégiée » (par. 31). Si le juge du procès avait conclu que K.B. comprenait la nature du serment, il aurait été tenu de la faire témoigner sous serment. Il était approprié pour le juge du procès de vérifier si K.B. pouvait satisfaire à cette norme au lieu de supposer qu'elle échouerait le test du par. 16(1) en raison de sa déficience intellectuelle.

[104] En ce qui concerne la deuxième possibilité (témoignage sans avoir prêté serment), le législateur n'a manifestement pas considéré la capacité de communiquer les faits dans un témoignage comme étant une condition unique et suffisante d'admissibilité. Une personne qui témoigne sans avoir prêté serment doit tout de même promettre de dire la vérité, et cette condition supplémentaire n'est pas,

and to protect the legitimate interest of the accused to a fair trial.

[105] I agree with the Chief Justice that "[p]romising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose" (para. 36). I do not agree with my colleague, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a "prophylactic" effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand "the seriousness of the situation and the importance of being careful and correct", there is no prophylactic effect, and the fair trial interests of the accused are unfairly prejudiced.

A. *The Khan Test*

[106] It is, of course, true that an inability to deal with concepts ("oaths", "solemn affirmations" and "promises") does not mean that a person suffering from a mental disability is by that fact unable to relate the factual events that he or she encountered. Many individuals whose mental capacity is not open to challenge may have difficulty giving a correct explanation of these concepts.

[107] In an effort to solve this dilemma, this Court in *Khan* adopted the approach formulated by Robins J.A. in *Khan* when it was before the Ontario Court of Appeal ((1988), 42 C.C.C. (3d) 197, at p. 206):

> To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity

selon moi, une formalité vide de sens; elle vise à soutenir les efforts de la cour en vue d'établir les faits authentiques et à protéger le droit légitime d'un accusé à un procès équitable.

[105] Je suis d'accord avec la Juge en chef pour dire que « [l]a promesse est un acte visant à renforcer, dans l'esprit du témoin éventuel, le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte. La promesse sert donc un objectif pratique et prophylactique » (par. 36). Je ne suis cependant pas d'accord avec ma collègue pour affirmer qu'un juge du procès ne peut pas tenter de déterminer — en termes concrets de la vie quotidienne — si un tel effet « prophylactique » existe effectivement dans le cas d'une personne dont la capacité mentale est mise en question. Si cette personne est à ce point déficiente qu'elle ne comprend pas « le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte », il n'y a aucun effet prophylactique et le droit de l'accusé à un procès équitable subit une atteinte injustifiée.

A. *Le critère formulé dans l'arrêt Khan*

[106] Assurément, une incapacité de saisir des notions (« serments », « affirmations solennelles » et « promesses ») ne signifie pas qu'une personne ayant une déficience intellectuelle soit par le fait même incapable de décrire les événements dont elle a été témoin. Bien des personnes dont la capacité intellectuelle n'est pas mise en question peuvent avoir de la difficulté à expliquer correctement ces notions.

[107] Cherchant à résoudre ce dilemme, notre Cour a adopté dans *Khan* la solution élaborée par le juge Robins alors que l'affaire *Khan* se trouvait devant la Cour d'appel de l'Ontario ((1988), 42 C.C.C. (3d) 197, p. 206) :

> [TRADUCTION] Pour satisfaire aux normes moins sévères applicables au témoignage qui n'est pas donné sous serment, il suffit que l'enfant comprenne le devoir de dire la vérité au sens de la conduite sociale ordinaire de la vie quotidienne. On peut en faire la preuve par une série de questions simples permettant de déterminer si l'enfant comprend la différence entre la vérité et

to tell the truth, and promises to do so. [Emphasis added.]

This approach (adopted at a time before the *Canada Evidence Act* introduced its present distinction between children and adults with challenged mental capacity) gives meaningful content to the statutory language while recognizing that the "simple line of questioning" is to be factual, not metaphysical.

[108] It is true, as the Chief Justice points out, that *Khan* was decided under an earlier version of s. 16 which referred expressly to "the duty of speaking the truth". However, as both *Khan* and McLachlin J. in *Rockey* were at pains to point out, those words were not interpreted as contemplating an abstract inquiry. In *Rockey*, decided at a time when s. 16(3) read the same as it does now, McLachlin J. insisted on a determination of "the ability to promise to tell the truth" (para. 25 (emphasis added)), but not as the mere physical ability of a potential witness to say the words. In that case, the child witness was not called to testify and the issue was whether his out-of-court statements could nevertheless be admitted against the accused under the principled hearsay exception. To do so required a demonstration of necessity and reliability. McLachlin J. held that "necessity" was established. In her view, the child was incompetent to testify under s. 16(3) because, not only was it "unrealistic to conclude that Ryan could have communicated his evidence in any useful sense either in the courtroom or in a smaller room via closed circuit television", but, as stated, because "no judge could reasonably have concluded that Ryan was able to promise to tell the truth" (paras. 26-27). Although Parliament had by that time eliminated the words "duty of speaking the truth" from s. 16(3), McLachlin J. nevertheless concluded that the words "on promising to tell the truth" incorporated the understanding in practical terms of a "moral obligation to say what is 'right'" (para. 27).

le mensonge, s'il sait qu'il n'est pas bien de mentir, s'il comprend la nécessité de dire la vérité et promet de le faire. [Je souligne.]

Cette approche (adoptée avant que la *Loi sur la preuve au Canada* n'établisse la distinction que l'on trouve maintenant entre les enfants et les adultes dont la capacité mentale est mise en question) donne un contenu significatif au texte de la loi tout en reconnaissant que la « série de questions simples » doit porter sur des faits et ne doit pas relever de la métaphysique.

[108] Certes, comme la Juge en chef le souligne, lorsque l'arrêt *Khan* a été rendu, une version antérieure de l'art. 16 mentionnait expressément « le devoir de dire la vérité ». Toutefois, comme l'arrêt *Khan* et la juge McLachlin dans *Rockey* ont pris bien soin de le signaler, ces mots n'envisageaient pas, dans leur interprétation, une enquête menée dans l'abstrait. Dans l'arrêt *Rockey*, rendu alors que le texte du par. 16(3) était le même qu'aujourd'hui, la juge McLachlin a insisté sur une détermination de « [l]a capacité [. . .] de promettre de dire la vérité » (par. 25 (je souligne)) qui ne soit pas simplement la capacité physique d'un témoin éventuel de prononcer les mots. Dans cette affaire, l'enfant n'a pas été appelé à témoigner et la question en litige était de savoir si ses déclarations extrajudiciaires pouvaient tout de même être admises à l'encontre de l'accusé en vertu de l'exception raisonnée à la règle du ouï-dire. À cette fin, il fallait démontrer la nécessité et la fiabilité des déclarations de l'enfant. La juge McLachlin a conclu que la « nécessité » avait été établie. Selon elle, l'enfant était inhabile à témoigner aux termes du par. 16(3) parce que, non seulement « il n'[était] pas réaliste de conclure que Ryan aurait pu communiquer les faits d'une façon utile, que ce soit dans la salle d'audience ou depuis une plus petite pièce, au moyen d'un système de télévision en circuit fermé », mais parce qu'« aucun juge n'aurait pu raisonnablement conclure que Ryan était capable de promettre de dire la vérité » (par. 26-27). Même si le législateur avait déjà enlevé au par. 16(3) les mots « devoir de dire la vérité », la juge McLachlin a néanmoins conclu que les mots « en promettant de dire la vérité » supposaient concrètement une « obligation morale de dire ce qui est "vrai" » (par. 27).

[109] In the result, the child was held under s. 16(3) to be incompetent to testify. The necessity for the hearsay evidence was therefore established. His out-of-court evidence was admitted and the accused was convicted.

[110] There is nothing in McLachlin J.'s reasons in *Rockey* to suggest that the "ability to promise to tell the truth" is to be ascertained on a "don't ask" basis, i.e. not to endeavour to determine whether the potential witness has any sense of what it means in simple concrete terms to promise to tell the truth. On the contrary, McLachlin J. rested her conclusion on the evidence heard by the trial judge concerning the ability of the potential witness to explain events and to understand the difference in practical terms between telling the truth and lying.

[111] Nor was it suggested in *Rockey* that, by insisting on "the ability" to make the promise, McLachlin J. was reading extraneous words into the statute, which is now the cornerstone of the majority judgment in this case. The making of a promise is not just a physical act. The question is whether the potential witness recognizes a sense of obligation, however articulated or unarticulated, to stick to the truth. This interpretation was consistent with the Parliamentary record which, as we will see, demonstrates a legislative intention under s. 16(3) that a trial judge be satisfied that a witness — as a condition precedent to testimonial capacity — understands the difference in practical everyday terms between telling the truth and not telling the truth.

[112] Of course, there are witnesses who suffer no mental disability and who recognize perfectly well that they are undertaking an obligation to tell the truth but nevertheless do not do so. That is a different problem. Their mental capacity is not in issue. In their case, the courts rely on cross-examination and other techniques to ferret out the truth. In the case of K.B., there was no allegation whatsoever of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events, and the crucible of cross-examination was considered by the trial judge to be useless because, as

[109] En définitive, l'enfant a été jugé inhabile à témoigner aux termes du par. 16(3). La nécessité de la preuve par ouï-dire a donc été établie. Sa déclaration extrajudiciaire a été admise et l'accusé a été déclaré coupable.

[110] Les motifs de la juge McLachlin dans *Rockey* n'indiquent nullement que la « capacité de promettre de dire la vérité » doive être déterminée « sans poser de questions », c'est-à-dire sans que l'on tente de déterminer si le témoin éventuel peut saisir ce que signifie, en termes simples et concrets, la promesse de dire la vérité. Au contraire, la juge McLachlin a appuyé sa conclusion sur la déposition faite devant le juge du procès concernant la capacité du témoin éventuel d'expliquer des faits et de comprendre la différence, en termes concrets, entre dire la vérité et mentir.

[111] L'arrêt *Rockey* ne donne pas non plus à penser que, en insistant sur « la capacité » de promettre, la juge McLachlin introduisait dans la loi des mots extrinsèques, ce qui constitue maintenant la pierre d'assise du jugement majoritaire en l'espèce. Faire une promesse ne se résume pas à un acte physique. La question est de savoir si le témoin éventuel se reconnaît une obligation, articulée ou non, de s'en tenir à la vérité. Cette interprétation était conforme à l'historique parlementaire qui démontre, comme nous le verrons, qu'aux termes du par. 16(3), le juge devait être convaincu que la personne comprend la différence, en termes ordinaires, entre dire et ne pas dire la vérité — une condition préalable à la reconnaissance de l'habilité à témoigner.

[112] Évidemment, certains témoins n'ayant aucune déficience intellectuelle ne diront pas la vérité tout en sachant parfaitement bien qu'elles se sont engagées à dire la vérité. Il s'agit là d'un problème différent. Leur capacité mentale n'est pas mise en question. Dans ces cas, le contre-interrogatoire et d'autres moyens permettront au tribunal de découvrir la vérité. Dans le cas de K.B., sa bonne foi n'était aucunement en cause, mais elle aurait quand même pu se tromper pour ce qui est de percevoir ou de se rappeler les faits, et le juge du procès considérait que l'épreuve du

stated, he found that "there is no secure method of testing K.B.'s credibility" (hearsay decision, at para. 56).

[113] The *Khan* test specifically framed the inquiry as being into "ordinary everyday social conduct" (C.A., at p. 206). At no point did this Court in *Khan* or McLachlin J. in *Rockey* require that the potential witness be able to *articulate* or even understand in the abstract concepts such as oaths, affirmations or promises. Leaving aside McLachlin J.'s reference to a "moral obligation" in *Rockey* — which, if anything, proposed a more strict test for admissibility than the Court's judgment in *Khan* — if it appears to the trial judge that the potential witness whose mental capacity is challenged has demonstrated an understanding of a promise to tell the truth in terms of ordinary, everyday social conduct, the witness has met the test for giving unsworn testimony. The same would be true in my view of a witness who understands the seriousness of the situation and "the importance of being careful and correct", to use the Chief Justice's words in this case (para. 36). However, even this approach could not be satisfied by K.B. according to the trial judge who was uniquely placed to observe her demeanour.

[114] I respectfully disagree with the Chief Justice's characterization of *Khan* as insisting "on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to" (para. 62). The *Khan* test, in my view, did just the opposite. In that case, Robins J.A. found that the trial judge had erroneously applied the standards applicable to a child giving sworn testimony to a situation in which only the unsworn testimony of a child was sought and to which less onerous standards were applicable. Robins J.A. underscored the difference between the two standards in no uncertain terms:

contre-interrogatoire serait inutile puisque, comme il l'a dit, [TRADUCTION] « il n'y a aucun moyen sûr de vérifier la crédibilité de K.B. » (décision relative au ouï-dire, par. 56).

[113] Le critère de l'arrêt *Khan* mentionne précisément que l'interrogatoire ne doit pas sortir du cadre de la [TRADUCTION] « conduite sociale ordinaire de la vie quotidienne » (C.A., p. 206). Notre Cour dans *Khan*, ou la juge McLachlin dans *Rockey*, n'exigeaient aucunement que le témoin éventuel soit capable d'*articuler* ou même de comprendre dans l'abstrait des concepts comme le serment, l'affirmation ou la promesse. Abstraction faite de la mention d'une « obligation morale » par la juge McLachlin dans *Rockey* — qui a même proposé un critère d'admissibilité plus rigoureux que celui retenu par notre Cour dans *Khan* — s'il semble au juge du procès que le témoin éventuel dont la capacité mentale est mise en question a démontré qu'il comprend au sens de la conduite sociale ordinaire de la vie quotidienne ce qu'est une promesse de dire la vérité, le témoin a satisfait au critère requis pour témoigner sans avoir prêté serment. Il en serait de même, selon moi, d'un témoin qui comprend le sérieux de la situation et « l'importance de répondre de façon prudente et correcte », pour reprendre le propos de la Juge en chef en l'espèce (par. 36). Toutefois, K.B. ne pouvait satisfaire même à ces conditions, selon le juge du procès qui était particulièrement bien placé pour observer son comportement.

[114] Avec égards, je ne suis pas d'accord avec la Juge en chef pour dire que l'arrêt *Khan* insiste « sur la compréhension, en termes abstraits, du devoir de dire la vérité et des questions d'ordre métaphysique que cet accent engendrait » (par. 62). Le critère énoncé dans *Khan*, selon moi, a un effet diamétralement opposé. Dans cette affaire, le juge Robins a conclu que le juge du procès avait commis une erreur en appliquant à un enfant qui témoigne sous serment les normes applicables à une situation dans laquelle on cherchait seulement à obtenir le témoignage d'un enfant qui n'a pas prêté serment et auquel des normes moins rigoureuses s'appliquaient. Le juge Robins a souligné en termes on ne peut plus clairs la différence entre les deux normes :

An appreciation of the assumption of "a moral obligation" or "getting a hold on the conscience of the witness" or . . . an "appreciation of the solemnity of the occasion" or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are all matters involving abstract concepts which are not material to a determination of whether a child's unsworn evidence may be received. A child need not comprehend "what it is to tell the truth in court" or to appreciate "what happens when you tell a lie in the courtroom" before he or she can give unsworn evidence. [Emphasis added; emphasis in original deleted; pp. 205-6.]

Therefore, I have no disagreement with the Chief Justice insofar as she affirms the existing law that the judge's inquiry should not ask the potential witness to "articulate abstract concepts" (para. 31) or tell what "the truth means in abstract terms" (para. 35) or venture into "abstract, philosophical realms" (para. 56) or conduct "an abstract inquiry into the nature of the obligation to tell the truth" (para. 58). Nor did *Khan*, or McLachlin J. in *Rockey*, in my view, "insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations" (para. 61). On the contrary, it seems to me that *Khan* affirms — not denies — that "[i]t is unnecessary and indeed undesirable to conduct an abstract inquiry" (para. 64). At no point does *Khan* require an explanation of "the nature of the obligation to tell the truth in philosophical terms" (para. 66). The reasons of McLachlin J. in the later case of *Rockey* expressed no disagreement with the *Khan* approach. It is the present majority opinion that effects a marked departure from the existing jurisprudence.

B. *An Issue of Statutory Interpretation*

[115] The bottom line of the majority judgment in this case is that s. 16(3) precludes a court from conducting an inquiry into whether (as McLachlin J. in *Rockey* put it) the proposed witness has "the ability to promise to tell the truth" (para. 25). This is based, it is said, on "[t]he first and cardinal principle of statutory interpretation [which] is that one must look to the plain words of the provision. Where

[TRADUCTION] Apprécier le fait d'assumer « une obligation morale » ou « la prise de conscience du témoin » ou [. . .] « apprécier le caractère solennel de l'occasion » ou être conscient d'un devoir de dire la vérité qui va au-delà du devoir normal de dire la vérité sont toutes des questions comportant des concepts abstraits qui n'ont pas d'incidence au moment de déterminer si le témoignage d'un enfant qui n'a pas prêté serment peut être admis. Avant de faire une déposition sans avoir prêté serment, un enfant n'a pas à comprendre « ce que signifie dire la vérité devant le tribunal » ni à apprécier « les conséquences d'un mensonge dans la salle d'audience ». [Je souligne; italiques dans l'original omis; p. 205-206.]

Par conséquent, je ne conteste pas l'exposé que donne la Juge en chef de l'état du droit lorsqu'elle dit que, dans son interrogatoire, le juge ne devrait pas demander au témoin éventuel de « formuler [d]es concepts abstraits » (par. 31) ou d'expliquer « en termes abstraits ce que signifie dire la vérité » (par. 35) ni s'aventurer dans le « domaine plus abstrait de la philosophie » (par. 56) ou mener « un interrogatoire dans l'abstrait sur la nature de l'obligation de dire la vérité » (par. 58). Et selon moi, ni l'arrêt *Khan* ni la juge McLachlin dans l'arrêt *Rockey* n'ont « [i]nsist[é] sur la formulation de la nature de l'obligation de dire la vérité, sans égard à des situations particulières » (par. 61). Au contraire, il me semble que *Khan* confirme — au lieu de nier — qu'« [i]l n'est ni nécessaire, ni même souhaitable, de poser des questions de nature abstraite » (par. 64). L'arrêt *Khan* n'exige aucunement une explication « en termes philosophiques [de] la nature de l'obligation de dire la vérité » (par. 66). Dans ses motifs dans l'arrêt *Rockey*, la juge McLachlin ne rejette nullement l'approche retenue dans *Khan*. C'est l'opinion des juges de la majorité en l'espèce qui rompt nettement avec la jurisprudence.

B. *Une question d'interprétation de la loi*

[115] Les juges de la majorité affirment essentiellement en l'espèce que le par. 16(3) empêche le tribunal de procéder à une enquête visant à déterminer si (comme l'a dit la juge McLachlin dans *Rockey*) le témoin éventuel a « [l]a capacité [. . .] de promettre de dire la vérité » (par. 25). Ils disent se fonder sur « le principe fondamental de l'interprétation des lois, [suivant lequel] il faut examiner

ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity . . . . Section 16 shows no ambiguity" (McLachlin C.J., at para. 26).

[116] A more contextual approach to statutory interpretation has been emphasized by our Court on numerous occasions in recent years, as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting Professor Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[117] Leaving aside for the moment the amendments relating to children in s. 16.1 added by the 2005 amendments, the relevant "three options" for persons with mental disability are set out in s. 16(1) to (4) as follows:

> **16.** (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
>
> (*b*) whether the person is able to communicate the evidence.
>
> (2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
>
> (3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

le libellé explicite de la disposition. En cas d'ambiguïté, il peut être nécessaire d'avoir recours à des facteurs externes pour la dissiper [. . .] L'article 16 ne comporte aucune ambiguïté » (la juge en chef McLachlin, par. 26).

[116] À plusieurs reprises au cours des dernières années, notre Cour a insisté sur une méthode d'interprétation des lois plus contextuelle telle qu'énoncée dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 21, où la Cour cite le professeur Driedger :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87)

[117] Abstraction faite pour l'instant des modifications applicables aux enfants apportées en 2005 par l'ajout de l'art. 16.1, les « trois possibilités » applicables aux personnes ayant une déficience intellectuelle sont énoncées comme suit aux par. 16(1) à (4) :

> **16.** (1) [Témoin dont la capacité mentale est mise en question] Avant de permettre le témoignage d'une personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :
>
> *a*) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;
>
> *b*) d'autre part, celle-ci est capable de communiquer les faits dans son témoignage.
>
> (2) [Témoignage sous serment] La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est capable de communiquer les faits dans son témoignage témoigne sous serment ou sous affirmation solennelle.
>
> (3) [Témoignage sur promesse de dire la vérité] La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut, malgré qu'une disposition d'une loi exige le serment ou l'affirmation, témoigner en promettant de dire la vérité.

(4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[118] Section 16 mandates only one "inquiry" by the trial judge in dealing with a witness "whose mental capacity is challenged". Section 16(3) is simply part of a single evaluation in which the trial judge considers the gamut from permitting the challenged witness to testify under oath to not being able to testify at all.

[119] As to whether the expression "promising to tell the truth" means more than the mere verbal ability to mouth the words I refer to what McLachlin J. herself said in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 236: "The phrase 'communicate the evidence' indicates more than mere verbal ability." Equally, it seems to me, the requirement that a witness promise to tell the truth requires more than "mere verbal ability" to say the words. The trial judge is required to ascertain whether the witness possesses not only the "mere verbal ability" but understands "in ordinary, everyday terms" the difference between truth and fiction and the importance of sticking to the former in his or her testimony.

[120] In the initial version of s. 16 proposed by the government, there appeared a requirement that a child be "of sufficient intelligence" to testify. This was deleted. The Chief Justice suggests that the record of the Legislative Committee on Bill C-15 shows that "sufficient intelligence" was essentially understood as the ability to appreciate the moral difference between telling the truth and lying (para. 29). I disagree. As I read the legislative record, the term "sufficient intelligence" was dropped from the draft bill because in the

(4) [Inaptitude à témoigner] La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) [Charge de la preuve] La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle.

[118] L'article 16 ne requiert du juge du procès qu'une seule « enquête » à l'égard d'une personne « dont la capacité mentale est mise en question ». Le paragraphe 16(3) s'inscrit simplement dans une analyse unique par laquelle le juge du procès envisage toutes les solutions possibles, allant du témoignage sous serment à l'inhabilité à témoigner.

[119] Quant à savoir si l'expression « en promettant de dire la vérité » signifie plus que la simple capacité verbale d'articuler les mots, je renvoie aux propos de la juge McLachlin elle-même dans l'arrêt *R. c. Marquard*, [1993] 4 R.C.S. 223, p. 236 : « L'expression "communiquer les faits dans son témoignage" indique plus qu'une simple capacité verbale. » Il me semble de même que si l'on exige de la personne qu'elle promette de dire la vérité, il faut plus que la « simple capacité verbale » de prononcer les mots. Le juge du procès doit s'assurer que la personne possède non seulement la « simple capacité verbale », mais également qu'elle comprend « au sens ordinaire de la vie quotidienne » la différence entre la vérité et la fiction, ainsi que l'importance de s'en tenir à la vérité lors de son témoignage.

[120] Dans la version initiale de l'art. 16 proposée par le gouvernement, il était exigé de la personne qu'elle soit « suffisamment intelligente » pour témoigner. Cette exigence a été supprimée. Selon la Juge en chef, les procès-verbaux du Comité législatif sur le projet de loi C-15 révèlent que l'expression « suffisamment intelligente » s'entendait essentiellement de la capacité d'apprécier la différence morale entre dire la vérité et mentir (par. 29). Je ne partage pas cette opinion. Selon mon interprétation de ces procès-verbaux, l'expression « suffisamment

Committee's view it potentially risked being interpreted as requiring judges to evaluate a child witness's IQ rather than his or her capacity to communicate and understand the difference between truth and lies. The Parliamentarians were assured that s. 16(3), without the words "sufficient intelligence", still required that "the child understands the difference between telling the truth and lying", as demonstrated in the following exchange:

[The Hon. Mary] Collins: Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.

Mr. Pink: It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

[The Hon. Mary] Collins: I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

Mr. Pink: I agree.

[The Hon. Mary] Collins: Thank you. [Emphasis added; p. 27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

[121] This seems as clear a demonstration as one could ask for from the Parliamentary record that it was intended under s. 16(3) that the trial judge be satisfied that the witness "understands the difference between telling the truth and lying" (emphasis added). Nothing in the legislative record of the 1987 amendments suggests that the mere verbal ability to mouth the words of a promise would be sufficient.

[122] As to the "object of the Act", it seems clear that Parliament, in making the amendments to s. 16

intelligente » a été radiée de l'avant-projet de loi parce que, de l'avis du Comité, elle aurait pu prêter à une interprétation obligeant les juges à évaluer le quotient intellectuel des enfants plutôt que leur capacité de communiquer et de comprendre la différence entre la vérité et le mensonge. Les membres du Comité ont obtenu l'assurance que, même sans les mots « suffisamment intelligente », le par. 16(3) exigeait toujours que « l'enfant compren[ne] la différence entre dire la vérité et dire un mensonge », comme l'illustre l'échange qui suit :

[L'hon. Mary] Collins : Oui. Cependant, si nous conservons le concept de « l'intelligence suffisante », et si on l'interprète de la même façon que précédemment, j'ai quand même l'impression que cela constituera peut-être un obstacle.

M. Pink : Il faudra peut-être que le Comité choisisse alors d'autres termes que « intelligence suffisante ». De toute façon, pourquoi pose-t-on d'abord toutes ces questions? S'agit-il vraiment de savoir si le témoin sait distinguer entre le vrai et le faux? Est-ce que tout ne revient pas à cela?

[L'hon. Mary] Collins : Je le pense. Oui. En conséquence, si l'enfant comprend la différence entre dire la vérité et dire un mensonge, il me semble que l'on disposerait là de tout ce dont on a vraiment besoin.

M. Pink : J'abonde en ce sens.

[L'hon. Mary] Collins : Merci. [Je souligne; p. 27.]

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15*, nº 2, 2e sess., 33e lég., 4 décembre 1986)

[121] Cet extrait des procès-verbaux du Comité démontre on ne peut plus clairement, il me semble, que le législateur voulait, au par. 16(3), que le juge du procès soit convaincu que la personne « comprend la différence entre dire la vérité et dire un mensonge » (je souligne). Les procès-verbaux du Comité relatifs aux amendements de 1987 ne donnent nullement à penser que la simple capacité verbale d'articuler les mots d'une promesse serait suffisante.

[122] En ce qui concerne l'« objet de la loi », il semble évident que le législateur, en modifiant

in 1987 (S.C. 1987, c. 24), was attempting to strike a balance between access to justice and the rights of an accused in enacting s. 16 (*ibid*., No. 1, November 27, 1986, at pp. 21, 24 and 33). A promise to tell the truth affords some protection to an accused, but not if "the promise" is reduced to an empty formality (or, to use McLachlin J.'s phrase in *Marquard*, to a "mere verbal ability" (p. 236)), which is the unfortunate result of the majority judgment in this case.

C. *The Proper Interpretation of Section 16(3) Was Not Altered by the 2005 Amendments Related to the Evidence of Children Under 14 Years Old*

[123] In 2005, Parliament amended the *Canada Evidence Act* with respect to the unsworn evidence of children based in part on the report of the Child Witness Project at Queen's University. I agree with the Chief Justice that "Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children" (para. 41 (emphasis added)).

[124] The 2005 amendments provide as follows (S.C. 2005, c. 32):

16.1 (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.

(2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

l'art. 16 en 1987 (L.C. 1987, ch. 24), tentait en adoptant cette disposition d'établir un juste équilibre entre l'accès à la justice et les droits de l'accusé (*ibid*., nº 1, 27 novembre 1986, p. 21, 24 et 33). Une promesse de dire la vérité fournit à l'accusé une certaine protection, mais pas si « la promesse » est réduite à une formalité vide de sens (ou une « simple capacité verbale », les mots qu'emploie la juge McLachlin dans *Marquard* (p. 236)), ce qui est le résultat regrettable auquel parviennent les juges majoritaires en l'espèce.

C. *Les modifications apportées en 2005 relativement au témoignage des enfants âgés de moins de 14 ans n'ont pas changé l'interprétation qu'il convient de donner au par. 16(3)*

[123] En 2005, en se fondant en partie sur le rapport du Child Witness Project de l'Université Queen's, le législateur a modifié la *Loi sur la preuve au Canada* en ce qui concerne les dispositions relatives au témoignage des enfants qui ne prêtent pas serment. Je suis d'accord avec la Juge en chef pour dire qu'« en adoptant en 2005 les modifications à la *Loi sur la preuve au Canada*, le législateur visait exclusivement les enfants. Les modifications ont été apportées comme suite au rapport Bala traitant des problèmes associés à la poursuite des actes criminels perpétrés contre les enfants. Les débats de la Chambre des communes portant sur l'art. 16.1 attestent que les modifications de 2005 avaient exclusivement trait aux enfants » (par. 41 (je souligne)).

[124] Les modifications apportées en 2005 prévoient ce qui suit (L.C. 2005, ch. 32):

16.1 (1) [Témoin âgé de moins de quatorze ans] Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) [Témoin non assermenté] Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) [Témoignage admis en preuve] Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

(4) [Charge de la preuve] La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) [Enquête du tribunal] Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) [Promesse du témoin] Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) [Question sur la nature de la promesse] Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) [Effet] Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

[125] The Crown acknowledges that there are "obvious distinctions" between Parliament's test for adults with limited mental capacity under s. 16 and children under 14 years of age under s. 16.1 (A.F., at para. 57). For adults, s. 16(3) retains the more expansive test developed in the jurisprudence regarding the ability to communicate the evidence: see *Marquard*. A child need only be able "to understand and respond to questions" (s. 16.1(5)). Section 16(1) retains the potential for a challenged adult to testify under oath, whereas s. 16.1(2) provides that a child witness shall *not* take an oath or make a solemn affirmation. The child, as in the case of the challenged adult, must promise to tell the truth (s. 16.1(6)), but s. 16.1(7) specifically prohibits asking children "any questions regarding their understanding of the nature of the promise to tell the truth". The Crown contends that research shows "that regardless of an inability to define these abstract concepts, the making of a promise to tell the truth by a child makes it more likely that a

[125] Le ministère public reconnaît qu'il existe des [TRADUCTION] « distinctions évidentes » entre le critère établi par le législateur à l'art. 16 à l'égard des adultes ayant une capacité mentale limitée et celui établi à l'art. 16.1 à l'égard des enfants âgés de moins de 14 ans (m.a., par. 57). Pour les adultes, le par. 16(3) conserve le critère plus large élaboré dans la jurisprudence en ce qui concerne la capacité de communiquer les faits dans un témoignage : voir *Marquard*. Pour l'enfant, il suffit qu'il soit capable « de comprendre les questions et d'y répondre » (par. 16.1(5)). Aux termes du par. 16(1), un adulte dont la capacité mentale est mise en question peut témoigner sous serment alors qu'aux termes du par. 16.1(2), un enfant *ne* peut prêter serment *ni* faire une affirmation solennelle. L'enfant, tout comme l'adulte dont la capacité mentale est mise en question, doit promettre de dire la vérité (par. 16.1(6)), mais le par. 16.1(7) interdit expressément de poser aux enfants une « question sur la compréhension de la nature

child will tell the truth" (A.F., at para. 79 (emphasis added)).

[126] I agree with the Chief Justice that the words "on promising to tell the truth" in s. 16(3) and s. 16.1(6) should receive the same interpretation. It is for that very reason that, in my view, Parliament felt it necessary in 2005 to introduce the s. 16.1(7) "don't ask" rule. Otherwise, the "simple line of questioning" to determine whether the potential witness understands "the seriousness of the situation and the importance of being careful and correct" would continue to apply to children under the 2005 amendments as well as to adults whose mental capacity is challenged. The point, however, is that s. 16.1(6), unlike s. 16(3), must be read together with s. 16.1(7) (the "don't ask" rule), and s. 16.1(7) was limited to children because the empirical research related to "children, and only children". Thus, the witness from the Department of Justice told the Parliamentary Committee:

> Professor Bala's research seems to highlight that there's significance in giving that promise because children understand what a promise is all about. [Emphasis added; 17:20.]

(House of Commons, *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2nd Sess., 37th Parl., October 29, 2003)

Senator Landon Pearson emphasized the empirical foundation of the "don't ask" rule:

> I want to put on the record the degree to which this provision of the bill is based on a considerable body of research on the capacity of children to understand that when they say "I promise to tell the truth," that

de la promesse ». Le ministère public plaide que la recherche démontre [TRADUCTION] « que même s'il n'est pas en mesure de définir ces notions abstraites, un enfant qui promet de dire la vérité est plus susceptible de dire la vérité » (m.a., par. 79 (je souligne)).

[126] Je suis d'accord avec la Juge en chef pour dire que l'expression « en promettant de dire la vérité » qui figure au par. 16(3) et au par. 16.1(6) devrait être interprétée de la même manière dans les deux dispositions. C'est exactement pour cette raison, selon moi, que le législateur a cru nécessaire d'introduire en 2005 la règle du par. 16.1(7) interdisant de poser des questions. Autrement, la « série de questions simples » visant à déterminer si le témoin éventuel comprend « le caractère sérieux de la situation et l'importance de répondre de façon prudente et correcte » continuerait de s'appliquer aux enfants aux termes de la modification apportée en 2005 ainsi qu'aux adultes dont la capacité mentale est mise en question. Le fait est, toutefois, que contrairement au par. 16(3), le par. 16.1(6) doit être interprété conjointement avec le par. 16.1(7) (l'interdiction de poser des questions), et l'application du par. 16.1(7) a été limitée aux enfants parce que la recherche empirique avait « exclusivement trait aux enfants ». Ainsi, la représentante du ministère de la Justice a dit ce qui suit en comité parlementaire :

> Selon les recherches de M. Bala, le fait pour des jeunes de faire une promesse a de l'importance puisqu'ils comprennent de quoi il retourne. [Je souligne; 17:20.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice et des droits de la personne*, n^o^ 77, 2^e^ sess., 37^e^ lég., 29 octobre 2003)

La sénatrice Landon Pearson a insisté sur le fondement empirique de la règle interdisant de poser des questions :

> Je veux simplement dire, pour mémoire, dans quelle mesure les dispositions de ce projet de loi sont fondées sur un corpus impressionnant de recherches sur la capacité des enfants à comprendre leur affirmation « Je

they know what they are doing. [Emphasis added; p. 19.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1st Sess., 38th Parl., June 23, 2005)

No such empirical studies were carried out with respect to adults with mental disabilities. In their case, there was no "don't ask" equivalent to s. 16.1(7) even proposed, let alone adopted. As the Chief Justice emphasizes, the 2005 amendments deal with "children, and only children" (para. 41).

[127] The Crown invites us, in effect, to apply the "don't ask" rule governing children to adults whose mental capacity is challenged, despite evidence of legislative intent to the contrary. It does so on the basis that both are members of a "vulnerable group" (A.F., at para. 58) and should be treated as equivalent. That is a policy argument for Parliament, not a change to be brought about by judicial amendment.

[128] The Chief Justice endorses a version of this equivalence argument in posing a rhetorical question:

When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? [para. 52]

In my view, the difference is that a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. The fact that psychiatrists speak of persons with mental disabilities calibrated in terms of mental ages is a useful way of describing the relative extent and severity of a person's disability, but it does not mean that a 22-year-old woman with a severe mental disability is on the same footing as a six-year-old child with no mental disability whatsoever, and of course the empirical evidence before Parliament in 2005 did not suggest otherwise.

promets de dire la vérité », c'est-à-dire qu'ils comprennent ce serment. [Je souligne; p. 19.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, nº 17, 1re sess., 38e lég., 23 juin 2005)

Aucune étude empirique de ce genre n'a été effectuée relativement aux adultes ayant une déficience intellectuelle. Dans le cas de ces adultes, aucune règle interdisant de poser des questions, équivalente à la règle du par. 16.1(7), n'a même été proposée, et encore moins adoptée. Comme l'a souligné la Juge en chef, les modifications de 2005 avaient « exclusivement trait aux enfants » (par. 41).

[127] Le ministère public nous invite, en réalité, à appliquer aux adultes dont la capacité mentale est mise en question la règle interdisant de poser des questions aux enfants et ce, en dépit de la preuve de l'intention du législateur au contraire. Il fait valoir qu'il s'agit dans les deux cas de membres d'un [TRADUCTION] « groupe vulnérable » (m.a., par. 58) qui doivent être traités de manière équivalente. Il s'agit d'un argument de politique générale à l'intention du législateur et non d'une modification introduite par voie judiciaire.

[128] La Juge en chef se prononce en faveur d'une version de cet argument d'équivalence en posant une question d'ordre rhétorique :

. . . en ce qui concerne l'habilité à témoigner, on peut se demander quelle est la différence, précisément, entre un adulte ayant la capacité mentale d'un enfant de six ans et un enfant de six ans ayant la capacité mentale d'un enfant de six ans. [par. 52]

Selon moi, la différence est qu'un enfant de six ans ayant la capacité mentale d'un enfant de six ans n'a pas une déficience intellectuelle. Le fait pour les psychiatres de classer en fonction de l'âge mental les personnes ayant une déficience intellectuelle se veut une manière utile de décrire l'ampleur et la gravité relatives de la déficience d'une personne, mais cela ne signifie pas qu'une femme âgée de 22 ans ayant une déficience intellectuelle grave est sur un pied d'égalité avec un enfant âgé de six ans n'ayant aucune déficience intellectuelle et, bien sûr, la preuve empirique soumise au législateur en 2005 ne donnait pas à penser autrement.

[129] The rhetorical question posed by the Chief Justice seeks to reverse the onus of proof. It *presumes* without proof the fact of equivalence and demands a rebuttal, but it was for the government to persuade Parliament, if it could, that there is no relevant difference between an adult with a severe mental disability and a child with no mental disability. It made no effort to do so because there was no evidence on which such an argument *could* have been made.

[130] No evidence was led in these proceedings to suggest equivalence and we cannot take judicial notice of alleged "facts" that are neither notorious nor easily verifiable from undisputed sources: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53. While greater latitude is allowed in the judicial notice of legislative facts (as opposed to adjudicative facts), it would still be necessary for the Crown to show that its assertion of equivalence of children and adults with a mental disability in this respect "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy" (*ibid*., at para. 65 (emphasis deleted)). The Crown's assertion of equivalence is pure assertion on a key issue, and mere assertion does not meet the *Spence* standard.

[131] Section 16(3) *does not* require an inquiry into the proposed witness's understanding of the abstract "nature of the obligation to tell the truth". The argument about abstract concepts was rejected in *Khan* and by McLachlin J. in *Rockey*, and there is no need for the majority to resurrect it at this point for the sole purpose of rejecting it yet again. That is not a point of disagreement between us

[129] La question d'ordre rhétorique posée par la Juge en chef vise à inverser le fardeau de la preuve. La question *suppose* sans aucune preuve à l'appui le fait de l'équivalence et exige que l'on réfute ce fait, mais il appartenait au gouvernement de convaincre le législateur, s'il le pouvait, qu'il n'existe aucune différence palpable entre un adulte ayant une déficience intellectuelle grave et un enfant n'ayant aucune déficience intellectuelle. Le gouvernement n'a déployé aucun effort en ce sens puisqu'il n'existait aucune preuve *susceptible* d'appuyer un tel argument.

[130] Aucun élément de preuve laissant croire que cette équivalence existe n'a été soumis en l'espèce et nous ne pouvons pas prendre connaissance d'office de « faits » allégués qui ne sont ni notoires, ni facilement vérifiables en ayant recours aux sources incontestées : *R. c. Find*, 2001 CSC 32, [2001] 1 R.C.S. 863, par. 48; *R. c. Spence*, 2005 CSC 71, [2005] 3 R.C.S. 458, par. 53. Si les juges ont plus de latitude pour prendre connaissance d'office des faits législatifs qu'ils n'en ont à l'égard des faits en litige, le ministère public devrait tout de même démontrer, relativement à l'équivalence qu'il invoque entre les enfants et les adultes ayant une déficience intellectuelle, qu'« une personne raisonnable ayant pris la peine de s'informer sur le sujet considérerait que ce "fait" échappe à toute contestation raisonnable quant à la fin à laquelle il sera invoqué, sans oublier que les exigences en matière de crédibilité et de fiabilité s'accroissent directement en fonction de la pertinence du "fait" pour le règlement de la question en litige » (*ibid*., par. 65 (italiques omis)). La prétention du ministère public relative à l'équivalence n'est que pure prétention relativement à une question clé, et une simple prétention ne satisfait pas au critère établi dans l'arrêt *Spence*.

[131] Le paragraphe 16(3) *n*'exige *pas* que l'on vérifie si le témoin éventuel comprend, dans l'abstrait, la « nature de l'obligation de dire la vérité ». L'argument au sujet des concepts abstraits a été rejeté dans *Khan* et par la juge McLachlin dans *Rockey*, et point n'est besoin que les juges majoritaires reviennent avec cet argument à ce moment-ci à seule fin de le rejeter de nouveau. Nous ne

and should not be portrayed as such. Section 16(3) requires only the "ability to promise to tell the truth" (quoting *Rockey*) in terms of ordinary, everyday social conduct.

[132] It is the majority, not the minority here, that must resort to extraneous language not found in s. 16(3) to achieve the result it seeks. As stated, I agree with the Chief Justice that the words "on promising to tell the truth" in s. 16(3) must bear the same meaning as "to promise to tell the truth" in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) "don't ask" rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words "promising to tell the truth" in s. 16(3), and thus rob the words of s. 16(3) of their ordinary meaning, in my opinion.

[133] The Chief Justice refers to s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, for the proposition that no inference as to the meaning of s. 16(3) flows from the adoption of s. 16.1(7) with respect to children (para. 46). Professor P.-A. Côté puts the point somewhat differently:

> The provisions [s. 45] do not, for example, prevent interpreting the act of amendment as an expression of the legislature's opinion; they simply eliminate an *a priori* presumption ("shall not be deemed"). The context, or even the formulation (in the form of a preamble, for example), of an amendment is quite capable of marking a clear desire to change the state of the law.
>
> (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 569)

In any event, this is not the foundation of the respondent's argument. He relies on s. 16(3) as it was enacted in 1987. He does not rely, nor does he need to rely, on the 2005 amendments which, as the majority concedes, apply only to children.

sommes pas en désaccord sur ce point et il ne faudrait pas laisser croire que tel est le cas. Le paragraphe 16(3) exige uniquement la « capacité [. . .] de dire la vérité » (citant *Rockey*) au sens de la conduite sociale ordinaire de la vie quotidienne.

[132] Ce sont les juges de la majorité, non les juges dissidents, qui doivent, pour obtenir le résultat qu'ils souhaitent, avoir recours à des termes extrinsèques qu'on ne trouve pas au par. 16(3). Je le répète, je suis d'accord avec la Juge en chef pour dire que les mots « en promettant de dire la vérité » au par. 16(3) doivent avoir le même sens que les mots « promettre [. . .] de dire la vérité » au par. 16.1(6). Cela étant, les juges majoritaires doivent incorporer, au par. 16(3) applicable uniquement aux adultes ayant une déficience intellectuelle, la règle du par. 16.1(7) interdisant de poser des questions, qui s'applique uniquement aux enfants, afin d'atténuer l'expression « en promettant de dire la vérité » au par. 16(3) et, à mon avis, de priver ce paragraphe de son sens ordinaire.

[133] La Juge en chef cite l'art. 45 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, comme fondement de l'affirmation suivant laquelle aucune inférence quant au sens du par. 16(3) ne découle de l'adoption du par. 16.1(7) relativement aux enfants (par. 46). Le professeur P.-A. Côté exprime ce point de vue un peu différemment :

> . . . les textes [l'art. 45] n'interdisent pas de voir dans une modification une manifestation d'opinion du Parlement : ils ne font qu'écarter toute présomption à ce sujet (« *shall not be deemed* »). Il pourrait très bien arriver que le contexte d'une modification, ou même la formulation de la loi modificative, le préambule par exemple, fasse voir une volonté de changer le droit.
>
> (P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 617)

Quoi qu'il en soit, il ne s'agit pas là du fondement de l'argument de l'intimé. Ce dernier se fonde sur le par. 16(3) tel qu'il a été adopté en 1987. Il ne se fonde pas, et n'a pas besoin de se fonder, sur les modifications apportées en 2005 qui, les juges de la majorité le concèdent, s'appliquent uniquement aux enfants.

D. *Was the Section 16(3) Test Misapplied in This Case?*

[134] The Crown contends that, even if the *Khan* test is affirmed, it was not applied properly in this case. Firstly, the trial judge should have sought assistance from individuals apart from Dr. K., a forensic psychiatrist called by the defence, whose evidence was, in any event, put aside by the trial judge as unnecessary. The trial judge did not hear from K.B.'s teacher or other support workers who were familiar with K.B.'s strengths and weaknesses for purposes of the s. 16 inquiry. The Crown argues that they could have assisted the court to pose questions in a way that K.B. was capable of dealing with. To do so could have disclosed K.B.'s true capacity to deal with concrete facts without the distraction of conceptual issues, which, as the *voir dire* confirmed, K.B. could not handle. Secondly, the Crown says that the trial judge, having chosen to proceed without such assistance, misdirected his questions to metaphysical issues which could not and did not provide the basis for a fair determination of K.B.'s mental capacity.

[135] I approach the trial judge's assessment of K.B. on the basis of "the ability to communicate the evidence and the ability to promise to tell the truth" (*Rockey*, at para. 25).

(1) The Ability to Communicate the Evidence

[136] The trial judge clearly had serious concerns about this first branch of the test. He reminded K.B.'s teacher, Ms. W., of testimony she had given at the preliminary inquiry, in which Ms. W. had said the following:

If the purpose of her testifying is to determine the truth of what happened, her capacity to express her recollections could be severely limited. So the court may be asking her to do something that she can't do, and her failure to do that may skew her knowledge of what happened. In other words, the outcome — there's a

D. *Le critère du par. 16(3) a-t-il été mal appliqué en l'espèce?*

[134] Le ministère public prétend que, même si le critère de l'arrêt *Khan* est confirmé, il n'a pas été appliqué correctement en l'espèce. Premièrement, le juge du procès aurait dû demander l'aide de personnes autres que le D^r^ K., un psychiatre légiste cité par la défense, dont le témoignage a été de toute façon écarté par le juge du procès au motif qu'il n'était pas nécessaire. Le juge n'a pas entendu, pour les besoins de l'enquête prévue à l'art. 16, l'enseignante de K.B. ni les autres personnes de soutien qui connaissaient les forces et faiblesses de K.B. Le ministère public prétend que ces personnes auraient pu aider la cour à poser des questions de façon à ce que K.B. soit capable de les comprendre et d'y répondre. Ainsi, il aurait été possible de voir la véritable capacité de K.B. d'examiner des faits concrets sans être distraite par des notions conceptuelles que K.B., comme le voir-dire l'a confirmé, n'était pas en mesure de saisir. Deuxièmement, le ministère public affirme que le juge du procès, ayant choisi de procéder sans demander d'aide, a posé par erreur des questions d'ordre métaphysique qui ne permettaient pas de rendre une décision équitable sur la capacité mentale de K.B.

[135] J'aborde l'appréciation que le juge du procès a faite de K.B. en fonction de « sa capacité de communiquer les faits dans son témoignage et celle de promettre de dire la vérité » (*Rockey*, par. 25).

(1) La capacité de communiquer les faits dans son témoignage

[136] Le juge du procès avait manifestement de sérieuses réserves quant à ce premier volet du critère. Il a rappelé à l'enseignante de K.B., M^me^ W., la déposition qu'elle avait faite à l'enquête préliminaire, dans laquelle M^me^ W. avait déclaré ce qui suit :

[TRADUCTION] Si son témoignage doit servir à déterminer ce qui s'est réellement produit, sa capacité d'exprimer ses souvenirs pourrait être très limitée. La cour pourrait lui demander de faire quelque chose qu'elle ne peut pas faire, et le fait qu'elle ne puisse pas le faire peut fausser sa connaissance de ce qui est arrivé. Autrement

potential for the outcome to not get at the truth, because of . . . her incapacity to express that. [Emphasis added; hearsay decision, at para. 4.]

This evidence, given earlier at the preliminary inquiry, was properly considered by the trial judge at the subsequent competency hearing.

[137] Moreover, during the competency *voir dire* itself, Dr. K., observing K.B.'s low tolerance for frustration, testified, "I don't think she has the ability to think what you're asking and come up with an answer" (A.R., vol. I, at p. 161). The expert also stated, as noted by the trial judge, and echoing the words in *Rockey*, that K.B. "had serious problems relating to her ability to communicate and to recollect" (hearsay decision, at para. 7 (emphasis added)). She could not adequately communicate evidence because, by reason of her mental disability, she was simply unable to "compute" what she was being asked.

[138] The accuracy of the trial judge's assessment of the extent of K.B.'s mental disability was corroborated and confirmed at subsequent stages of the trial. In the course of her testimony at the hearsay *voir dire*, for example, Ms. W., K.B.'s teacher, referred to a statement K.B. had made to an educational assistant, claiming that she, K.B., had spent the weekend at the respondent's house (which was not true). Ms. W. said that if K.B. were asked what she had done that weekend, and replied "[D.A.I.]'s place", this might have meant that she had been *thinking about* D.A.I. and *wanted* to go to his place, not that she had gone there at all (A.R., vol. II, at pp. 25 and 27; see also p. 7). Communication of wishful thinking is not communication of evidence.

[139] Further, the trial judge, in rejecting K.B.'s out-of-court statements, adverted to the earlier observations that K.B. had "serious problems in communicating her evidence, her incapacity to

dit, en fin de compte — il est possible en fin de compte de ne pas apprendre la vérité, en raison de [. . .] son incapacité de l'exprimer. [Je souligne; décision relative au ouï-dire, par. 4.]

Cette déposition, qui avait été faite lors de l'enquête préliminaire, a été prise en compte comme il se doit par le juge du procès au cours de l'audition ultérieure relative à l'habilité à témoigner.

[137] En outre, au cours même du voir-dire relatif à l'habilité à témoigner, le D^r^ K., constatant la faible tolérance de K.B. face à la frustration, a affirmé ce qui suit : [TRADUCTION] « Je ne crois pas qu'elle ait la capacité de penser à vos questions et de donner une réponse » (d.a., vol. I, p. 161). Le juge du procès a souligné que l'expert, répétant les propos tenus dans *Rockey*, a déclaré aussi que K.B. [TRADUCTION] « avait de sérieux problèmes liés à sa capacité de communiquer et de se souvenir » (décision relative au ouï-dire, par. 7 (je souligne)). Elle ne pouvait pas communiquer adéquatement les faits dans son témoignage parce que, du fait de sa déficience intellectuelle, elle était tout simplement incapable de « computer » ce qu'on lui demandait.

[138] Les étapes subséquentes du procès ont corroboré et confirmé la justesse de l'appréciation, par le juge du procès, de la gravité de la déficience intellectuelle de K.B. Au cours de son témoignage lors du voir-dire relatif au ouï-dire, par exemple, M^me^ W., l'enseignante de K.B., a fait part d'une déclaration dans laquelle K.B. avait dit à une aide-éducatrice avoir passé la fin de semaine chez l'intimé (ce qui n'était pas vrai). M^me^ W. a dit que si l'on demandait à K.B. ce qu'elle avait fait pendant la fin de semaine et qu'elle répondait [TRADUCTION] « chez [D.A.I.] », cela pouvait signifier qu'elle avait *pensé à* D.A.I. et qu'elle *voulait* aller chez lui, et non qu'elle y était allée (d.a., vol. II, p. 25 et 27; voir aussi p. 7). La communication de ses rêveries n'est pas une communication des faits dans un témoignage.

[139] De plus, en rejetant les déclarations extrajudiciaires de K.B., le juge du procès a fait allusion à ses observations antérieures à propos de K.B., à savoir [TRADUCTION] « [ses] sérieuses difficultés à

answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother" (hearsay decision, at para. 53 (emphasis added)).

[140] While it is true that the trial judge emphasized the second branch of the test (the ability to promise to tell the truth), his concerns about K.B.'s ability to communicate the evidence are plain and obvious and were in themselves sufficient to conclude that she lacked the capacity to testify by reason of her severe mental disability.

(2) The Ability to Promise to Tell the Truth

[141] As noted by the Chief Justice, this was the principal ground for the rejection of K.B.'s evidence. However, I believe, as did Doherty and MacPherson JJ.A., for a unanimous Court of Appeal, that this conclusion was certainly open to the trial judge on the evidence.

[142] At the competency hearing, Dr. K. counselled the trial judge that "when you ask about truth, honesty, lie, these are difficult concepts for anybody" (A.R., vol. I, at p. 137). The inquiry, he said, could better be pursued by asking K.B. what she had for breakfast or "other areas in her life, day to day events, and see whether she can understand what is true and what is lie" (p. 140). Such questions would yield an answer that could be verified one way or another (p. 145) and, according to Dr. K., could assist to "see whether she has any ability to discriminate between what is real or just come up with an answer kind of thing" (p. 137).

[143] Armed with this guidance, the trial judge embarked on a second round of questions to ascertain K.B.'s capacity. He asked K.B. a series of simple and concrete questions about her family, school, breakfast routine, and so on. He then posed

communiquer les faits dans son témoignage, [. . .] son incapacité à répondre à des questions relativement simples portant sur ses allégations, [. . .] sa confusion quant à savoir si elle avait ou non parlé à sa mère » (décision relative au ouï-dire, par. 53 (je souligne)).

[140] Le juge du procès a effectivement mis l'accent sur le deuxième volet du critère (la capacité de promettre de dire la vérité), mais les réserves qu'il a exprimées quant à la capacité de K.B. de communiquer les faits dans son témoignage sont claires et évidentes et lui suffisaient pour conclure qu'elle n'avait pas la capacité de témoigner du fait de sa grave déficience intellectuelle.

(2) La capacité de promettre de dire la vérité

[141] Comme l'a souligné la Juge en chef, il s'agissait du principal motif justifiant le rejet du témoignage de K.B. Toutefois, tout comme les juges Doherty et MacPherson qui s'exprimaient au nom d'une Cour d'appel unanime, j'estime qu'il était certainement loisible au juge du procès de conclure comme il l'a fait en se fondant sur la preuve.

[142] À l'audience relative à l'habilité à témoigner, le D^r^ K. a dit au juge du procès que [TRADUCTION] « les questions au sujet de la vérité, l'honnêteté et le mensonge portent sur des notions difficiles à saisir pour tous » (d.a., vol. I, p. 137). Selon lui, l'enquête serait facilitée si l'on demandait à K.B. ce qu'elle a mangé au petit-déjeuner ou en lui posant des questions à propos « d'autres aspects de sa vie, sa routine quotidienne, et voir si elle peut comprendre ce qu'est la vérité et ce qu'est le mensonge » (p. 140). De telles questions apporteraient des réponses vérifiables d'une façon ou d'une autre (p. 145) et, selon le D^r^ K., aideraient à « savoir si elle est capable de distinguer ce qui est réel ou si elle répond ce qui lui passe par la tête » (p. 137).

[143] Fort de ces conseils, le juge du procès a entrepris de poser une seconde série de questions en vue de vérifier la capacité de K.B. Il a posé à cette dernière une série de questions simples et concrètes à propos de sa famille, de son école, de

the following questions to K.B. and received the following responses (*ibid.*, at pp. 155-56):

[THE COURT:]

Q. You don't know. Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

la routine du déjeuner, et ainsi de suite. Il a ensuite posé les questions suivantes à K.B. qui a répondu comme suit (*ibid.*, p. 155-156) :

[TRADUCTION]

[LA COUR :]

Q. Tu ne sais pas. Sais-tu pourquoi tu es ici aujourd'hui?

R. Je ne sais pas. Pour parler de [D.A.I.].

Q. Oui, et penses-tu que ce soit vraiment important?

R. Peut-être, oui.

Q. Peut-être oui? Te souviens-tu, plus tôt, quand je t'ai posé des questions à propos d'une promesse?

R. Non.

Q. As-tu déjà fait une promesse à quelqu'un?

R. Je ne sais pas.

Q. As-tu déjà promis d'être gentille, as-tu déjà dit cela? As-tu déjà entendu l'expression « je promets d'être gentille, maman »?

R. D'accord.

Q. Très bien. Alors, sais-tu ce qu'est une promesse, que tu vas agir de la bonne façon? Comprends-tu?

R. D'accord.

Q. Peux-tu me dire si tu comprends ça, [K.B.]?

R. Je ne sais pas.

Q. Est-ce qu'il arrive quelque chose si tu ne tiens pas une promesse?

R. Je ne sais pas.

Q. Tu m'as dit que tu ne vas pas à l'église, n'est-ce pas?

R. Exact.

Q. Et personne ne t'a jamais parlé de Dieu; est-ce exact? Personne ne t'a jamais parlé de Dieu?

R. Non.

Q. Est-ce qu'on t'a jamais dit que si tu dis de gros mensonges, tu vas aller en prison?

R. Exact.

Q. If you tell big lies will you go to jail?

A. No.

Q. No?

THE COURT: Those are all the questions I'm going to pursue at this point.

The Crown also posed a second set of questions (*ibid.*, at pp. 156-58):

Q. We asked you the last time if you knew the difference between a truth and a lie, do you remember that, [K.B.]?

A. Yeah.

Q. Okay. We talked about the room and the colour of the room?

A. Sometimes.

Q. Okay. Do you think it's important to tell the truth or do you think it matter (*sic*)?

A. Does it matter?

Q. It matters?

A. Does it matter?

Q. Does it matter. Do you understand when I say "matter", do you understand what that means?

A. I don't know.

. . .

Q. Okay. We talked about the room. If I were to say to you that you had eggs for breakfast would that be a truth or a lie?

A. I don't know.

Q. You don't know? How about lunch, if I said you had eggs for lunch, ---

A. Yuk.

Q. --- would that be a truth or a lie?

A. I don't know.

Q. You don't know? Okay.

A. It's getting hard.

Q. It's getting hard?

A. Yeah.

Q. Si tu dis de gros mensonges, tu vas aller en prison?

R. Non.

Q. Non?

LA COUR : Ce sont là toutes mes questions pour l'instant.

Le ministère public a lui aussi posé une seconde série de questions (*ibid.*, p. 156-158) :

Q. Nous t'avons demandé la dernière fois si tu savais la différence entre la vérité et le mensonge, tu t'en souviens, [K.B.]?

R. Oui.

Q. D'accord. Nous avons parlé de la pièce et de la couleur de la pièce?

R. Des fois.

Q. D'accord. Penses-tu qu'il est important de dire la vérité ou penses-tu que cela ait de l'importance?

R. Est-ce que c'est important?

Q. C'est important?

R. Est-ce que c'est important?

Q. Est-ce important. Comprends-tu quand je dis « important », comprends-tu ce que cela signifie?

R. Je ne sais pas.

. . .

Q. D'accord. Nous avons parlé de la pièce. Si je disais que tu as mangé des œufs au petit-déjeuner, est-ce que ce serait la vérité ou un mensonge?

R. Je ne sais pas.

Q. Tu ne sais pas? Et pour le dîner, si je disais que tu as mangé des œufs au dîner, ---

R. Eurk.

Q. --- ce serait la vérité ou un mensonge?

R. Je ne sais pas.

Q. Tu ne sais pas? D'accord.

R. Ça commence à être difficile.

Q. Ça commence à être difficile?

R. Oui.

Q. Why is it getting hard?

A. I don't know why.

Q. You don't know. Okay.

MR. SEMENOFF: Thank you.

At the conclusion of K.B.'s testimony, the trial judge ruled her unsworn testimony to be inadmissible. He explained:

> What I'm saying is I wouldn't have to hear from [Dr. K.]. I've heard from him but it doesn't in any way add or detract or anything from the opinion I've come to, having watched and questioned this witness, which is my obligation.
>
> In other words, I suppose what I'm saying to you is I'm fully satisfied that this witness does not understand what a promise to tell the truth involves, has no concept of that. None. Zero. Then that's what this inquiry is about. [*Ibid*., at p. 165]

Contrary to the majority opinion, I do not read the trial judge's assessment as based on K.B.'s inability to articulate concepts. It was based on her inability — by virtue of her mental disability — to "understand what a promise to tell the truth involves". The trial judge made the sort of practical inquiry in everyday terms that *Khan* required.

[144] This was a borderline case. The Crown complains that some of the questions were too abstract, while the question about going to church was beside the point once it became clear that K.B. would give testimony unsworn or not at all. The trial judge could certainly have proceeded further with pointed and concrete factual questions to get at the degree of K.B.'s disability but he saw and heard K.B. and clearly he believed that he had heard enough. Sitting on appeal with nothing but a bare transcript in front of us, in my opinion, we are not in a position to say that his appreciation of K.B.'s capacity was wrong.

Q. Pourquoi c'est difficile?

R. Je ne sais pas pourquoi.

Q. Tu ne sais pas. D'accord.

M. SEMENOFF : Merci.

À la fin du témoignage de K.B., le juge du procès a décidé que son témoignage non assermenté était inadmissible. Voici son explication :

> [TRADUCTION] Ce que je dis, c'est que je n'aurais pas eu à entendre le [Dr K.]. J'ai entendu ce qu'il avait à dire, mais ça n'ajoute ni n'enlève quoi que ce soit à la conclusion à laquelle je suis arrivé, après avoir regardé et interrogé ce témoin, ce que je suis obligé de faire.
>
> Autrement dit, je suppose que ce que je vous dis, c'est que je suis entièrement convaincu que ce témoin ne comprend pas ce que la promesse de dire la vérité signifie, n'en a aucune idée. Aucune. Zéro. Alors, voilà ce en quoi consiste cette enquête. [*Ibid*., p. 165]

Contrairement à l'opinion des juges majoritaires, j'estime que le juge du procès n'a pas fondé son appréciation sur l'incapacité de K.B. d'articuler des concepts. Il s'est fondé sur son incapacité — attribuable à sa déficience intellectuelle — à « comprend[re] [. . .] ce que la promesse de dire la vérité signifie ». Le juge du procès a mené, en utilisant des termes concrets et ordinaires, une enquête conforme aux prescriptions de l'arrêt *Khan*.

[144] Il s'agissait d'un cas limite. Le ministère public allègue que certaines questions étaient trop abstraites et que la question à propos de l'église n'était aucunement pertinente lorsqu'il est devenu évident que K.B. témoignerait sans prêter serment ou ne témoignerait pas du tout. Le juge du procès aurait certainement pu continuer à poser des questions factuelles précises et concrètes afin de déterminer l'importance de la déficience intellectuelle de K.B., mais, il a vu et entendu K.B. et, de toute évidence, il estimait en avoir assez entendu. Comme nous siégeons en appel et que nous disposons seulement d'une transcription de l'instance, nous ne sommes pas en mesure de dire, selon moi, que son appréciation de l'habilité de K.B. à témoigner était erronée.

(3) Conclusion on the Competency Issue

[145] Much of the dispute in this case turned on the significance of K.B.'s "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether K.B. was actually able to "compute" her responses to what she was being asked — a condition precedent, surely, to any ability to test her evidence by cross-examination. The trial judge observed K.B.'s demeanour as she struggled with the attempted dialogue. The trial judge was responsible for protecting the fair trial interests of the accused, as well as society's interest in the prosecution of crimes. The inability of K.B. to deal with simple questions would mean that her evidence — however erroneous it might be, and however much (to pick up on her teacher's observation) it might be the product of K.B.'s wishful thinking — would be effectively immune to challenge by the defence, thereby prejudicing the interest of society as well as the accused in a fair trial.

[146] The teacher, Ms. W., thought that a skilled questioner who possessed direct personal knowledge of K.B. might be able to help K.B. overcome these limitations. On this view, a judge would need to rely on the teacher's guidance not only to formulate the questions, but also to interpret K.B.'s responses. Generally speaking, of course, only an expert witness can put opinions before the court and, even then, only when the trial judge would be unable to determine the issue in question properly without expert assistance: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178. At the end of the day, it has to be the judge or jury — not the lay witness — to assess the witness's testimony.

[147] In *Parrott*, the complainant was a mature woman who was said to possess the mental development equivalent in some respects to that of a three- or four-year-old child. The Crown declined

(3) Conclusion relative à la question de l'habilité à témoigner

[145] Une grande partie du litige en l'espèce reposait sur l'importance des réponses de K.B. lorsqu'elle disait [TRADUCTION] « je ne sais pas ». De toute évidence, il s'agissait d'un avantage important pour le juge du procès d'être témoin de l'enchaînement des questions et des réponses et de déterminer si K.B. était réellement capable de « computer » les questions posées et d'y répondre — une condition essentielle, certes, à toute possibilité de vérifier sa déposition lors d'un contre-interrogatoire. Le juge du procès a observé le comportement de K.B. alors qu'elle avait des difficultés à suivre le dialogue. Il incombait au juge du procès d'assurer la protection du droit de l'accusé à un procès équitable ainsi que de l'intérêt de la société à ce que les criminels soient poursuivis. L'incapacité pour K.B. de comprendre des questions simples et d'y répondre signifiait que son témoignage — si erroné soit-il, surtout s'il devait résulter (pour reprendre le propos de l'institutrice de K.B.) des rêveries de K.B. — ne pourrait effectivement être attaqué par la défense, ce qui porterait atteinte à l'intérêt de la société et au droit de l'accusé à un procès équitable.

[146] L'enseignante, M^me^ W., était d'avis qu'un interrogateur qualifié qui connaissait bien K.B. pouvait être en mesure de l'aider à surmonter ces limites. Dans cette optique, un juge devrait se fier aux conseils de l'enseignante non seulement pour formuler les questions, mais aussi pour interpréter les réponses de K.B. Bien entendu, de façon générale, seul un témoin expert peut exprimer ses opinions devant la cour et, même alors, seulement dans le cas où le juge du procès n'est pas en mesure de trancher comme il se doit une question donnée sans l'aide d'un expert : *R. c. Mohan*, [1994] 2 R.C.S. 9; *R. c. Parrott*, 2001 CSC 3, [2001] 1 R.C.S. 178. En bout de ligne, c'est au juge ou au jury — non au témoin profane — qu'il appartient d'apprécier la déposition du témoin.

[147] Dans *Parrott*, la plaignante était une femme adulte dont le développement mental pouvait équivaloir à certains égards à celui d'un enfant de trois ou quatre ans. Le ministère public a refusé

to call the complainant herself on the basis that a court appearance might cause her trauma or other adverse effects, and instead called expert witnesses to lay the foundation for the admission of her earlier out-of-court statements. In this context, we held that the experts could not be substituted for calling the complainant herself, but that

> [i]f she had been called and it became evident that the trial judge required expert assistance to draw appropriate inferences from what he had heard her say (or not say), or if either the defence or the Crown had wished to pursue the issue of requiring an oath or solemn affirmation, expert evidence might then have become admissible to assist the judge. [para. 52]

[148] I think we should go further in this case and hold that on a competency *voir dire* where the mental capacity of an adult is challenged and the adult is herself called as a proposed witness, the court may also admit evidence from *fact* witnesses personally familiar with the proposed witness's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses, unlike Dr. K., would not be in a position to express an opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box.

[149] Ultimately, however, it is the judge who must reach his or her own considered opinion about the level of mental capacity of the proposed witness. Where, as in this case, the judge, after hearing from the proposed witness, considers the calling of additional fact witnesses to be unnecessary, I do not think we are in a position to second-guess that procedural conclusion.

[150] Accordingly, I would reject the Crown's appeal with respect to the trial judge's ruling that

d'assigner la plaignante à témoigner au motif que sa comparution devant le tribunal risquait de la traumatiser ou de lui porter préjudice. Il a plutôt assigné des experts afin de justifier l'admission de ses déclarations extrajudiciaires antérieures. Dans ce contexte, nous avons conclu que les experts ne pouvaient pas être appelés à témoigner en remplacement de la plaignante elle-même, mais que

> [s]i elle avait été assignée à témoigner et qu'il était devenu évident que le juge du procès avait besoin de l'aide d'experts pour tirer les inférences appropriées de ce qu'il l'a entendue dire (ou ne pas dire), ou si la défense ou le ministère public avait souhaité soulever la question de l'opportunité d'exiger un serment ou une affirmation solennelle, la preuve d'expert aurait alors pu devenir admissible comme aide apportée au juge. [par. 52]

[148] Je crois que nous devrions aller plus loin en l'espèce et conclure que, dans le cadre d'un voir-dire relatif à l'habilité à témoigner, où la capacité mentale d'une personne adulte est mise en question et la personne adulte est assignée à témoigner, le tribunal peut également admettre les dépositions de témoins des *faits* qui connaissent bien les habilités du témoin éventuel à s'exprimer et à comprendre, ainsi que ses limites, et ce, afin d'aider le tribunal à mieux saisir les capacités de la personne. Ces témoins, contrairement au D^{r} K., ne seraient pas en mesure d'exprimer une opinion, mais ils pourraient témoigner à propos de ce qu'ils ont eux-mêmes directement observé chez le témoin éventuel. La preuve pourrait, si le juge du procès l'estime utile, aider le juge ou le jury à apprécier les réponses (ou l'absence de réponse) que lui donne la personne qui témoigne.

[149] Cependant, c'est le juge qui, en fin de compte, doit former sa propre opinion éclairée au sujet de la capacité mentale du témoin éventuel. Lorsque, comme en l'espèce, le juge estime qu'il n'est pas nécessaire de citer d'autres témoins de faits après avoir entendu le témoin éventuel, je ne crois pas que nous soyons en mesure de remettre en question cette conclusion de nature procédurale.

[150] Par conséquent, je suis d'avis de rejeter le pourvoi interjeté par le ministère public

the unsworn evidence of K.B. is inadmissible. In his view, the quality of the proposed evidence did not meet the s. 16(3) threshold. Sitting on appeal from this determination, and not having had the advantage of observing and questioning K.B., I see no valid basis for reversing that evidentiary ruling.

E. *Admissibility of Out-of-Court Statements*

[151] The Crown contends that the trial judge erred by effectively deciding that K.B.'s testimonial incompetence predetermined the unreliability of her hearsay statements. The admissibility analysis in a hearsay *voir dire* is to be focused on whether the hearsay dangers have been overcome: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 71. These hearsay dangers include the inability to inquire into the declarant's perception, memory and credibility. The trial judge's conclusion in the competency hearing that K.B. lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, the trial judge's conclusion that K.B.'s testimony lacked sufficient reliability. I agree with Doherty and MacPherson JJ.A., that "it is not surprising, and it is not an error, that the trial judge's reasoning on the issue of the threshold reliability in his hearsay ruling was quite similar to his reasoning on the *CEA* s. 16 voir dire" (para. 48). I would therefore not give effect to this ground of appeal.

III. Disposition

[152] I would dismiss the appeal.

APPENDIX A

Until 1987, s. 16 of the *Canada Evidence Act* provided:

16. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in

relativement à la décision du juge du procès selon laquelle le témoignage non assermenté de K.B. est inadmissible. Selon ce dernier, le témoignage envisagé n'avait pas la qualité nécessaire pour satisfaire au critère énoncé au par. 16(3). Siégeant en appel de cette décision, et n'ayant pas eu l'avantage d'observer et d'interroger K.B., je ne vois aucune raison valable d'annuler cette décision sur l'admissibilité de la preuve.

E. *Admissibilité des déclarations extrajudiciaires*

[151] Le ministère public prétend que le juge du procès a commis une erreur en décidant en fait que l'inhabilité à témoigner de K.B. a entraîné automatiquement la non-fiabilité de ses déclarations relatées. L'analyse relative à l'admissibilité lors d'un voir-dire doit être axée sur la question de savoir si les dangers associés au ouï-dire ont été surmontés : *R. c. Khelawon*, 2006 CSC 57, [2006] 2 R.C.S. 787, par. 71. Ces dangers incluent l'incapacité d'examiner la perception, la mémoire et la crédibilité du déclarant. Le fait que le juge du procès ait conclu, lors de l'audience visant à déterminer l'habilité à témoigner, que K.B. n'avait pas la capacité de percevoir, de se souvenir et de raconter ce qui s'est passé et de comprendre la différence entre la vérité et la fausseté l'a amené, mais pas de façon automatique, à conclure que le témoignage de K.B. n'était pas suffisamment fiable. Je suis d'accord avec les juges Doherty et MacPherson pour dire que [TRADUCTION] « ce n'est pas surprenant, et ce n'est pas une erreur, que le raisonnement du juge du procès sur la question du seuil de fiabilité dans sa décision relative au ouï-dire était très semblable à son raisonnement sur le voir-dire prévu à l'art. 16 de la *LPC* » (par. 48). Je suis donc d'avis de rejeter ce motif d'appel.

III. Dispositif

[152] Je suis d'avis de rejeter le pourvoi.

ANNEXE A

Jusqu'en 1987, l'art. 16 de la *Loi sur la preuve au Canada* prévoyait ce qui suit :

16. (1) Dans toute procédure judiciaire où l'on présente comme témoin un enfant en bas âge qui, de l'avis

the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

The origin of this provision, at stake in *Khan*, can be traced back to s. 25 of the *Canada Evidence Act, 1893*, S.C. 1893, c. 31. This was the first instance in Canadian history that Parliament legislated on the testimonial competence of children. At the time however, and until 1987, no statutory provision addressed the capacity to testify of adults with mental disabilities. Section 25 of the 1893 *Canada Evidence Act* provided:

25. In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

On October 29, 1986, Minister of Justice Ramon Hnatyshyn presented the House of Commons with Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*. During the first reading of Bill C-15, cl. 17 proposed to repeal s. 16 of the *Canada Evidence Act* and to replace it with a new provision:

17. Section 16 of the said Act is repealed and the following substituted therefor:

"**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

du juge, juge de paix ou autre fonctionnaire présidant, ne comprend pas la nature d'un serment, le témoignage de cet enfant peut être reçu, bien qu'il ne soit pas rendu sous serment, si, de l'avis du juge, juge de paix ou autre fonctionnaire présidant, selon le cas, cet enfant est doué d'une intelligence suffisante pour justifier la réception de son témoignage, et s'il comprend le devoir de dire la vérité.

(2) Aucune cause ne peut être décidée sur ce seul témoignage, et il doit être corroboré par quelque autre témoignage essentiel.

L'origine de cette disposition, en cause dans l'arrêt *Khan*, remonte à l'art. 25 de l'*Acte de la preuve en Canada, 1893*, S.C. 1893, ch. 31. Pour la première fois dans l'histoire du Canada, le Parlement légiférait sur l'habilité des enfants à témoigner. À l'époque, toutefois, et ce jusqu'en 1987, aucune disposition législative ne traitait de l'habilité à témoigner des adultes ayant une déficience intellectuelle. L'article 25 de cette loi prévoyait ce qui suit :

25. Dans toute procédure légale où l'on offrira un jeune enfant comme témoin, et si cet enfant, de l'avis du juge, juge de paix ou autre fonctionnaire présidant, ne comprend pas la nature d'un serment, le témoignage de cet enfant pourra être reçu, bien qu'il ne soit pas rendu sous serment, si, de l'avis du juge, juge de paix ou autre fonctionnaire présidant, selon le cas, cet enfant est doué d'une intelligence suffisante pour justifier la réception de son témoignage, et s'il comprend le devoir de dire la vérité.

2. Mais aucune cause ne sera décidée sur ce témoignage seul, et il devra être corroboré par quelque autre témoignage essentiel.

Le 29 octobre 1986, le ministre de la Justice Ramon Hnatyshyn a déposé à la Chambre des communes le projet de loi C-15, *Loi modifiant le Code criminel et la Loi sur la preuve au Canada*. En première lecture, l'art. 17 du projet de loi C-15 proposait l'abrogation de l'art. 16 de la *Loi sur la preuve au Canada* et son remplacement par une nouvelle disposition :

17. L'article 16 de la même loi est abrogé et remplacé par ce qui suit :

« **16.** (1) Avant de permettre à une personne âgée de moins de quatorze ans ou dont la capacité mentale est mise en question de témoigner, le tribunal procède à une enquête visant à déterminer si :

(*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is sufficiently intelligent that the reception of the evidence is justified.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is sufficiently intelligent that the reception of the evidence is justified shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is sufficiently intelligent that the reception of the evidence is justified may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is sufficiently intelligent that the reception of the evidence is justified shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation."

A crucial amendment, for present purposes, was made to the original text of Bill C-15 by the *ad hoc* Legislative Committee on Bill C-15. This amendment replaced the requirement to be "sufficiently intelligent" initially provided in Mr. Hnatyshyn's proposal with the criterion that the proposed witness be "able to communicate the evidence".

What is striking from the lengthy works of the Legislative Committee on Bill C-15 is the focus on the "ability to communicate the evidence" as the sole qualitative requirement for the competence of children or adults with mental disabilities who do not understand the nature of an oath. There is nothing in the record of the Committee which suggests that a "promise to tell the truth" also imposed an understanding of the nature of such a promise.

a) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;

b) d'autre part, celle-ci est suffisamment intelligente pour que le recueil de son témoignage soit justifié.

(2) La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est suffisamment intelligente pour que le recueil de son témoignage soit justifié témoigne sous serment ou affirmation solennelle.

(3) La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est suffisamment intelligente pour que le recueil de son témoignage soit justifié peut témoigner sur promesse de dire la vérité.

(4) La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas suffisamment intelligente pour que le recueil de son témoignage soit justifié ne peut témoigner.

(5) La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle. »

Un amendement important, pour les besoins de l'espèce, a été apporté au libellé original du projet de loi C-15 par le Comité législatif sur le projet de loi C-15 (un comité *ad hoc*). Par cet amendement, on a remplacé la condition selon laquelle la personne devait être « suffisamment intelligente », qui figurait à l'origine dans la proposition de M. Hnatyshyn, par la condition voulant que le témoin éventuel soit « capable de communiquer les faits dans son témoignage ».

Ce qui retient l'attention dans les longs travaux du Comité législatif sur le projet de loi C-15, c'est l'importance que le Comité a attachée à la « capacité de communiquer les faits dans le témoignage » comme seule condition de nature qualitative relative à l'habilité à témoigner des enfants ou des adultes ayant une déficience intellectuelle qui ne comprennent pas la nature du serment. Les procès-verbaux du Comité n'indiquent aucunement que la « promesse de dire la vérité » exigeait aussi que la personne comprenne la nature de cette promesse.

In fact, the requirement to be "sufficiently intelligent" in the original draft was understood by the Committee as requiring an understanding of the moral difference between telling the truth and lying. On December 4, 1986, the Committee held a discussion on the meaning of "sufficient intelligence". It came to the conclusion that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying:

Mr. Nicholson: Well, that is the first test. I think the section Mrs. Collins referred to, proposed subsection 16(3) of our proposed section 16, says that if the person does not understand the nature of an oath, well it is fine, because it often happens that the children may not know the concept of God and hell and all that sort of thing. I have seen it happen in a trial, but if the person testifies on the promise of telling the truth then let the judge after that just decide how much weight he or she will place on that evidence without making the other determination of "sufficient intelligence".

Mr. Pink: Under section 16 of the Canada Evidence Act it says:

. . .

Now, it has been my experience in determining the so-called "sufficient intelligence" — that is, when the judge goes through the series of questions he normally does about how far is he in school, how is he doing in school, and things of that sort, and he knows where he lives, he knows the difference between speaking the truth and speaking a falsity and things of that sort, then the judge concludes he is of sufficient intelligence, we will accept his evidence, but because he does not understand the nature of an oath, it will be unsworn evidence, that is all.

Mr. Nicholson: Do you think that is still a necessary element?

Mr. Pink: Absolutely.

Mr. Nicholson: Do you think it is important to have this, that we cannot just eliminate it and have the judge decide the weight that he gives to the evidence, which is basically what we do with adults?

Mr. Pink: I personally feel that before a child's evidence is received, he must understand the difference

En fait, pour les membres du Comité, les mots « suffisamment intelligente » figurant dans le projet initial sous-entendaient que la personne comprenne la différence morale entre dire la vérité et mentir. Le 4 décembre 1986, le Comité a discuté de la signification de ces termes. Il est arrivé à la conclusion que tout ce qui était exigé pour qu'un témoin soit suffisamment intelligent était qu'il comprenne la différence morale entre dire la vérité et mentir :

M. Nicholson : Eh bien, il s'agit d'un premier test. À ce sujet, je crois que M^me^ Collins a mentionné le paragraphe 3 de l'article 16, et elle disait que si l'enfant ne comprend pas la nature d'un serment, eh bien il n'y a rien de mal à cela étant donné qu'il arrive souvent que les enfants ne comprennent pas des idées comme Dieu, l'enfer et tout ce genre de choses. Je l'ai d'ailleurs observé moi-même lors d'un procès. Toutefois, si quelqu'un comparaît après avoir promis de dire la vérité, alors laissons au juge le soin d'établir quel poids il accordera aux preuves ainsi fournies sans nous occuper de vérifier s'il y a « intelligence suffisante ».

M. Pink : En vertu de l'article 16 de la Loi sur la preuve au Canada, il est dit ce qui suit, et je cite :

. . .

Or d'après mon expérience lorsqu'il s'agit d'établir cette « intelligence suffisante », c'est-à-dire lorsque le juge pose toute une série de questions, il demande d'habitude à l'enfant où il en est dans ses études, quels sont [ses] résultats scolaires et des choses de ce genre. Il vérifie en outre où habite l'enfant, s'il connaît la différence entre dire la vérité et dire un mensonge et des choses de ce genre. Ensuite, il peut établir qu'il est d'intelligence suffisante et que son témoignage sera donc recevable, mais que son témoignage ne sera pas reçu sous serment, étant donné qu'il ne comprend pas la nature d'un serment, c'est tout.

M. Nicholson : Croyez-vous que cela reste nécessaire?

M. Pink : Tout à fait.

M. Nicholson : Est-il important de conserver cela; ne pouvons-nous pas l'éliminer et tout simplement nous en remettre au juge pour décider de l'importance à accorder aux preuves fournies, c'est-à-dire de procéder comme on le fait avec les adultes?

M. Pink : Personnellement, j'estime qu'avant d'entendre le témoignage d'un enfant, il faut vérifier si

between telling the truth and a falsity; he has to know that before his evidence can be received.

. . .

Mrs. Collins: How do you deal with the problem of a mentally retarded child? We know that sometimes those children are the victims or are easily the victims of sexual abuse. Also, how do you deal then with children of very, very tender years, who we also know can be victimized by sexual abuse, three-year-olds?

Mr. Pink: First of all, I do not think you will ever see a three-year-old giving evidence. I have seen cases where mentally retarded children have in fact given evidence, because the judge was satisfied, after querying him, that he knew the difference between telling the truth or a falsehood. He knew it was right to tell the truth, he knew it was wrong to tell a lie. He did not understand the nature of an oath and all that, so his evidence was not sworn.

Mrs. Collins: Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.

Mr. Pink: It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?

Mrs. Collins: I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.

Mr. Pink: I agree. [Emphasis added; pp. 26-27.]

(House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

One week later, on December 11, 1986, the Legislative Committee on Bill C-15 heard evidence from Professor Nicholas Bala, then Director of the Canadian Council on Children and Youth. Professor Bala expressed his fears about the

celui-ci comprend la différence entre dire la vérité et dire un mensonge; il doit savoir cela avant qu'on entende son témoignage.

. . .

Mme Collins : Qu'avez-vous prévu dans le cas d'un enfant souffrant d'arriération mentale? Nous savons en effet que ces enfants peuvent parfois être assez facilement les victimes d'agression sexuelle. En outre, qu'avez-vous prévu dans le cas d'enfants en très bas âge, qui sont eux aussi l'objet d'agressions sexuelles? Je pense à des enfants de trois ans, par exemple.

M. Pink : D'abord, je crois qu'on ne verra jamais le jour où l'on fera comparaître un enfant de trois ans. J'ai observé certaines causes où on avait fait témoigner des enfants souffrant d'arriération mentale, mais c'était parce que le juge les avait interrogés et savait donc qu'ils connaissaient la différence entre dire la vérité et dire un mensonge. Les enfants savaient qu'il était bien de dire la vérité et mal de dire un mensonge. Ils ne comprenaient cependant pas la nature d'un serment, et leur témoignage n'avait donc pas été reçu sous serment.

Mme Collins : Oui. Cependant, si nous conservons le concept de « l'intelligence suffisante », et si on l'interprète de la même façon que précédemment, j'ai quand même l'impression que cela constituera peut-être un obstacle.

M. Pink : Il faudra peut-être que le Comité choisisse alors d'autres termes que « intelligence suffisante ». De toute façon, pourquoi pose-t-on d'abord toutes ces questions? S'agit-il vraiment de savoir si le témoin sait distinguer entre le vrai et le faux? Est-ce que tout ne revient pas à cela?

Mme Collins : Je le pense. Oui. En conséquence, si l'enfant comprend la différence entre dire la vérité et dire un mensonge, il me semble que l'on disposerait là de tout ce dont on a vraiment besoin.

M. Pink : J'abonde en ce sens. [Je souligne; p. 26-27.]

(Chambre des communes, *Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-15*, n^{o} 2, 2^{e} sess., 33^{e} lég., 4 décembre 1986)

Une semaine plus tard, le 11 décembre 1986, le Comité législatif sur le projet de loi C-15 a entendu le professeur Nicholas Bala, qui était alors directeur du Conseil canadien de l'enfance et de la jeunesse. Le professeur Bala a fait part de ses craintes

"sufficient intelligence" requirement for testimonial capacity as understood by the Committee, and he proposed replacing it with the ability to communicate criterion:

Dr. Nick Bala . . .

Our concern is that standard of sufficient intelligence. A layperson or indeed even a lawyer not familiar with the case law might think well, of course, you are not going to want to hear from a child not sufficiently intelligent enough to testify. But when one starts looking at the case law and when one realizes that the concept of "sufficient intelligence" is one which appears in the present section 16 of the Canada Evidence Act, one realizes it therefore will be brought to the courts with all the precedents decided and all the traditions decided. That will make it very difficult for children to testify; in particular children under 10 may well be considered, for example, to be of average intelligence, but not of sufficient intelligence to testify.

Therefore we would submit that there should be another test, and the test we have suggested in our brief is a test of ability to communicate; that is to say the judge should be satisfied the child is able to communicate, and if the child seems able to communicate the case should be left to the trier of the fact, the jury or the judge. Obviously a prosecutor who is calling a child as a witness is not going to do that unless the prosecutor is satisfied the child has something to say of value and some recollection of the events, and is not going to be wasting everybody's time.

(*Ibid.*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, at p. 7)

The debates that followed in the Committee supported the view that it was not prudent to condition testimonial capacity on sufficiency of intelligence, which was conceived as including an understanding of the difference between truth and falsity. As a result, the Committee modified the proposed amendment to s. 16 of the *Canada Evidence Act* in order to replace the requirement of sufficient intelligence for ability to communicate the evidence, as was originally suggested by Professor Bala.

concernant la compréhension qu'avait le Comité de la condition selon laquelle la personne devait être « suffisamment intelligente » relativement à l'habilité à témoigner, et il a proposé de la remplacer par le critère de la capacité de communiquer les faits dans son témoignage :

M. Nick Bala . . .

Nous nous demandons comment on entend déterminer qu'un enfant est suffisamment intelligent. En effet, un non-initié ou même un avocat qui ne connaît pas bien la jurisprudence, pourrait très bien penser que, de toute manière, on ne voudrait pas entendre le témoignage d'un enfant qui n'est pas suffisamment intelligent. Mais qu'est-ce que cette notion figure dans ce projet de l'article 16 de la Loi sur la preuve, cela veut dire qu'il y aura des précédents et des traditions. Nous craignons donc que cette disposition fasse obstacle aux témoignages des enfants, surtout des enfants âgés de moins de 10 ans qui, même s'ils sont d'intelligence moyenne, pourraient être considér[és] comme pas suffisamment intelligents pour témoigner.

Nous préconisons par conséquent l'adoption d'un autre critère qui est la capacité de communiquer. C'est-à-dire que dans les cas où l'enfant semble capable de communiquer, c'est le jury ou le juge qui devrait décider de l'admissibilité du témoignage. Il nous semble assez évident qu'un procureur qui cite un enfant comme témoin ne le fera que s'il est persuadé que l'enfant se souvient assez bien des évènements, qu'il ne fera pas perdre le temps de tout le monde et que son témoignage sera utile.

(*Ibid.*, n^{o} 3, 2^{e} sess., 33^{e} lég., 11 décembre 1986, p. 7)

Dans les débats qui ont suivi, le Comité a souscrit à l'opinion selon laquelle il n'était pas prudent de faire dépendre l'habilité à témoigner de la condition selon laquelle une personne devait être suffisamment intelligente, laquelle condition était censée sous-entendre que la personne comprenait la différence entre la vérité et la fausseté. Par conséquent, le Comité a amendé la modification envisagée à l'art. 16 de la *Loi sur la preuve au Canada* afin de remplacer la condition selon laquelle la personne devait être suffisamment intelligente par la condition qu'elle devait être capable de communiquer les faits dans son témoignage, comme le professeur Bala l'avait initialement proposé.

As such, s. 18 of the *Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, provided the following:

18. Section 16 of the said Act is repealed and the following substituted therefor:

"**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation."

The amendment to Bill C-15 shows that Parliament did not intend children and adults with mental disabilities to be questioned on their understanding of the difference between truth and falsehood in order to testify.

Additionally, the fact that the legislative debates emphasized that ability to communicate was the qualitative condition for testimonial capacity under s. 16(3), and that no mention was made that promising to tell the truth required understanding of a promise to tell the truth, demonstrate the intent of Parliament that a mere promise would suffice.

Ainsi, l'art. 18 de la *Loi modifiant le Code criminel et la Loi sur la preuve au Canada,* L.C. 1987, ch. 24, prévoyait ce qui suit :

18. L'article 16 de la même loi est abrogé et remplacé par ce qui suit :

« **16.** (1) Avant de permettre à une personne âgée de moins de quatorze ans ou dont la capacité mentale est mise en question de témoigner, le tribunal procède à une enquête visant à déterminer si :

a) d'une part, celle-ci comprend la nature du serment ou de l'affirmation solennelle;

b) d'autre part, celle-ci est capable de communiquer les faits dans son témoignage.

(2) La personne visée au paragraphe (1) qui comprend la nature du serment ou de l'affirmation solennelle et qui est capable de communiquer les faits dans son témoignage sous serment ou affirmation solennelle.

(3) La personne visée au paragraphe (1) qui, sans comprendre la nature du serment ou de l'affirmation solennelle, est capable de communiquer les faits dans son témoignage peut témoigner sur promesse de dire la vérité.

(4) La personne visée au paragraphe (1) qui ne comprend pas la nature du serment ou de l'affirmation solennelle et qui n'est pas capable de communiquer les faits dans son témoignage ne peut témoigner.

(5) La partie qui met en question la capacité mentale d'un éventuel témoin âgé d'au moins quatorze ans doit convaincre le tribunal qu'il existe des motifs de douter de la capacité de ce témoin de comprendre la nature du serment ou de l'affirmation solennelle. »

L'amendement apporté au projet de loi C-15 démontre que le législateur ne voulait pas que les enfants et les adultes ayant une déficience intellectuelle soient interrogés sur leur compréhension de la différence entre la vérité et le mensonge afin de pouvoir témoigner.

De plus, le fait que, dans les débats législatifs, il ait été souligné que la capacité de communiquer les faits dans le témoignage était la condition de nature qualitative relative à l'habilité à témoigner prévue au par. 16(3), et que l'on n'ait pas mentionné que la promesse de dire la vérité sous-entendait une compréhension de la promesse de dire la vérité, démontre que le législateur voulait qu'une simple promesse de dire la vérité soit suffisante.

APPENDIX B

The second important amendment to s. 16 of the *Canada Evidence Act* began in 2004, when Minister of Justice Irwin Cotler presented the House of Commons with Bill C-2. In 2005, Parliament adopted the *Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32. Sections 26 and 27 provided:

26. The portion of subsection 16(1) of the *Canada Evidence Act* before paragraph (*a*) is replaced by the following:

16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

27. The Act is amended by adding the following after section 16:

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their

ANNEXE B

La deuxième modification importante apportée à l'art. 16 de la *Loi sur la preuve au Canada* a été introduite en 2004, lorsque le ministre de la Justice Irwin Cotler a déposé le projet de loi C-2 à la Chambre des communes. En 2005, le législateur a adopté la *Loi modifiant le Code criminel (protection des enfants et d'autres personnes vulnérables) et la Loi sur la preuve au Canada*, L.C. 2005, ch. 32. Les articles 26 et 27 de cette Loi prévoyaient ce qui suit :

26. Le passage du paragraphe 16(1) de la *Loi sur la preuve au Canada* précédant l'alinéa *a*) est remplacé par ce qui suit :

16. (1) Avant de permettre le témoignage d'une personne âgée d'au moins quatorze ans dont la capacité mentale est mise en question, le tribunal procède à une enquête visant à décider si :

27. La même loi est modifiée par adjonction, après l'article 16, de ce qui suit :

16.1 (1) Toute personne âgée de moins de quatorze ans est présumée habile à témoigner.

(2) Malgré toute disposition d'une loi exigeant le serment ou l'affirmation solennelle, une telle personne ne peut être assermentée ni faire d'affirmation solennelle.

(3) Son témoignage ne peut toutefois être reçu que si elle a la capacité de comprendre les questions et d'y répondre.

(4) La partie qui met cette capacité en question doit convaincre le tribunal qu'il existe des motifs d'en douter.

(5) Le tribunal qui estime que de tels motifs existent procède, avant de permettre le témoignage, à une enquête pour vérifier si le témoin a la capacité de comprendre les questions et d'y répondre.

(6) Avant de recevoir le témoignage, le tribunal fait promettre au témoin de dire la vérité.

(7) Aucune question sur la compréhension de la nature de la promesse ne peut être posée au témoin en

understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

A reading of the works of the two standing committees which studied Bill C-2 shows that Parliament did not intend the prohibition of questions to children on whether they understand the duty to tell the truth under s. 16.1(7) to change the law. On the contrary, s. 16.1(7) was seen as reaffirming the requirement of s. 16(3) that the ability to communicate the evidence was the sole qualitative condition for capacity and that a mere promise to tell the truth would suffice.

During a debate on the phrasing of s. 16.1(7), held in the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, a discussion between Joe Comartin and Professor Nicholas Bala revealed the perception that s. 16(3) had been misinterpreted by courts. The original intent of the provision was to allow challenged witnesses to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence. This discussion, which occurred on March 24, 2005, shows that s. 16.1(7) was aimed at clarifying the state of the law:

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Professor Bala, to start, I read your material in the paper around the changes you want to proposed subsection 16.1(7), but I don't understand, quite frankly, how you would change it. Proposed subsection 16.1(6) provides, as you're promoting strongly, that no oath be issued, that they simply be required to promise to tell the truth.

So I don't know exactly how you want (7) amended, from its current proposal.

Prof. Nicholas Bala: The concern I have about proposed subsection 16.1(7) is that it says no child shall be

vue de vérifier si son témoignage peut être reçu par le tribunal.

(8) Il est entendu que le témoignage reçu a le même effet que si le témoin avait prêté serment.

Les procès-verbaux des deux comités permanents qui ont étudié le projet de loi C-2 indiquent que le législateur ne voulait pas modifier l'état du droit en interdisant, au par. 16.1(7), que des questions soient posées aux enfants quant à savoir s'ils comprennent le devoir de dire la vérité. Au contraire, on considérait que le par. 16.1(7) réitérait l'exigence prévue au par. 16(3) selon laquelle la capacité de communiquer les faits dans le témoignage constituait la seule condition de nature qualitative relative à l'habilité à témoigner et qu'une simple promesse de dire la vérité suffisait.

Au cours d'une séance du Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile, de la Chambre des communes, portant sur la formulation du par. 16.1(7), une discussion entre Joe Comartin et le professeur Nicholas Bala a révélé que l'on estimait que le par. 16(3) avait été mal interprété par les tribunaux. À l'origine, le législateur voulait, par cette disposition, permettre aux personnes dont la capacité mentale est mise en question de témoigner en ne faisant que promettre de dire la vérité, et ce, dès qu'ils avaient été jugés aptes à communiquer les faits dans leur témoignage. Cette discussion, tenue le 24 mars 2005, révèle que le par. 16.1(7) visait à préciser l'état du droit :

M. Joe Comartin (Windsor—Tecumseh, NPD) : Monsieur Bala, pour commencer, j'ai pris connaissance de votre mémoire et des changements que vous suggérez à l'égard du paragraphe 16.1(7) proposé, mais, en toute franchise, je ne comprends pas comment vous le changeriez. Le paragraphe 16.1(6) proposé prévoit que les enfants ne prêteront pas serment, qu'ils seront simplement tenus de promettre de dire la vérité, et cela correspond à ce que vous préconisez avec tant de vigueur.

Je ne comprends pas exactement de quelle façon vous voulez modifier le paragraphe (7), dans sa forme actuelle.

M. Nicholas Bala : Ce qui me préoccupe du paragraphe 16.1(7) proposé, c'est qu'il prévoit qu'aucune

asked any questions regarding their understanding of the nature "of the promise" for the purpose of determining whether their evidence shall be received by the court, and I would submit to you that it should be "of the promise to tell the truth".

It's a relatively small change, but again, the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"?

Some judges will continue to interpret it that way. In some ways, it's a very small amendment, but I assume it's consistent with your actual intent. My concern, as I say, has been based on how some of these previous provisions have been interpreted. [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

This perception was also shared, at the time, by the Department of Justice. Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of Justice Canada, testified that s. 16 was originally intended by Parliament to allow witnesses to give evidence without inquiring into their comprehension of the duty to tell the truth. During her opening statement before the Standing Senate Committee on Legal and Constitutional Affairs, on July 7,

question sur la compréhension de la nature de la « promesse » ne peut être posée à l'enfant en vue de vérifier si son témoignage peut être reçu par le tribunal, et j'avance qu'il faudrait reformuler afin qu'il s'agisse de « la promesse de dire la vérité ».

C'est un changement relativement modeste, mais, encore une fois, ma préoccupation découle du fait que la loi actuelle a été interprétée de façon très étroite par les juges. Quand on consulte les transcriptions — j'ai été témoin en 1988, quand les dispositions sont entrées en vigueur — je crois que les gens ont pensé : « Eh bien, nous n'avons pas besoin d'être explicites à cet endroit, car les juges comprendront. »

Évidemment, nous devons faire confiance à notre magistrature au sujet d'un grand nombre de questions, mais, pour certains enjeux, je crois qu'il est important de les orienter le plus possible. Je crains qu'un juge lise ceci — et nous avons une imposante jurisprudence qui reflète cela — et se dis[e] : « Bon, je ne peux t'interroger pour déterminer si tu comprends la nature de la promesse, mais est-ce que je peux te poser des questions sur le sens de la vérité? » Le Parlement prévoit explicitement, au paragraphe 16.1(6), qu'ils seront tenus de promettre de dire la vérité. On ne peut interroger les enfants sur la nature de la promesse, mais est-ce qu'on peut leur poser des questions sur le sens de « vérité » et de « mensonge »?

Certains juges continueront de l'interpréter de cette façon. Dans une certaine mesure, c'est une modification très modeste, mais je suppose que cela correspond au but de votre projet de loi. Ma préoccupation, comme je l'ai dit, concerne la façon dont certaines de ces dispositions antérieures ont été interprétées. [Je souligne; p. 7.]

(Chambre des communes, *Témoignages devant le Comité permanent de la justice, des droits de la personne, de la sécurité publique et de la protection civile*, n^{o} 26, 1re sess., 38^{e} lég., 24 mars 2005)

Cette perception était également partagée, à l'époque, par les juristes du ministère de la Justice. M^{me} Catherine Kane, directrice du Centre de la politique concernant les victimes, au ministère fédéral de la Justice, a affirmé que le législateur voulait, à l'origine, que l'art. 16 permette aux enfants de témoigner sans que l'on cherche à savoir s'ils comprennent le devoir de dire la vérité. Au cours de sa déclaration d'ouverture devant le Comité sénatorial

2005, Ms. Kane explained how the initial purpose of s. 16 had been misinterpreted by courts:

Ms. Catherine Kane . . .

The other part concerns the amendments to the Canada Evidence Act with respect to children. Under the current law, the Canada Evidence Act treats children under 14 in the same way as it treats other people whose mental capacity is challenged. There is a current section 16 that requires the judge to conduct a two-part inquiry whether they are dealing with a person who has some mental disabilities or whether they are dealing with a child under 14. The two-part inquiry requires the judge to first determine, in the case of a child, whether the child understands the nature of an oath or the nature of a solemn affirmation and, second, to determine if the child is able to communicate the evidence. These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.

If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the [e]vidence in an effort to permit children's evidence to be admitted more readily.

As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]

(Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Appeal allowed, BINNIE, LEBEL *and* FISH JJ. *dissenting.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

permanent des Affaires juridiques et constitutionnelles, le 7 juillet 2005, M^me^ Kane a expliqué en quoi l'objet initial visé par l'art. 16 avait été mal interprété par les tribunaux :

Mme Catherine Kane . . .

L'autre partie concerne les modifications à la Loi sur la preuve [au] Canada, relativement aux enfants. En vertu de la loi actuelle, la Loi sur la preuve au Canada traite les enfants de moins de 14 ans de la même manière qu'elle traite d'autres personnes dont la capacité mentale est mise en question. Il y a un article actuellement, l'article 16, qui oblige le juge à mener une enquête en deux parties, qu'il ait affaire à une personne qui a quelque incapacité mentale ou à un enfant de moins de 14 ans. L'enquête en deux parties exige du juge, d'abord, qu'il détermine, dans le cas d'un enfant, si celui-ci saisit la nature d'un serment ou d'une affirmation solennelle, et, deuxièmement, qu'il détermine si l'enfant est capable de communiquer la preuve. Ces modifications ont été apportées en 1988 pour rendre plus facilement acceptables les témoignages des enfants. Cependant, d'après la manière dont cette disposition a été interprétée dans certains procès, nous n'avons pas encore observé d'acceptation sans réserve de témoignages d'enfants.

Si ces deux critères sont respectés, un enfant témoigne sous serment ou sous affirmation solennelle. Cependant, si l'enfant ne comprend pas la nature du serment ou de l'affirmation mais est capable de communiquer la preuve, celle-ci est reçue sur promesse de dire la vérité. C'est la loi actuelle. Bien que cela puisse paraître logique à première vue, les interprétations et applications de ces dispositions ne reflètent pas l'intention du Parlement de modifier la Loi sur la preuve de manière à ce que les témoignages des enfants soient plus facilement acceptés.

Tel qu'il est interprété par les tribunaux, l'article 16 stipule qu'avant qu'un enfant soit autorisé à témoigner, il doit être assujetti à un interrogatoire pour déterminer son degré d'entendement de l'obligation de dire la vérité et du concept d'une promesse, et ses capacités de communiquer. [Je souligne; p. 105-106.]

(Sénat, *Délibérations du Comité sénatorial permanent des Affaires juridiques et constitutionnelles*, n^o^ 18, 1^re^ sess., 38^e^ lég., 7 juillet 2005)

Pourvoi accueilli, les juges BINNIE, LEBEL *et* FISH *sont dissidents.*

Procureur de l'appelante : Procureur général de l'Ontario, Toronto.

Solicitors for the respondent: Webber Schroeder Goldstein Abergel, Ottawa.

Solicitor for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada: Women's Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Di Luca Copeland Davies, Toronto.

Solicitors for the intervener the Council of Canadians with Disabilities: Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureurs de l'intimé : Webber Schroeder Goldstein Abergel, Ottawa.

Procureur des intervenants le Fonds d'action et d'éducation juridiques pour les femmes et le Réseau d'action des femmes handicapées du Canada : Fonds d'action et d'éducation juridiques pour les femmes, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Di Luca Copeland Davies, Toronto.

Procureurs de l'intervenant le Conseil des Canadiens avec déficiences : Aikins, MacAulay & Thorvaldson, Winnipeg.

TAB 22

See paras. 57-58.

COURT OF APPEAL FOR ONTARIO

CITATION: SFC Litigation Trust v. Chan, 2019 ONCA 525
DATE: 20190624
DOCKET: C65247

Hoy A.C.J.O., Brown and Zarnett JJ.A.

BETWEEN

Cosimo Borrelli, in his capacity as trustee of the SFC Litigation Trust

Plaintiff (Respondent)

and

Allen Tak Yuen Chan

Defendant (Appellant)

Robert Rueter, Sara J. Erskine, and Malik Martin for the appellant

Robert W. Staley, Jonathan G. Bell, William A. Bortolin, Jason M. Berall and Preet Bell, for the respondent

Heard: January 14 and 15, 2019

On appeal from the judgment of Justice Michael A. Penny of the Superior Court of Justice, dated March 14, 2018, with reasons reported at 2018 ONSC 1429.

Zarnett J.A.:

I. Introduction

[1] The appellant, Allen Tak Yuen Chan, was the co-founder, chief executive officer and chairman of the Board of Directors of Sino-Forest Corporation ("SFC"),

a corporation which had its head office in Ontario and whose shares traded on the Toronto Stock Exchange.

[2] SFC's subsidiaries carried on an integrated forest plantation and products business with assets located predominately in the People's Republic of China ("PRC").

[3] Between 2003 and the second quarter of 2011, SFC's consolidated financial statements reported rapid growth, including in assets and revenues. A significant portion of the reported assets in the second quarter of 2011 – some $2.99[1] billion – was "BVI standing timber ", that, is standing timber held under what was known as the "BVI model". Sales of BVI standing timber accounted for $1.3 billion of SFC's reported consolidated revenue in 2010, and over 90% of its reported consolidated income.

[4] Representing BVI standing timber as an asset with significant value on the SFC financial statements enabled SFC to raise money in the debt and equity markets – approximately $3 billion up to 2010.

[5] In June 2011, a report was issued by a short seller's research company (the Muddy Waters Report) which was, to say the least, highly critical of SFC. It alleged, among other things, that SFC did not hold anything close to the full amount of the

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[1] All references to currency are in USD, unless otherwise noted.

timber assets reported on its financial statements and that it greatly overstated its revenues. SFC formed an Independent Committee to investigate. It was unable to rebut the allegations or confirm ownership of the BVI standing timber. SFC could not issue further financial statements and advised the public, following discussions with its external auditors, that prior years' financial statements should not be relied upon. The Ontario Securities Commission ("OSC") ordered that trading in SFC securities cease. SFC defaulted on its debt obligations. A number of class actions were commenced against SFC and its directors, auditors, underwriters and consultants.

[6] On March 30, 2012, SFC obtained insolvency protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 *("CCAA").* On December 10, 2012, the Superior Court sanctioned SFC's CCAA Plan of Compromise and Reorganization (the "Plan"). Under the Plan, SFC's interests in its subsidiaries were transferred to holding companies owned by SFC's creditors and its causes of action were transferred to the SFC Litigation Trust (the "Litigation Trust") constituted for the benefit of its creditors. In exchange, SFC's creditors released their claims for repayment of debts owed to them by the company.

[7] In 2014, the respondent, as trustee of the Litigation Trust, commenced this action alleging that the appellant had committed fraud against, and breached his fiduciary duty to, SFC.

[8] After a 48-day trial, the trial judge found that the appellant had directed a "massive fraud" in breach of his fiduciary duties to SFC, causing SFC to misrepresent its assets and their value. This enabled SFC to raise significant funds in the capital markets. SFC would not have undertaken obligations of this magnitude to lenders or shareholders, or entrusted the funds raised to the appellant and his management team, but for the appellant's fraud. The trial judge found that the appellant's conduct caused a loss to SFC. The funds raised were either directed by the appellant into fictitious or over-valued lines of business which dealt with third parties secretly related to and entities secretly controlled by the appellant, or were largely consumed by the necessity of dealing with the consequences of the discovery of the appellant's fraud and the collapse of SFC that followed. The trial judge awarded damages equal to what he found to be SFC's loss – $2,627,478.00 – as well as punitive damages of $5 million Canadian.

[9] The appellant asks us to reverse the trial judgment, making the following principal arguments:

a) The respondent is only entitled to advance claims that were transferred to the Litigation Trust under the Plan. Properly interpreted, the Plan did not transfer the claims advanced in this action to the Litigation Trust.

b) The trial judge's award of damages is flawed because he did not conduct a proper causation analysis and awarded compensation for losses

not of SFC, but of its stakeholders (its noteholders and shareholders). In doing so he improperly exposed the appellant to duplicate claims and created risks of double recovery.

c) The respondent's claim ought to have been rejected under the doctrine of election. When SFC transferred the assets, contracts and businesses of its subsidiaries as contemplated by the Plan (by transferring its subsidiaries' shares), there was an election to treat them as valid. Yet the respondent's claim is premised on those same assets, contracts and businesses being fraudulent and invalid.

d) The trial judge made various errors in his acceptance of evidence, including evidence based on documents that had not been translated into English and on opinions from a non-expert, which make his factual conclusions unsafe to rely upon.

[10] For the reasons which follow I would dismiss the appeal. As I explain below:

a) The trial judge did not err in his conclusion that the claims advanced in the action were causes of action that had been held by SFC, had been transferred to the Litigation Trust by SFC under the Plan, and could be pursued by the respondent against the appellant.

b) The trial judge did not err in his causation analysis or assessment of damages. His determinations in that regard were not the product of legal

errors and there is no basis to interfere with his factual determinations, which are subject to deference from this court.

c) There is no merit to the argument that the transfer of the shares of SFC's subsidiaries pursuant to the Plan was an election that barred the respondent from suing for damages arising from the appellant's conduct.

d) The complaints of the appellant about the trial judge's approach to certain evidence do not justify any interference with the judgment the trial judge reached. The trial judge assiduously reviewed the evidence given in a lengthy trial and his factual conclusions were supported by the record.

II. The Facts and the Trial Judge's Award

[11] In addition to the facts outlined above, the following facts are important to appreciation of the issues on the appeal. I set them out based on the trial judge's findings, since on the first three issues that the appellant raises, he contends the trial judgment cannot stand even on those findings. I then deal separately, as the parties did, with the appellant's complaints about the trial judge's fact-finding.

(1) *The Appellant's Role and the Nature of the Wrongdoing*

[12] The trial judge found that the appellant had ultimate control over nearly all aspects of SFC's and its subsidiaries' operations, directly and through a small

group of individuals he directed on his management team (the trial judge referred to them collectively as “Inside Management”).

[13] The trial judge identified four different, but related, frauds for which the appellant was responsible and one other transaction in which there was a breach by the appellant of his fiduciary duties. I summarize these below.

(a) The BVI Model Fraud

[14] The most significant fraud found by the trial judge had to do with the reporting, on SFC’s consolidated financial statements, of assets held and revenue and income generated under the BVI model.

[15] The BVI model involved SFC subsidiaries incorporated in the British Virgin Islands (“BVIs”). It was designed in light of restrictions at one time imposed by the PRC under which foreign entities were not permitted to have PRC bank accounts, operate or sell timber plantations, or own land use rights in the PRC.

[16] To circumvent these restrictions, the BVI Model contemplated that SFC’s BVI subsidiaries would acquire standing timber from third parties known as “Suppliers”, who in turn would acquire it from others, typically rural or business collectives. The BVIs would sell standing timber indirectly, through authorized intermediaries (“AIs”) that acted as their customers. The BVIs would not pay the Suppliers or receive payment from the AIs. Instead, the AIs and Suppliers would be directed to set off payments so that payment from an AI for the sale of standing timber rights

would be rolled forward into the purchase of new BVI standing timber rights from a Supplier. Consequently, no cash would flow through the BVIs' or SFC's bank accounts in connection with the BVI standing timber and money associated with the BVI standing timber would be locked up in the PRC to be rolled forward into further BVI standing timber purchases.

[17] Under the BVI model, the BVIs would not acquire actual land use rights in the PRC. Instead, they ostensibly would acquire a contractual right to the standing timber itself.

[18] As noted above, significant valuable assets were reported by SFC as held, and revenue and profit-generating activity was reported as occurring, under the BVI Model. By the second quarter of 2011, SFC's consolidated financial statements showed BVI standing timber assets valued at $2.99 billion. Trading under that model was the biggest contributor to the revenues and profits shown on the statements.

[19] After the Muddy Waters Report, the Independent Committee was, however, unable to locate key documents to confirm valid title to the BVI standing timber or to even determine its location. Collections of accounts receivable from AI's, which had been represented to take place with 100% success, dropped to close to 0%. Consultants retained by SFC's creditors were also unable to locate or verify the BVI standing timber assets. When the Monitor for SFC appointed under the *CCAA*

made unannounced site visits to Suppliers and AIs at their registered addresses, it found, with only one exception, little to no evidence of any operations. Those entities were later established to have undisclosed connections to the appellant and his management team.

[20] The inability to locate or verify the BVI standing timber assets continued after the Plan was sanctioned by the Superior Court. Under the Plan, the rights to any such assets were transferred to entities owned by former SFC creditors; they were subsequently sold to a third party purchaser, New Plantations. The transferees had strong economic motivations to locate the standing timber assets. None of the transferees could do so.

[21] The trial judge considered, among other things, expert and other evidence about the type of documents that would be required to validly show title to the reported BVI standing timber assets and evidence of the efforts taken to locate and establish ownership or valid title to the standing timber assets that had been represented on the SFC consolidated financial statements as having a value of $2.99 billion. He found that:

a) Proper documentation to establish valid title to the assets did not exist. For example, maps, essential to establish the locations of the alleged standing timber assets, were produced by the appellant and his management team for only 1% of the claimed assets.

b) Despite efforts by persons with significant motivation to locate those assets so they could be monetized, they had not been located even up to the time of trial in 2017.

[22] The trial judge concluded that the BVI standing timber model was a fraud perpetrated by the appellant, that the assets reported simply did not exist, and that the transactions reported as resulting in revenue and income were paper transactions without substance. He stated:

> [551] The former assets of [SFC] have now been in the hands of New Plantations for more than a year. Even with Mr. Chan's assistance, New Plantations has not produced any evidence that it has been able to find, prove title to or monetize any purported interest in the BVI standing timber assets. It has not paid anything to EPHL [the former-creditor-owned company] under the RAPA arising out of the sale of any BVI assets. The best [the appellant] can offer in this regard is revealed in the evidence of Alvin Lim, who testified that New Plantations is "still in the process of investigation."
>
> [552] Six years have passed since the Muddy Waters Report was released and nobody, despite enormous financial incentives to do so, (incentives motivating [SFC], the bondholders, the purchaser Emerald [the former-creditor-owned company], the purchaser New Plantations and [the appellant] himself), has been able to locate, confirm ownership of, or monetize the BVI assets. When considered in the context of all the evidence, the inescapable conclusion is that [SFC] did not own the BVI assets that it claimed to own.
>
> [553] All of the evidence considered as a whole, leads to the inescapable conclusion that the BVI standing timber model was a fraud. The logical and reasonable

inferences to be drawn from the totality of the evidence, based on a preponderance of probabilities, are that:

> i) the defendant and others inside and outside [SFC] management operated an elaborate system of nominee companies ultimately controlled by [the appellant] or persons acting under his direction;
>
> ii) many of these nominees companies were major Suppliers of BVI standing timber;
>
> iii) the Suppliers and AIs were not *bona fide* arm's length sellers and purchasers of BVI standing timber;
>
> iv) the BVI standing timber transactions were paper transactions. [SFC] employees under the direction of [the appellant] and his cadre of Inside Management created the contracts, the supporting documents and the so-called evidence of directed payments made between the AIs and Suppliers. No consideration in fact passed between these entities;
>
> v) [SFC] subsidiaries did not hold title to BVI standing timber plantations;
>
> vi) the value of [SFC's] BVI standing timber, represented at $2.99 billion in 2011, did not exist. Because [SFC] did not own these assets, this value was nil; and
>
> vii) the defendant and members of Inside Management exploited weaknesses and ambiguities in the PRC forestry regulatory regime to perpetrate this fraud and to conceal it from scrutiny by [SFC], external auditors, other professional advisors, independent members of the Board and the public.

(b) The WFOE Standing Timber Fraud

[23] A second fraud found by the trial judge arose within a method of doing business referred to as the WFOE standing timber model. That model was used because in 2004 the PRC gave permission for foreign investors to invest in PRC-incorporated trading companies, known as wholly foreign owned enterprises ("WFOEs"), which could acquire actual plantation land use rights, harvest timber, sell logs and standing timber directly to end users, and open PRC bank accounts. WFOEs were also permitted to plant standing timber plantations due to their land use rights.

[24] Assets were acquired and activities undertaken by SFC subsidiaries which were WFOEs. These included planting forests and holding them until harvest ("planted plantations") and, in addition, ostensibly acquiring and trading in existing standing timber ("purchased plantations").

[25] The trial judge found that the hallmarks of the BVI standing timber fraud were present in the purchased plantations aspect of the WFOE standing timber model. Many of the WFOE purchased plantation transactions were conducted through Suppliers controlled by the appellant and his management team. Plantation rights certificates were lacking for most of the purchased plantations. The trial judge concluded that "like the BVI standing timber, the majority of the WFOE purchased plantations were never actually owned by [SFC] and had no value": at para. 562.

(c) The Wood Log Trading Cash Gap Fraud

[26] The third fraud found by the trial judge was in wood log trading activities. From 2005 to 2010, revenue from wood log trading ranged from 15% to 25% of SFC's total consolidated revenues, and a smaller percentage of SFC's consolidated profits. Under SFC's wood log trading model, an SFC BVI subsidiary would purchase logs from a Supplier outside of the PRC and pay for the logs using a letter of credit guaranteed by SFC. It would then resell the logs to a customer. However, typically only about 70% of the wood log sales accounts receivable were paid in cash by the customer. The remaining 30% was directed to BVI standing timber Suppliers, which had the effect of diverting "new" money into the BVI standing timber model.

[27] The diversion of 30% of the wood-log-trading receivables to BVI standing timber Suppliers, for assets the trial judge determined did not really exist, created a "cash gap" – $239.8 million more was paid out to purchase wood logs than was received on their sale. And, after the Muddy Waters Report, substantial amounts of accounts receivable associated with the wood log trading business were not paid – the customers vanished. Many of SFC's wood log customers were found not to have been at arm's-length from the appellant.

[28] The trial judge found "the preponderance of probabilities, having regard to all of the evidence, is that the wood log cash gap was a fraud orchestrated by [the

appellant] with the assistance of [his management team] at [the appellant's] direction": at para. 633.

(d) The Wood Log Deposit Fraud

[29] The fourth fraud found by the trial judge arose from the practice of placing deposits for the purchase of the logs. The appellant caused SFC subsidiaries to enter into wood log trading agreements requiring payment of substantial unsecured "deposits" and "advance payments" for the purchase of logs, which exceeded the value of any logs actually delivered. After the Muddy Waters Report, log deliveries ceased and, with one exception, none of the deposits or advance payments were repaid, resulting in a loss of $167.4 million. The appellant's relationship with many of the wood log suppliers was not at arm's-length.

[30] The trial judge found the preponderance of evidence established that the wood log deposit transactions were a fraudulent mechanism for diversion of funds out of SFC to entities controlled by the appellant or acting under his direction.

(e) The Greenheart Transaction

[31] The further transaction in which the trial judge found a breach of fiduciary duty by the appellant was referred to as the Greenheart Transaction. Between July 2007 and July 2010, the appellant caused SFC to acquire a majority interest in Greenheart Resources Holdings Limited and its majority shareholder, Greenheart Group Limited (collectively, "Greenheart"), by purchasing shares from

shareholders of Greenheart, including several in which the appellant had undisclosed interests. At the time of the acquisitions, the appellant knew but did not disclose that Greenheart was in serious financial difficulties. SFC ultimately invested $202.2 million, which was more than the amount realized when the Greenheart interest was later sold.

[32] The trial judge found that the appellant had committed a clear violation of his fiduciary duties through his nondisclosure. In addition to causing a loss to SFC, he made an undisclosed personal profit of approximately $38 million on the transaction.

(2) *The Collapse of SFC, The Fate of the Funds Raised, The CCAA Process and Realizations on Assets*

[33] The events following the Muddy Waters Report and the inability of SFC to rebut its allegations had a profound impact on the company.

[34] In August 2011, the OSC issued a cease-trading order over SFC's securities, alleging that SFC had engaged in significant non-arm's-length transactions, its assets and revenues had been exaggerated, and that the appellant and others appeared to be involved in the fraud.

[35] SFC became unable to issue further financial statements. In December 2011, it advised it could give no assurance it would ever be able to do so. In January

2012, SFC issued a press release which stated that its “historic financial statements and related audit reports should not be relied upon”.

[36] By early 2012 SFC, the appellant, and others had been named in at least four class actions alleging that SFC’s financial statements were materially false and misleading and claiming, on behalf of classes of debt and equity holders, damages for amounts that they overpaid when they purchased securities in reliance on the false financial statements, among other relief.

[37] SFC defaulted on its debt obligations. In March of 2012, it entered into a Restructuring Support Agreement with its noteholders, who held first priority security interests over the shares of SFC’s subsidiaries, which contemplated the transfer of SFC’s business to those noteholders unless a sales process revealed that the value of SFC’s assets exceeded its debt. The sales process revealed that potential purchasers were only willing to pay a fraction of the quantum of the debt for the company’s assets. Consequently, the sales process terminated in June 2012.

[38] SFC filed for insolvency protection under the *CCAA* on March 30, 2012, and the Superior Court sanctioned its Plan on December 10, 2012. Under the Plan, SFC’s assets were transferred to creditor-controlled entities and SFC’s causes of action were transferred to the Litigation Trust. The Plan provided for releases of

SFC and specified others. The precise terms of the Plan bearing on the issues in this appeal are more fully described in the Analysis section below.

[39] The trial judge found that by the time the fraud was uncovered and "the dust settled", more than half of the almost $3 billion that had been raised by SFC on the capital markets was gone. He also found that what was left in cash by June of 2011 was largely consumed in propping up and managing the enterprise during the extended crisis brought on by the disclosure of the fraud and its investigation (including dealing with ongoing concealment by the appellant and his management team). He found that, to the extent that the funds raised on the capital markets had actually been invested in assets, the value of those assets was represented by the amounts realized on their sales, effected under and after implementation of the Plan.

[40] Under the Plan, effective January 30, 2013, all of SFC's assets, including its interests in wholly-owned subsidiaries, were transferred to Emerald Plantation Holdings Limited ("EPHL") and then by EPHL to Emerald Plantation Group Limited ("EPGL"), a wholly-owned subsidiary of EPHL. These entities were formed for the purpose of holding SFC's assets and realizing on them to achieve recoveries for SFC's creditors, who became EPHL's shareholders.

[41] Commencing in October 2014, EPGL caused the sale of the Greenheart business and then of miscellaneous assets to third parties. In 2016, EPGL caused

the sale of the remaining assets to New Plantations, a third-party purchaser. The sale to New Plantations had special provisions for further payments if New Plantations was able to make any recovery on assets that were ascribed zero value in the sale, including the BVI standing timber, the BVI standing timber receivables, the wood log receivables, and the wood log deposits. The trial judge found that, at the time of trial, there had been no recoveries on, or any further payments in respect of, those assets: at paras 89 to 96.

[42] The total net recoveries from the sale of assets of SFC's subsidiaries was $438.5 million.

(3) *The Trial Judge's Damages Award*

(a) Causation

[43] The trial judge approached causation on the basis that the "but for" causation test was to be applied in a common sense, robust fashion; that causation could be inferred from evidence that connected the wrongdoing to the injury; and that inferences could be drawn against a defendant found liable for fraud or breach of fiduciary duty who did not provide credible alternative causes for the loss.

[44] The trial judge's factual findings about causation can be summarized as follows. Between 2004 and 2010, SFC raised in excess of $2.9 billion in Canada's debt and equity markets, based on the appellant's fraudulent misrepresentations of the existence and value of assets. But for the appellant's deceit, SFC would

never have undertaken obligations of this magnitude to lenders and shareholders, nor would it have entrusted the money it raised to the appellant and his management team. The appellant directed much of the money raised towards fictitious or over-valued lines of business, engaged in undisclosed related-party transactions and funneled funds into entities he secretly controlled. This conduct, and the consequences of its discovery, ultimately caused the collapse of SFC. The trial judge found that SFC had suffered losses directly related to the appellant's fraud and breach of fiduciary duty.

(b) Measurement of Damages

[45] The trial judge referred to the measure of tort damages for deceit and to the principles of equitable compensation. He accepted that the proper approach to measuring SFC's loss was the primary approach put forward by the respondent's expert, Peter Steger.

[46] Steger's primary approach began with the $2.9 billion SFC raised in the debt and equity markets between 2004 and 2010. Subtracting the share and debt issue costs and principal debt repayments made by SFC, he calculated the net cash available to SFC from these capital raises as $2.588 billion. To this, Steger added a proxy for the minimum return that SFC should have made by investing the cash. This led to an available cash figure of $3.065 billion.

[47] On the basis that SFC would have had $3.065 billion in cash available for investment in profit-generating assets, Steger considered the effect of the appellant's conduct, which saw those funds invested in subsidiaries engaged in largely fraudulent businesses. To the extent there was value in the businesses that were invested in, it was represented by the $438.5 million amount that was actually recovered by EPGL from the sales of the assets acquired from SFC under the Plan. The difference between these two figures – $2.627 billion – represented SFC's loss attributable to appellant's conduct.

[48] The trial judge rejected the appellant's argument that damages could only be calculated on a "transaction by transaction" basis, both as a matter of law and because the appellant's damages expert, who criticized Steger for not conducting that analysis, did not do it himself or "hint at a methodology" to do so.

[49] The trial judge considered two other damages calculations, in case Steger's primary approach was found to be incorrect. The first was an alternative approach set out by Steger, which calculated damages of $3.2 billion based on a write-down of assets methodology. He then considered a specific loss approach, based on calculating the losses resulting from specific proven acts of fraud or breach of fiduciary duty, including the wood log cash gap fraud, the wood log deposit fraud, the Greenheart transaction, the appellant's profits on the Greenheart transaction, the cost of SFC's investigation following the Muddy Waters Report, and the

appellant's remuneration. These amounts totalled $812.43 million. Deducting the net realization of $438.5 million from post-Plan sales produced an alternative specific loss compensation award of $373.9 million. However, the trial judge concluded that the primary Steger approach, rather than either of these other approaches, should be accepted.

[50] The trial judge awarded punitive damages of $5 million Canadian on the basis of his finding that the appellant had abused his fiduciary position to orchestrate a large and complex fraud, resulting in billions of dollars of losses.

(4) *The Trial Judge's Rejection of Specific Defences*

(a) Duplication with Class Actions

[51] The trial judge rejected the argument that the respondent could not recover any amounts because there was duplication between the claims made in this action and claims made in certain class actions (the "Class Actions", as defined in the Plan) that had named both SFC and the appellant, among others, as defendants. He noted that the Class Actions alleged some of the same facts as were alleged in this action and that those Class Actions had been brought on behalf of persons who acquired SFC securities (defined as common shares, notes and other securities) from 2007 to 2011.

[52] The trial judge held that the claims advanced in this action were transferred to the Litigation Trust and properly advanced by the respondent because they were

claims against the appellant that, prior to their transfer, could have been asserted by SFC; were not released by the Plan (under which the appellant received no release); and were not “Excluded Litigation Trust Claims” as defined in the Plan, which were not transferred to the Litigation Trust. He noted the Plan’s language that claims advanced in the Class Actions were not transferred to the Litigation Trust, but held that the claims in the Class Actions were different than those in this action. The claims in the Class Actions were not for wrongs done to SFC but were claims for wrongs done to individual noteholders or shareholders; thus they were different causes of action held by different persons. Nor was there a risk of double recovery. The courts in the Class Actions could prevent that from occurring when those actions reached judgment (the Class Actions were still at the pleadings stage).

(b) No Affirmation

[53] The trial judge also rejected the argument that SFC had elected to affirm the validity of all of the assets, contracts, and transactions that the respondent complained of when it transferred the shares of its subsidiaries to EPGL under the Plan, such that the respondent could not sue and recover damages for them on the basis that they were fraudulent. He found the principle of affirmation had no application to the case.

III. Analysis

(1) *Is the Respondent Precluded By The Plan from Advancing The Claims in This Action?*

(a) Introduction

[54] The appellant makes three arguments that the Plan did not transfer, to the Litigation Trust, the causes of action that are asserted against him by the respondent and that therefore the Plan precludes those claims from being advanced: (1) the claims are the same as, or overlap with, the claims asserted in the "Class Actions" which were not transferred to the Litigation Trust; (2) the claims constitute "Excluded Litigation Trust Claims" which were excepted from the transfer of claims to the Litigation Trust; and (3) the claims constitute "SFC Intercompany Claims" that were assigned under the Plan by SFC to EPGL and not to the Litigation Trust. (Each of the quoted terms is a defined term in the Plan).

[55] The appellant's argument that the claims advanced in this action were not transferred to the Litigation Trust is an argument about the meaning of the Plan. It was common ground before the trial judge and in this court that the respondent's ability to bring these claims had to derive from the provisions of the Plan, the Litigation Trust Agreement made thereunder and the terms of the Sanction Order which approved the Plan. These defined what causes of action were transferred to the Litigation Trust and which were not. It was not suggested that the terms or

effect of these three documents differed on the issues material here, and accordingly argument was chiefly directed to the terms of the Plan itself.

[56] I first address the principles of interpretation to be applied to the Plan and the standard of review to be applied by this court in assessing the interpretation arrived at by the trial judge. I then address the factors bearing on the interpretation of the Plan and the precise terms of the Plan. Finally I consider whether the appellant's arguments disclose any reversible errors in the trial judge's interpretation of the Plan.

(b) The principles of interpretation

[57] A *CCAA* plan of compromise and arrangement has been held to be "in substance a contract, sanctioned by the Court", to be interpreted in light of the purposes of the *CCAA*, the overall purpose and intention of the plan in question, and the principles of contractual interpretation: *Re Canadian Red Cross Society* (2002), 35 C.B.R. (4th) 43 (Ont. S.C.), at paras. 12 to 13; aff'd 46 C.B.R. (4th) 239 (Ont. C.A.), leave to appeal refused, [2003] S.C.C.A. No. 539; see also *The Catalyst Capital Group Inc. v. VimpleCom Ltd.*, 2018 ONSC 2471, at para. 109, aff'd on other grounds, 2019 ONCA 354, applying these principles to a corporate plan of arrangement.

[58] The principles of contractual interpretation include: reading the words of the document as a whole, giving meaning to all its terms; determining the parties'

intentions in accordance with the words used; considering the factual matrix (the objective facts known at the time of contracting) to aid in understanding the words used; and adopting an interpretation which avoids commercial absurdity: *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust,* 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24; *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, at paras. 47-48, 57-58.

(c) The standard of review

[59] This court has given deference to the interpretation of a plan by a judge who had familiarity with the plan's development through supervision of the debtor's restructuring: *Red Cross* (Ont. C.A.), at para. 2. The respondent argues that the same approach of deference should apply here as the trial judge, an experienced Commercial List judge, had the opportunity to consider the Plan in light of its purpose, terms and the factual matrix explored in a lengthy trial. This deferential approach would be consistent with viewing the Plan as "in substance a contract": *Red Cross* (Ont. S.C.), at para. 13. A trial judge's contractual interpretation is, absent extricable legal error, generally subject to appellate deference: *Sattva,* at paras. 52-55.

[60] The appellant asks this court to replace the trial judge's interpretation of the Plan with its own, arguing that a correctness standard should apply. A correctness standard of appellate review applies to contractual interpretation where

consistency of meaning is a primary concern and where there is no meaningful factual matrix to consider. Certain standard form contracts of adhesion are examples: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23.

[61] Although a *CCAA* plan is not a standard form contract, plans often use language borrowed from other plans, giving rise to consistency concerns. Moreover, a plan is different from an ordinary contract in that it takes its force not only from the consent of parties who have been involved in its negotiation, but also from the provisions of the *CCAA* which render a plan binding on those who have not agreed to or voted for it, if the requisite majorities of creditors have done so and court approval has been obtained: *CCAA*, s. 6(1). In this respect a plan has aspects of a contract of adhesion.

[62] Nonetheless, in my view a deferential standard of review should apply. *CCAA* plans are developed to fit the unique circumstances of each restructuring. The overall purpose and intention of the individual plan are important determinants of its interpretation, to be considered against the backdrop of the factual aspects of the restructuring and the events that led up to it. The types of considerations that will go into a plan's interpretation will usually be fact and context-specific and the factual matrix will accordingly be important. The questions which arise in the interpretation of a plan will almost always be mixed questions of law and fact. All

of this supports a deferential standard of appellate review, one that accords with the standard applicable generally to a trial judge's interpretation of a contract.

[63] Accordingly, absent an extricable error of law, an interpretation that involves palpable and overriding errors of fact, or one that is clearly unreasonable, the trial judge's interpretation should not be interfered with.

(d) The Factual Matrix

[64] The trial judge did not expressly identify which facts he considered to be the factual matrix relevant to the Plan's interpretation. But he did make significant findings about how and why the Plan came about. It is the "facts giving rise to the plan" that are important to determine its scope and meaning: *Catalyst,* at para 110. Here, those facts include: that SFC had been forced to file for *CCAA* protection because of the fraud and the consequences of its discovery; the appellant had been identified, including by the OSC, as allegedly having been involved in that fraud; it had already been determined that the assets SFC offered in the sales process were worth substantially less than the amount of its debt so that additional sources of recovery by SFC, including recoveries through litigation, would be important; and class actions by SFC stakeholders were already pending against the appellant, amongst others, in which SFC stakeholders, but not SFC itself, were advancing claims.

(e) The Purposes of the CCAA and of the Plan

[65] The full title of the *CCAA* states that it is: “An Act to facilitate compromises and arrangements between companies and their creditors.” “The *CCAA* has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress, rehabilitation of honest but unfortunate debtors, and enhancement of the credit system generally.” (emphasis added): Janis P. Sarra, *Rescue!: The Companies Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 14.

[66] Creditors are a key constituency under the *CCAA*, as the approval of specified majorities of creditors is required for a plan of compromise and arrangement to be effective: *CCAA*, s. 6(1). Given the objectives of the *CCAA* and the need for creditor approval, it is reasonable to expect that the goal of a plan will be to maximize the value to be obtained from the insolvent corporation’s assets, including its intangible rights such as litigation claims, so as to enhance ultimate distributions to creditors. A key barometer of a plan’s acceptability is how it proposes to achieve that goal compared to what would be available through alternative insolvency processes, such as liquidation or bankruptcy.

[67] The SFC Plan addressed those objectives. It provided in section 2.1 that it was “put forward with the expectation that the Persons with an economic interest

in SFC … will derive greater benefit from the implementation of the Plan and the continuation of the SFC Business as a going concern than would result from a bankruptcy or liquidation of SFC."

[68] And in keeping with this expectation, the Plan described its purpose: to release SFC from the claims of "Affected Creditors"[2]; to transfer ownership of the business of SFC to creditor-controlled entities free and clear of all claims against SFC and its subsidiaries, so as to enable the business to continue on a going-concern basis; and "to allow Affected Creditors and Noteholder Class Action Claimants[3] to benefit from contingent value that may be derived from litigation claims to be advanced by the Litigation Trustee": section 2.1.

[69] The Superior Court sanctioned the Plan, finding this purpose and its implementation in the Plan to be in compliance with the *CCAA* and its objectives: *Re Sino-Forest Corporation,* 2012 ONSC 7050, at para. 79.

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[2]Affected Creditors were defined by the Plan as including persons with Noteholder Claims. A Noteholder Claim included a claim for principal and accrued interest under Notes (debt instruments issued by SFC when it raised financing on the public markets) by the owner or holder of such Note or their trustee.

[3] Noteholder Class Action Claimants were persons with Noteholder Class Action Claims. These were defined as claims as Noteholders in class actions against SFC and its directors, officers, auditors or underwriters, relating to the purchase, sale or ownership of the Notes, but did not include Noteholder Claims, i.e., did not include claims for principal and accrued interest payable under the Note.

(f) The Plan's Operative Terms

[70] The Plan provided two avenues for assets of SFC to be realized upon and the proceeds distributed to creditors: (1) by the transfer of SFC causes of action to the Litigation Trust; and (2) by the transfer of the shares of SFC's subsidiaries to creditor controlled entities, EPHL and EPGL: section 6.4(h). The provisions of the Plan implementing these transfers, as well as the release provisions of the Plan, are key to assessing the appellant's arguments.

[71] The Plan provided, in section 6.4(o), that SFC would establish the Litigation Trust. SFC and the trustees for SFC's noteholders would then convey to it the "Litigation Trust Claims", defined by the Plan as:

> [A]ny Causes of Action that have been or may be asserted by or on behalf of: (a) SFC against any and all third parties; or (b) the Trustees (on behalf of the Noteholders) against any and all Persons in connection with the Notes issued by SFC; provided, however, that in no event shall the Litigation Trust Claims include any (i) claim, right or cause of action against any Person that is released pursuant to Article 7 hereof or (ii) any Excluded Litigation Trust Claim. For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims transferred to the Litigation Trust shall not be advanced in the Class Actions."

[72] "Causes of Action", used in the definition of Litigation Trust Claims, was given a very broad meaning, which included any claims or entitlements in law, equity or otherwise for damages or other relief.

[73] However, the definition of “Litigation Trust Claims” narrowed the transfer of claims to the Litigation Trust (i) by excepting claims against certain individuals and entities who were released by the Plan and (ii) by excepting “Excluded Litigation Trust Claims” from the claims that would otherwise have been transferred to the Litigation Trust: Article 7. “Excluded Litigation Trust Claims” were defined as Causes of Action agreed, as between SFC and a subgroup of Noteholders, to be excluded from the Litigation Trust Claims: section 4.12. Section 4.12(b) of the Plan specified that certain claims against SFC’s Underwriters fell within this category, except if they were claims for fraud or criminal conduct.

[74] The definition of “Litigation Trust Claims” contained “greater certainty” language specifying that claims in the “Class Actions” were not transferred to the Litigation Trust. The “Class Actions” referred to in the “greater certainty” clause were defined to mean four specific actions in Ontario, Quebec, Saskatchewan and New York, brought on behalf of persons who, during defined class periods, had purchased SFC notes or shares. The Class Actions include: claims against the appellant based on allegations that he made false representations that SFC’s financial statements were accurate when they in fact were materially misleading and grossly overstated SFC’s assets; that the appellant’s misrepresentations induced class members to buy equity or debt at inflated prices; and that he thus

caused them losses. The plaintiff classes seek damages, among other things, to recover the amounts they paid or overpaid to acquire those securities.

[75] Section 4.11 of the Plan set out who would benefit from any recoveries on claims transferred to the Litigation Trust. Beneficial interests in the Litigation Trust were to be held 75% by Affected Creditors[4] and 25% by Noteholder Class Action Claimants[5].

[76] In addition to their interests in the Litigation Trust, Affected Creditors also received interests in EPHL, a holding company which held the shares of EPGL, to which SFC transferred the shares of its subsidiaries (and indirectly the assets they held and businesses they carried on): sections 4.1, 6.4 and 6.6. Included among the assets transferred to EPGL were “SFC Intercompany Claims” defined to include amounts owing to SFC by any of its subsidiaries: section 4.10. The Plan provides that all obligations and agreements to which EPHL or EPGL became parties as a result of the transfer to them “shall be and remain in full force and effect, unamended”: section 8.2(j).

[77] All equity holders in SFC released their claims against SFC: section 4.5. Noteholder Class Action claims against SFC were released: section 4.4. Affected Creditors – comprised mainly of SFC’s noteholders, whose claims had been

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[4] See note 2.
[5] See note 3.

secured by first-priority security interests over the shares of SFC's subsidiaries – released SFC from their claims for payment of principal and interest on the notes: section 4.1. Article 7 specified individuals and entities also released by the Plan. The appellant was not one of the specified individuals.

(g) Analysis of The Appellant's Plan Preclusion Arguments

[78] In light of the principles of interpretation, the factual matrix, the purposes of the *CCAA* and the Plan, and the Plan's language, I turn now to the analysis of the appellant's plan preclusion arguments.

(i) No Right to Advance Claims Advanced in the Class Actions

[79] The appellant argues that the claims made in the action are not Causes of Action that were transferred to the Litigation Trust because they are the same as, or overlap with, the claims made in the Class Actions. He asserts that the claims in this action on the one hand, and those in the Class Actions on the other, rely on the same or similar allegations of wrongdoing by the appellant and claim the same or similar amounts, based on the amounts that SFC raised, as debt or equity, in the capital markets. He also argues that there is an overlap in who will benefit from the claims, in that certain creditors are beneficiaries of the Litigation Trust and

class members in the Class Actions.[6] The “greater certainty” language of the Plan makes it clear, he maintains, that these claims were not transferred.

[80] I would not give effect to this argument.

[81] The Plan, by the combination of section 6.4(o) and the definition of Litigation Trust Claims, transferred to the Litigation Trust two types of Causes of Action held by two different persons. First, it transferred Causes of Action of SFC against any and all third parties. Second, it transferred Causes of Action of the Trustees on behalf of Noteholders against any and all persons for certain matters. The respondent relies upon the first transfer only, that is, the transfer of Causes of Action that SFC had against the appellant. The trial judge did not err in concluding that the causes of action the respondent advanced in this action are Causes of Action that SFC had against the appellant. This differentiates them from causes of action of SFC stakeholders, which are being advanced in the Class Actions.

[82] A wrong (such as a tort) done to a corporation is actionable by the corporation which is entitled to recover the loss it suffered. The shareholders and creditors of a corporation cannot sue for damage to the corporation, even though they are indirectly affected by it: *Hercules Management Ltd. v. Ernst and Young,* [1997] 2

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[6] There is an overlap between this argument, and the appellant’s argument that in assessing damages the trial judge awarded the respondent amounts that could only be claimed in the Class Actions or were duplicative of those amounts. However, I have addressed the points as distinct. One argument is essentially about the respondent’s standing to assert certain claims. The other is about whether, even if he has standing, the damages actually awarded were appropriate.

S.C.R. 165, at para. 59; *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (Ont. C.A.), at paras. 11-16. Similarly, an action for breach of a corporate director's or officer's fiduciary duty is an action of the corporation, whether it seeks damages or an accounting of profits: *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69, [2008] 3 SCR 560, at para. 41; *Midland Resources Holding Limited v. Shtaif,* 2017 ONCA 320, 135 O.R. (3d) 481, at paras. 148-149 and 156, leave to appeal refused, [2018] S.C.C.A. No. 541.

[83] On the trial judge's findings, the appellant was a fiduciary of SFC and he breached his fiduciary duty to it. SFC was the victim of the appellant's tort – his fraud – in that it was SFC that was caused to record fictitious or overstated assets and revenues on its financial statements, SFC that was caused to raise money from the public and incur obligations to lenders and others that it would not otherwise have incurred, and SFC's funds, received through these activities, that were invested and lost in illegitimate businesses or consumed by the consequence of the discovery of the fraud. Leaving aside the question of how damages for these matters are assessed, the causes of action to sue for them were Causes of Action of SFC.

[84] The Plan transferred to the Litigation Trust Causes of Action "that have been or may be asserted by or on behalf of … SFC against any and all third parties…", a term which would include the appellant: section 1.1. The appellant's contention

could only be correct if there were something in the Plan that restricted the meaning that would otherwise be given to that transfer language. The provision of the Plan relied upon by the appellant for this effect is the “greater certainty” clause in the definition of Litigation Trust Claims, which reads as follows: “For greater certainty: (x) the claims being advanced or that are subsequently advanced in the Class Actions are not being transferred to the Litigation Trust; and (y) the claims being transferred to the Litigation Trust shall not be advanced in the Class Actions”. Like the trial judge, I do not read that phrase to have the meaning for which the appellant argues.

[85] First, as the trial judge correctly noted, the claims made in the Class Actions are claims made on behalf of noteholders and equity holders for their causes of action arising from damages they suffered. SFC did not make claims in the Class Actions asserting SFC Causes of Action or seeking damages SFC suffered. The distinction is important and is not undermined by either the factual overlap in the claims or the fact that certain creditors are or may be both beneficiaries of the Litigation Trust and members of the plaintiff classes.

[86] On the point of factual overlap, the same or similar facts may give rise to a cause of action by a shareholder and one by the corporation. The law recognizes that “…where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may

also have a separate and distinct cause of action" (emphasis added): *Hercules,* at para. 62. Shareholders and noteholders may have causes of action arising from misrepresentations made to them when acquiring securities, based on common law doctrines or under securities legislation. And where they do, they may have rights to sue for damages they personally have suffered. But the existence of those causes of action does not detract from the existence of a separate and distinct cause of action of the corporation, based on wrongdoing against or breach of duties owed to it, to sue for damages it has suffered.

[87] As for the argument that, because creditors of SFC are Litigation Trust beneficiaries, the causes of action asserted by the Litigation Trust are or become indistinguishable from their personal rights of action, in my view this court's decision in *Livent Inc. v. Deloitte & Touche,* 2016 ONCA 11, 128 O.R. (3d) 225, rev'd in part on other grounds, 2017 SCC 63, [2017] 2 S.C.R. 855, stands as a complete answer to that proposition.

[88] In *Livent*, it was held that the distinction between the corporation's cause of action arising from wrongs done to it to recover damages it has suffered and the separate cause of action of a corporate stakeholder to assert a personal cause of action for a wrong done to her for damages she has suffered, does not cease to apply when the corporation is insolvent and intends to distribute any recovery to its stakeholders. In other words, the separate and distinct cause of action of the

corporation does not become one and the same as the stakeholders' cause of action even if the corporation's intention is to benefit its stakeholders with any recovery. Blair J.A. explained why an argument to the contrary must be rejected, observing, at para. 57, that:

> It impermissibly conflates damages sustained by the corporation with the distribution of those damages, once recovered, to creditors and other stakeholders, as part of the assets of the corporation, in the course of the proceeding under the [*CCAA*]…. To conflate them is to disregard the long-recognized principle of corporate law that a corporation is a legal entity separate apart from its shareholders and stakeholders, and that the corporation alone has the right to sue for wrongs done to it. [Citations omitted.]

[89] The Litigation Trust is the *CCAA* vehicle for the pursuit of SFC's corporate causes of action and the distribution of its damages, once recovered, to creditors. Thus the statement from *Livent* is equally applicable here. The Plan's stated purpose of benefiting creditors by recoveries achieved by the Litigation Trust does not affect the distinction between SFC's causes of action (pursued through the Litigation Trust) and any personal causes of action that creditors or others may pursue, including in the Class Actions. That distinction continues.

[90] In addition to conflicting with well-established corporate law principles, the appellant's attempt to divorce the concept of a cause of action from the person or corporation that holds it conflicts with the language of the Plan. In defining the Litigation Trust Claims transferred to the Litigation Trust, the Plan refers to Causes

of Action that have been or may be asserted on behalf of SFC and those that have been or may be asserted on behalf of the Trustees for the Noteholders. It links the Causes of Action transferred to the entity that held them. The “greater certainty” language in this definition must be read in the same way. The fact that the causes of action of shareholders’ and noteholders’ advanced in the Class Actions were not transferred to the Litigation Trust under the Plan has no bearing on the transfer of SFC’s separate and distinct Causes of Action to the Litigation Trust, even if arising from the same or similar facts and even though creditors are beneficiaries of the Litigation Trust. SFC’s Causes of Action were not being advanced in the Class Actions. The “greater certainty” language consequently does not have the effect for which the appellant contends.

[91] Stepping back from the precise wording of the Plan, the appellant argues more generally that it represented a bargain that his wrongs would be pursued in the Class Actions only. I do not accept this argument, which does not find support in the text of the Plan, read in light of the factual matrix and the purposes of the Plan and the *CCAA*.

[92] The Class Actions pre-dated the Plan. If they were intended to be the sole vehicle for recovery from the appellant, it is unclear why the appellant did not receive a release from SFC or the Litigation Trust under the Plan. Moreover, when the Plan was put forward and approved, the failed sales process had already

established that recoveries from assets in SFC subsidiaries would be insufficient to allow SFC to satisfy creditor claims, making other sources of recovery, including enforcement of SFC's litigation rights, important. There is no reason why rights of action of SFC against the appellant, which would continue to exist in a bankruptcy or liquidation of SFC, would be given up in this *CCAA* Plan, where the object was to maximize recoveries in a manner more advantageous than bankruptcy or liquidation. Moreover, the stated purpose of the Plan includes allowing creditors to benefit from the pursuit of contingent claims by the Litigation Trust. Morawetz J., in granting the Sanction Order approving the Plan, noted that it provided the opportunity "through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for *CCAA* protection": *Re Sino-Forest Corporation*, at para 65. When the Plan was approved, the appellant was already alleged to be one of those persons, but on the appellant's argument the opportunity Morawetz J. identified would not exist.

[93] The purposes of the *CCAA* and the Plan, and the Plan's precise provisions read in light of the factual matrix, all rebut the appellant's characterization of the Plan as preventing the Litigation Trust from pursuing a claim that SFC could have pursued against the appellant for his misconduct.

[94] Accordingly, the trial judge did not err in interpreting the Plan as allowing the respondent to advance the claims made in this action against the appellant notwithstanding the claims by noteholders and shareholders advanced in the Class Actions.

(ii) Excluded Litigation Trust Claims

[95] The appellant's second argument is that the claims advanced in the action are Excluded Litigation Trust Claims. As noted above, that exclusion applies where there is an agreement between SFC and a category of its creditors that a particular claim is excluded from those transferred to the Litigation Trust. The Plan specifies one category of excluded claim, encompassing certain claims against SFC's underwriters. There is no similar particularization of claim(s) of SFC against the appellant which are excluded.

[96] The only agreement to exclude a claim of SFC against the appellant that the appellant points to is the "greater certainty" language providing that claims advanced in the Class Actions are not transferred to the Litigation Trust. The argument is therefore just a repackaging of the appellant's first argument, as it depends for its validity on the Plan having exempted claims arising from facts asserted in the Class Actions from those Causes of Action of SFC transferred to the Litigation Trust. As previously discussed, the Plan does not have that effect.

[97] I would therefore not give effect to this argument.

(iii) SFC Intercompany Claims

[98] The appellant's third argument is that the claims for which he was found liable are SFC Intercompany Claims. He argues that these were assigned under the Plan by SFC to EPHL and EPGL, rather than to the Litigation Trust.

[99] I agree with the appellant that SFC Intercompany Claims were not assigned to the Litigation Trust, but I disagree that the claims for which the appellant was found liable in this action are SFC Intercompany Claims.

[100] SFC Intercompany Claim is defined in the Plan as "any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against any Subsidiary or Greenheart". SFC's shares in each Subsidiary and in Greenheart were transferred under the Plan to EPHL and by EPHL to EPGL. The SFC Intercompany Claims followed the same route: section 4.10.

[101] Essentially, the appellant's argument is that the respondent is claiming money raised by SFC in the capital markets that was invested in its subsidiaries and lost. In his submission, a claim about funds invested in SFC's subsidiaries and not returned is an SFC Intercompany Claim, regardless of against whom it is made.

[102] I disagree. In my view, reading the Plan in accordance with the interpretive principles noted above yields the conclusion that what was transferred to EPHL and then to EPGL were the debt obligations of *subsidiaries* or *Greenheart* to SFC and the rights SFC had to claim against *those entities*. This makes commercial

sense in light of the words used in the definition of SFC Intercompany Claim – "any amount owing to SFC by any Subsidiary or Greenheart and any claim by SFC against [them]". It also makes sense in light of the fact that the shares of the Subsidiaries and Greenheart were being similarly transferred. It would not make commercial sense for EPHL and EPGL to acquire the shares in SFC's subsidiaries but to leave the subsidiaries exposed to SFC's claims against them. The concluding words of section 4.10 of the Plan make this clear: "[T]he applicable Subsidiaries and Greenheart shall be liable to [EPGL] for such SFC Intercompany Claims from and after the Plan Implementation Date".

[103] SFC Intercompany Claims does not refer to claims against the appellant arising from his conduct, even though that conduct involved investing SFC's funds in the company's subsidiaries. The transfer to EPGL of SFC's claims against its subsidiaries and Greenheart did not include the transfer of SFC's causes of action against the appellant.

[104] I would accordingly reject this argument.

(iv) Conclusion on Appellant's Plan Preclusion Arguments

[105] I would not give effect to the appellant's arguments that the trial judge erred in concluding that the Plan transferred the claims advanced in this action to the Litigation Trust and did not preclude them from being advanced against the appellant by the respondent.

(2) *Causation and Damages*

(a) The Appellant's Arguments

[106] The appellant argues that, even if the claims made in the action were SFC's Causes of Action, that only takes the respondent so far. As transferee of Causes of Action of SFC, the respondent can only claim amounts that would have been properly claimable by SFC. Thus the only damages that could be claimed were damages of SFC proved to have been caused by the appellant's wrongdoing. In interrelated arguments, the appellant submits that the damages that were awarded by the trial judge are not damages of SFC, nor was it appropriate to consider them as caused by the appellant's wrongdoing.

[107] The appellant submits that the core of the claim is for losses incurred by debt and equity holders and that the amounts raised from them, if acquired by fraud as the respondent alleges, never belonged to SFC and therefore could not form part of SFC's loss. He argues that allowing such a claim improperly creates the risk of double recovery.

[108] The appellant goes on to submit that the trial judge simply presumed the appellant to have caused everything that led to SFC's ultimate collapse. He argues that the trial judge should have: required proof that each transaction that occurred would not have occurred without the appellant's deceit; calculated, for each

transaction so found, the loss resulting from it and; accounted for transactions on which there was no loss.

[109] Finally, he argues that the trial judge applied incorrect principles of damages assessment. The Steger primary approach should have been completely rejected in favour of a transaction-by-transaction analysis. Even the specific loss analysis that the trial judge performed is flawed as it would, in part, award SFC damages which could only have been suffered by its subsidiaries.

[110] For the reasons that follow, I would not give effect to the appellant's principal causation and damages arguments or disturb the trial judge's award of damages. Accordingly, it is unnecessary to address the appellant's arguments about whether and how the trial judge's alternative damages calculation should be adjusted.

(b) The Standard of Review

[111] Causation is a question of fact, and is reviewed on a deferential standard. Absent palpable and overriding error, appellate intervention is not warranted: *Ediger v. Johnston,* 2013 SCC 18, [2013] 2 S.C.R. 98, at para 29.

[112] A trial judge's assessment of damages attracts considerable deference. It will not be interfered with absent an error of principle or law, a misapprehension of evidence, a showing that there was no evidence on which the trial judge could have reached his or her conclusion, a failure to consider relevant factors or consideration of irrelevant factors, or a palpably incorrect or wholly erroneous

assessment of damages: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 80; *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4th) 509, at para. 41.

(c) Analysis of The Appellant's Causation and Damages Arguments

(i) The Trial Judge's Factual Findings Appropriately Underpin His Causation Conclusion and Damages Assessment

[113] The trial judge's causation conclusion and his assessment of damages are conceptually linked. They both are premised on five core factual findings that he made.

[114] The first was that SFC's raising of money in the debt and equity markets was something which was caused by the appellant's wrongdoing, including his misrepresentation of BVI standing timber as a valuable asset. The second was that "but for Mr. Chan's deceit, [SFC] would never have undertaken obligations of this magnitude to lenders and shareholders". The third was that but for the appellant's wrongdoing, SFC would not have "entrusted this money [the funds raised on the capital markets] to [the appellant] and Inside Management." Fourth was his finding that the appellant, "rather than directing [SFC's] spending on legitimate business operations, poured hundreds of millions of dollars into fictitious or over-valued lines of business where he engaged in undisclosed related-party transactions and

funnelled funds to entities that he secretly controlled": at para. 1022. Fifth was the finding, at para. 1020, regarding the impact of the fraud and its discovery:

> When the fraud was uncovered, and the dust settled, more than half of the money was gone. To the extent those funds went into the acquisition of assets, the value of those assets was realized through the EPHL sales process. What was left in cash on June 2, 2011 was largely consumed in propping up and managing the enterprise during the extended crisis brought on by the disclosure of the fraud and its ongoing investigation including the ongoing concealment by [the appellant] and Inside Management.

[115] These five findings underlie the trial judge's conclusion that what occurred was a chain of events all flowing from the appellant's fraud and breach of duty, which resulted in the loss of the funds that had been raised. As he put it: "[t]he loss of these funds to [SFC] was directly related to Mr. Chan's fraud and breach of fiduciary duty": at para. 1022.

[116] In my view, these findings were available to the trial judge on the record. The argument that the trial judge simply presumed the appellant to be responsible for everything that led up to SFC's ultimate collapse is without foundation.

(ii) There Is No Legal Error In the Trial Judge's Causation Analysis

[117] The trial judge applied the appropriate legal principles to his causation analysis. He approached the "but for" causation test on the robust common sense approach the law contemplates: *Clements v. Clements,* 2012 SCC 32, [2012] 2

S.C.R. 181, at para. 46; *Snell v. Farell*, [1990] 2 S.C.R. 311, at para. 34. Moreover, he was alive to the need to be satisfied that the loss was caused by the chain of events flowing from the wrongdoing after considering whether there were intervening causes that broke the chain of causation: *Canson Enterprises Ltd. v. Boughton & Co.,* [1991] 3 S.C.R. 534, at paras. 9, 47, 52, and 54-57.

[118] The appellant argues that the trial judge did not take into account other causes for the discrepancy between the value of SFC's assets, held by its subsidiaries, and the value of the funds invested in them. Not all of the subsidiaries' activities were found by the trial judge to be fictitious. Therefore external factors, such as climate, industry pricing etc., may have caused the losses, rather than the appellant's fraud.

[119] In my view the trial judge was entitled to reject this argument. He did not ignore the fact that not all of the businesses were fictitious. He found that a loss was caused by the appellant notwithstanding that finding. His approach credited the value actually existing in the subsidiaries. And, since once a loss arising from a fraud or breach of duty is established, it is the defendant who bears the onus of showing that the plaintiff would have suffered the same loss absent the defendant's wrongdoing, the trial judge was not required to give effect to unproven alternative causes: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, 1991 SCC

27, [1991] 3 S.C.R. 3, at pp. 15-16: *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377, at pp. 441-2.

(iii) The Trial Judge Did Not Award Compensation For Amounts That Could Not Be Legally Considered Losses of SFC

[120] The appellant submits that the trial judge's analysis contains a fundamental flaw because the trial judge proceeded as though the money that SFC raised on the debt and equity markets "belong[ed] to the corporation" and its loss was a loss to SFC. This could not be, the appellant argues, since if the funds were raised "[b]ased on fraudulent misrepresentations about the nature and value of the BVI standing timber assets", as the trial judge found, the funds would have been impressed with a trust in favour of the shareholders and noteholders who advanced the funds. Only they, not SFC, would have a right to claim for the loss of these funds. Moreover, allowing a claim for these funds would involve SFC in inconsistent positions – complaining that funds were obtained on its behalf through fraud while trying to obtain the benefit of those very funds.

[121] In making the latter argument, the appellant relies on the Supreme Court of Canada's decision in *Corporation Agencies Ltd. v. Home Bank of Canada*, [1925] S.C.R. 706. In that case, an individual engaged in a fraudulent cheque kiting scheme, making unauthorized deposits into Corporation Agencies' bank account followed by equally unauthorized withdrawals. Corporation Agencies sued the

bank alleging it should not have honoured the unauthorized withdrawals. Success on that claim would have given it the benefit of the unauthorized deposits.

[122] In rejecting the claim, the majority of Supreme Court held, at p. 726, that the plaintiff could not accept part of the fraudulent scheme – the part that saw money deposited to its account - while relying on the fraud to dispute withdrawals that had been made pursuant to the same fraudulent scheme.

[123] In my view, this case does not assist the appellant because it is distinguishable on two fundamental points. Corporation Agencies was suing a party who was not the perpetrator of the fraud and was seeking to benefit from part of the fraud at that party's expense. Here, the claim is not against an innocent party, but against the perpetrator, for damages caused by the fraudulent scheme. Nothing in the Supreme Court's decision precludes that type of claim. Moreover, in *Corporation Agencies,* the plaintiff did not establish that the monies deposited into its account were funds for which it would have to account to others: at p. 726. Here, SFC had obligations in respect of the funds raised on the capital markets, which the appellant's fraud deprived it of the ability to meet.

[124] I do not have to decide if the appellant's trust characterization is correct, as it does not support his position. The trial judge found that SFC had suffered damage because it raised money on the capital markets, incurred obligations to its shareholders and noteholders by doing so, and then lost the money raised, none

of which would have occurred but for the appellant's misconduct. The result was to leave SFC with the obligations it took on when it raised the funds while depriving it of the means to honour those obligations.

[125] This analysis would not change if the monies raised were, as the appellant argues, "impressed with a trust in favour of the shareholders and noteholders who advanced the funds". By reason of the appellant's fraud, SFC would still have been left with obligations to its shareholders and noteholders – though trust obligations – while having been deprived of the means of honouring them. It would still have suffered damage, and accrued a cause of action to recover for that damage.

[126] The trial judge did not commit a legal error by considering the loss of the funds raised to have been a loss suffered by SFC in these circumstances. Where directors cause a corporation to incur liabilities and misapply money which should have been paid to answer those liabilities, leaving the company with large liabilities and no means of paying them, the directors cause the corporation to suffer a recognizable form of loss: *Bilta (UK) Ltd v. Nazir (No. 2)*, 2015 UKSC 23, [2015] 2 WLR 1168, at paras. 176-178. That proposition was accepted by this court in *Livent*: at para. 349.

[127] Nor is the result changed because, as the appellant argues, SFC was ultimately released by the Plan from its obligations to equity holders and creditors. The appellant submits that the release undercuts the argument that SFC was left

with obligations it could not honour by reason of the appellant's conduct. I disagree. The fact that the Plan ultimately released SFC from its obligations to creditors and equity holders from whom funds were raised does not undermine the causation or damages conclusions of the trial judge.

[128] The release of SFC by creditors does not result in a windfall gain. Absent the Plan, if SFC had itself pursued its claims against the appellant, it could have used any damages it recovered towards satisfying its creditors. The Plan transferred the right to pursue SFC's claims to the Litigation Trust together with the obligation to distribute damages, once recovered, to the creditors who are the beneficiaries of the Litigation Trust. Effectively, the Litigation Trust assumes and replaces SFC's obligations to creditors through its obligation under the Plan to distribute damages it recovers to beneficiary creditors. Releasing SFC's obligations to creditors and requiring the Litigation Trust to distribute damages it recovers to beneficiary creditors ensures that the obligations to creditors rests with the person that will recover the damages.

[129] Similarly, the release of SFC by equity holders does not result in any windfall. Under s. 6(8) of the *CCAA*, unless all creditor claims are to be paid in full, a plan may not provide for payment of equity claims. "…(I)n enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish

the assets of the debtor available to general creditors in a restructuring": Re *Sino-Forest Corporation,* 2012 ONCA 816 at para 56. The fact that the Plan does not provide for equity holders to benefit from the Litigation Trust thus follows the priorities set by the *CCAA* for the distribution of recoveries from the enforcement of an SFC asset.

[130] It would be contrary to the purpose of the Plan, and the Litigation Trust it provided for, to give the release of SFC under the Plan the effect for which the appellant contends. The Litigation Trust was a vehicle to allow recoveries from persons whose conduct caused damage to SFC. The appellant's argument would treat the Plan as effectively having released him from being pursued for causing that damage, something the Plan did not do.

(iv) The Double Recovery Doctrine Does Not Apply

[131] The appellant argues that the trial judge's assessment of damages creates the risk of double recovery from him. He argues that a judgment against him should not issue because "a defendant cannot be liable twice for the same alleged loss". Reduced to its bare essentials, the appellant's position is that the funds raised by SFC on the debt and capital markets are at the core of both the claims in the Class Actions and the award of damages in this action. Even if separate causes of action and rights to damages exist, the damages award in this action will undoubtedly overlap with what may be awarded against him in the Class Actions.

[132] I would not give effect to this argument. Since SFC has a separate and distinct cause of action and suffered a recognizable form of loss, neither the cause of action nor recovery for it can be defeated by an argument that the appellant's conduct also gave rise to causes of action in others who may seek to claim their own damages from him, even if in similar amounts.

[133] The appellant invokes the rule against double recovery, but his position does not attract the rule, properly understood. The rule does not prevent a party with a claim from obtaining a judgment for 100% of its losses. The rule only prevents a party who has made a recovery on a judgment from recovering, through other actions, more than 100% of those losses. "It is not the *damage award* that amounts to satisfaction and bars a second action but the *recovery* by the plaintiff in the first action" (emphasis in original): *The Treaty Group Inc. (Leather Treaty) v. Drake International Inc.*, 2007 ONCA 450, 86 O.R. (3d) 366, at para 13. The rule has no application here, where it is raised to avoid judgment against the appellant[7]. There is no suggestion that the Litigation Trust has already recovered 100% of the losses it is entitled to claim.

[134] To the extent that the appellant raises the spectre of beneficiaries of the Litigation Trust achieving double recovery in the future if they receive benefits from

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[7] The appellant clarified in oral argument that double recovery was raised to avoid judgment against the appellant, not to reduce any damage award made against him. Indeed, the appellant did not point to any recoveries that had been made against him.

the Litigation Trust's collection of the judgment against him and then are successful in the Class Actions against him, this is not an objection to the judgment in this action for the reasons set out above.

[135] As the trial judge noted, it is in the recovery stage of the Class Actions that any issue of double recovery would have to be raised to the extent that members of the class attempt to recover damages already recovered through the Litigation Trust. For that issue to even emerge, the appellant would first have to pay the judgment granted against him in this action and then the plaintiffs in the Class Actions would have to fail to appropriately credit any distributions they receive. Neither precondition has occurred. Speculating on whether they will is inappropriate here. The point is that the rule against double recovery does not assist the appellant in resisting the granting of the judgment under appeal.

[136] As an alternative basis to his finding that the prospect of double recovery did not stand as a bar to the respondent's action, the trial judge interpreted the Plan to limit Class Action recoveries against the appellant to $150 million; thus, the overlap of claims would only be to the extent of $150 million, and not to the entirety of the respondent's claim. The appellant argues that the trial judge misinterpreted the Plan, which does not limit the Class Action claims against him.

[137] Any error in the trial judge's interpretation of the Plan in this respect was immaterial. He advanced the point as an alternative only to the main point that the

prospect of later recoveries in the Class Actions could not stand as a bar to the appellant's liability to pay damages in this action.

[138] I would therefore not give effect to this ground of appeal.

(v) The Trial Judge Applied The Correct Principles of Damages Assessment

[139] Given that the trial judge properly found causation of a recognizable form of loss to SFC, the measurement of that loss fell squarely within the trial judge's broad powers to assess damages. I see no reason to interfere with that assessment, which was based on his findings of fact and acceptance of expert evidence consistent with the chain of causation he found to exist.

[140] The trial judge referred to the measure of damages for deceit. He correctly described it as the difference between the financial position of the plaintiff as a result of the fraud, including losses flowing from it even if not foreseeable at the time of its commission, and the financial position of the plaintiff as it would have been if the tort had not occurred: para 928, citing *Rainbow Industrial Caterers Ltd. v Canadian National Railway* (1990), 67 D.L.R. (4th) 348 (B.C.C.A.), at p. 359, aff'd,1991 SCC 27, [1991] 3 S.C.R. 3. Elsewhere in his reasons he referred to the principles of equitable compensation citing, among other authorities, this court's decision in *Whitefish Lake Band of Indians v. Canada (Attorney General),* 2007 ONCA 744, 87 O.R. (3d) 321. He noted that "equitable compensation is concerned

with restoration of the actual value of the thing lost through the breach of duty, in this case [SFC's] funds raised on the capital markets" and that compensation is assessed at the date of trial and with the presumption that trust funds will be invested in the most profitable way: at paras 1007 to 1011.

[141] The appellant says the trial judge erred by awarding damages based on the full equitable measure of compensation, which is only appropriate where property is owned by a beneficiary but is controlled by the fiduciary as trustee. He relies on the distinction between cases of breach of trust and those of breach of a non-trust fiduciary duty made in *Whitefish Lake Band of Indians*, at para. 54, and *Canson Enterprises,* at p. 578. In *Canson Enterprises,* the Supreme Court stated that in cases of breach of trust, "the concern of equity is that [the trust property] be restored … or, where that cannot be done, to afford compensation for what the object would be worth", whereas in cases of breach of duty, "the concern of equity is to ascertain the loss resulting from the breach of the particular duty": at p. 578. The court went on to observe that, in determining the loss resulting from breach of a particular fiduciary duty, equity may borrow common law concepts like remoteness, intervening cause, and mitigation to avoid undue harshness: at p. 579-80, 585-586, and 588. The appellant argues that since the claim against him did not involve a breach of duty in respect of funds of SFC that he controlled, the trial judge should have assessed damages based on these common law principles.

[142] I would not give effect to that complaint for a number of reasons. First, on the trial judge's findings, the appellant had control over the funds raised by SFC, which the trial judge found to have been "entrusted" to the appellant and "directed" by him into various entities to which he was related or which he secretly controlled. The trial judge properly concluded on the basis of these findings that the appellant "owed fiduciary duties towards [SFC] akin to those of a trustee": at para. 923.

[143] Second, even if the principles of equitable compensation applicable where trust property is involved were not available, the trial judge's damage assessment can be justified based on the principles in *Canson Enterprises*. As I have discussed above, the trial judge properly considered causation and potential intervening acts in coming to his damages award, and remoteness does not appear to be an issue.

[144] In any event, in my view the trial judge's assessment of damages was in fact primarily based on the tort measure of damages. His reference to equitable compensation principles was made primarily in relation to a point the appellant's expert made, namely that when credit was given for asset realizations, the Greenheart realization should have been adjusted to take into account what Greenheart was worth when SFC made its investment, not what it ultimately was sold for. The trial judge rejected that argument. He said: "The fact that the discovery of [the appellant's] fraud had a negative effect on the market value of the

Greenheart asset is not a market risk [SFC] has to bear… It is sufficient that [SFC] suffered a loss in fact, provided the realization was not improvident": at para. 1101.

[145] The trial judge's treatment of the Greenheart transaction is fully justified under the equitable principles of compensation applicable to a case where trust property is not involved. In *Hodgkinson*, the Supreme Court clarified that its observations in *Canson Enterprises* did not "signal a retreat from the principle of full [equitable] restitution" in all cases of breach of duty, as the appellant contends: at p. 443. The majority rejected the defendant investment advisor's argument that the plaintiff's loss was caused by the market rather than his breach of duty, holding that it was appropriate to place the risk of market exigencies on the defaulting fiduciary: at pp. 442, 452-3. It observed that breach of fiduciary duty can take a variety of forms, and consequently different approaches may be appropriate to remedy the harm caused by different breaches: *Hodgkinson,* at pp. 443-444. Here, as in *Hodgkinson,* there was a strong nexus between the wrong complained of, the fiduciary relationship, and the risk of market volatility that contributed to SFC's loss. The appellant's wrongdoing involved abuse of his fiduciary role and breach of the duty of loyalty to the corporation that lay at its core: at pp. 445, 452-453. This is exactly the type of case that justifies placing the risk of market fluctuations on the appellant.

[146] The trial judge's reasons for rejecting the appellant's expert's proposed adjustment of the realization amount for Greenheart were also justified under a deceit measure of damages. As the trial judge found, the appellant knew or could be deemed to have known that the discovery of his fraud would send SFC "into a tailspin": at para. 1012. The effect that had on the timing and distressed circumstances in which assets were realized can be seen as part of the chain of events flowing from the appellant's fraud: *Rainbow* (B.C.C.A.), at p. 359; *Canson Enterprises, at p. 565; Hodgkinson,* at pp. 445-6. This conclusion reflects the reality that as courts strive to treat similar wrongs similarly, equitable and common law paths often produce the same result: *Hodgkinson,* at p. 444-5, *Canson Enterprises,* at p. 585-6.

(3) *The Doctrine of Election*

[147] The appellant argues that the equitable doctrine of election, also known as the rule against approbation and reprobation, prohibits a party from asserting that a transaction is valid to obtain some advantage and then turning around to assert that it is invalid to secure some other advantage. The transfer, under the Plan, of SFC's assets to EPGL (and the subsequent transfers to third-party purchasers) constituted an election to treat the assets as valid and subsisting, since the Plan deemed obligations and agreements to which EPGL became a party "in full force". The equitable doctrine of election, which he contends the trial judge erred in failing

to consider, should prevent the respondent from making the inconsistent argument that the assets were fictitious, fraudulent, tainted or overvalued as a product of his fraud.

[148] I would not give effect to this argument. First, the cases relied upon by the appellant deal with markedly different situations to the one at bar. As one example, in *Kin Tye Loong v. Seth* (1920), 1 C.B.R. 349 (P.C.), the plaintiff filed a claim in the defendant's bankruptcy for the price of goods sold and delivered, received a dividend on that claim, and compromised and released it. This conduct – consistent only with the position that a valid sale had taken place – barred a subsequent action by the plaintiff claiming that no sale in fact had taken place, that property in the goods had never been transferred, and that damages should be paid for conversion of what the plaintiff alleged were still its goods. Nothing analogous is present here.

[149] Second, the language of the Plan cannot be read as elevating the nature or value of what was transferred under the Plan above what actually existed. For example, at the time of the Plan, the standing timber assets had not been located or verified and the trial judge found they were and had been fictitious. SFC’s insolvency, which gave rise to the Plan, arose from, among other things, that very circumstance. In the sale to New Plantations effected by EPGL, the standing timber assets were ascribed no value unless recoveries on them were made, but

none occurred. Nothing in the Plan or the steps taken under it can be read to treat the non-existent as existing, or the valueless as valuable, preventing the Litigation Trust from maintaining that the fraud alleged had occurred.

[150] This court has recently explained the doctrine of election in both its common law and equitable aspects. At common law, the doctrine addresses the consequences of a party choosing between inconsistent alternatives; the choice of one alternative, for example, to affirm a contract, forecloses later choice of an inconsistent alternative, for example, to rescind the same contract. The equitable doctrine of election precludes a party who has accepted benefits under a particular instrument, for example, a will, from refusing to accept the balance of the provisions of that instrument: See *Charter Building Company v. 1540957 Ontario Inc.*, 2011 ONCA 487, 107 O.R. (3d) 133, at paras. 18-22.

[151] The trial judge correctly held that there had been no election between inconsistent rights here. The transfer of SFC's assets to EPGL and the transfer of its claims against the appellant for fraud and breach of fiduciary duty to the Litigation Trust were not inconsistent. The Plan contemplated that the benefit of both would be preserved and pursued. This conclusion, reached by the trial judge upon consideration of the common law doctrine of election (the parties before us disagreed as to whether the equitable doctrine was argued before the trial judge), is equally applicable to the equitable doctrine. The Litigation Trust's acceptance of

benefits under the Plan, namely the transfer of SFC's Causes of Action for fraud and breach of fiduciary duty, are not accompanied by any refusal to accept the burden of giving effect to other dispositions under the Plan, such as the obligation to distribute damages, once recovered, to the creditors who are the beneficiaries of the Litigation Trust, and the transfers of SFC's assets to EPGL, enabling the sales to subsequent purchasers. Indeed, the damages awarded by the trial judge deducted the value implied by the recovery from those sales.

[152] As the trial judge noted, even where a party has elected to affirm a contract, its right to damages is not precluded. The same principle would apply here to the argument about the equitable doctrine of election. Nothing suggests that a party is foreclosed from pursuing damages when, as a result of being defrauded, its loss is mitigated by the disposition of whatever property was acquired in transactions affected by the fraud. Indeed, the measure of damages available to a party induced by fraud to enter into a transaction involves the calculation of the loss the plaintiff suffered, which usually requires a credit to be given for the actual value of the property that was acquired: Lewis N. Klar & Cameron Jefferies, *Tort Law*, 6th ed. (Toronto: Thompson Reuters, 2017), at p.815.

[153] In my view, the doctrine of election is of no assistance to the appellant.

(4) *Errors in Factual Findings*

[154] The appellant argues that the trial judge made two fundamental errors in his treatment of the evidence, which undermine his factual conclusions. First, the appellant argues that the trial judge drew the inference that the BVI standing timber model was a fraud based on one sample transaction for which the documentation had been translated into English. He goes on to argue that the inference that all of the 525 transactions conducted under the BVI standing timber model were the same as the sample transaction was impermissible for two reasons: first, fraud in numerous transactions cannot be proven by reference to one example and, second, that proceeding as the trial judge did required the conclusion that the other transactions, comprised of documents which had not been translated into English, were substantially similar to the sample when those non-translated documents were inadmissible under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 125(2).

[155] The trial judge considered the argument that one sample was not sufficient and rejected it. He stated that all of the purchase and sale contract documentation for all the transactions was in evidence and available to both parties and that trial and judicial economy dictated that unless absolutely necessary, time should not be devoted to the proof of every piece of documentation for all 525 transactions. Rather, if the defendant had wanted to quarrel with the assertion that the sample

transaction was essentially the same as the rest of them, he had the raw material necessary to do that. He did not attempt to do so.

[156] For the reasons given by the trial judge, and the following additional reasons, I would not give effect to the appellant's argument:

a) The requirement that fraud be proven by clear and cogent evidence does not mean, as a matter of law, that it can never be proven by inference drawn from a sample. It depends on the circumstances. Here, there was evidence from which the conclusion could be drawn that the sample was representative, beyond the evidence of the respondent himself. The appellant gave evidence that the content of certain documents was identical in each transaction and a defence witness testified as to how contracts and documents for each transaction were prepared from a "template". Additionally, the appellant did not assert that any fraud evident in the sample transaction was an isolated incident. His position was that there was no fraud, a position that appears consistent with evaluating the matter on the basis of the sample. Finally, the trial judge described the protocol the parties had followed whereby documents could be translated when required. The appellant and various experts and witnesses were fluent in the language of the documents and it was open to them to require translations of any documents that they could use to show the non-representative nature of the

sample. There was evidence about some other transactions and, to the extent that it was before the trial judge, it was for him to assess in terms of the sample's representativeness.

b) The trial judge's finding of fraud was not solely based on an inference from the sample. The trial judge devoted over 200 paragraphs of his reasons to an analysis of the BVI standing timber model and why it was fraudulent, referring to evidence well beyond the sample. This included: the lack of objective evidence to support the existence of cash flows between the AIs and the Suppliers; the drop in collection of accounts receivable owing by the AIs to nil after the Muddy Waters Report; the failure to locate the BVI standing timber after the Muddy Waters Report and even until trial; the expert evidence about critical documents that were missing or deficient such as plantation certificates, maps, Forestry Bureau confirmations, sales contracts and harvesting permits; the inability of the Independent Committee to confirm the existence and operations of Suppliers and AIs; and the appellant's control over supposedly arms-length counterparties. The trial judge made numerous findings of credibility in assessing all of that evidence, which he clearly viewed as a whole.

c) A factual finding of fraud by a trial judge who has weighed large quantities of complex evidence is entitled to deference, absent palpable and

> overriding error. Such an error must go to the very outcome of the case: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36-38. In light of the findings of the trial judge on the record before him, the alleged errors concerning the sample would not, in any event, rise to the level that would warrant appellate interference.

[157] The appellant also argues that the trial judge erred in allowing the evidence of the respondent, given by affidavit, to remain in the record where it contained opinions that could only be given by an expert. The trial judge was alive to this issue; he ruled in a pre-trial admissibility motion that the respondent's affidavit, where it deposed to matters outside his personal knowledge and contained opinions, would not be relied on as evidence but simply as a description of positions that had to be proven by admissible evidence. The trial judge did not rely on any opinions of the respondent that could only be given by an expert. The appellant's objection that the trial judge should have gone on to "redline" out offending portions of the respondent's affidavit elevates form over substance in these circumstances.

[158] I would not give effect to the appellant's arguments about the trial judge's fact-finding.

IV. Conclusion

[159] I would dismiss the appeal. In accordance with the parties' agreement, I would award costs of the appeal to the respondent in the amount of $100,000 inclusive of disbursements and applicable taxes.

Released: "AH" JUN 24, 2019

"B. Zarnett J.A."
"I agree. Alexandra Hoy A.C.J.O."
"I agree. David Brown J.A."

TAB 23

See paras. 50-51, 60.

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7050
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121212

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 SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation**

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation

John Pirie and David Gadsden, for Poyry (Beijing)

James Doris, for the Plaintiff in the New York Class Action

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSED: DECEMBER 10, 2012

REASONS: DECEMBER 12, 2012

ENDORSEMENT

[1] On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

[2] The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

[3] With the exception of one party, SFC's position is either supported or is not opposed.

[4] Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

[5] The defined terms have been taken from the motion record.

[6] SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision")

(2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

[7] Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

[8] The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

[9] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

[10] The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

[11] Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

[12] SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

[13] SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

[14] SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

[15] On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

[16] SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

[17] Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

[18] The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings,

preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

[19] SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

[20] On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

[21] On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

[22] As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

[23] After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

[24] *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

[25] The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

[26] In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

[27] Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

[28] The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

[29] The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

[30] The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

[31] SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

[32] On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

[33] In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

[34] On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

[35] According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

[36] Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

[37] SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

[38] SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

[39] The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

[40] Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

[41] Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

[42] With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate

amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

[43] The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

[44] The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

[45] The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

[46] The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	250	98.81%	$ 1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$ 414,087	0.03%
Total Claims Voting	253	100.00%	$ 1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a “no” vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

[47] E&Y has now entered into a settlement (“E&Y Settlement”) with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

[48] As noted in the endorsement dated December 10, 2012, which denied the Funds’ adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

[49] Further, SFC’s counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

[50] Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

[51] To establish the court’s approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

[52] SFC submits that there has been strict compliance with all statutory requirements.

[53] On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

[54] The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

[55] SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

[56] Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation*.

[57] Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc*. (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* (2009) O.J. No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

[58] In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

[59] I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

[60] SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

[61] In *Nelson Financial*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

[62] The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

[63] In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

[64] I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

[65] The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

[66] In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

[67] In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

[68] As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

[69] With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation*, (2005) 14 C.B.R. (5^{th}) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

[70] Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

[71] The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

[72] In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

[73] Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

[74] In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

[75] With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

[76] It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

[77] I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

[78] Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

[79] Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

[80] Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

MORAWETZ J.

Date: December 12, 2012

TAB 24

See paras. 5-7.

1998 CarswellOnt 5922
Ontario Court of Justice, General Division (Commercial List)

Skydome Corp., Re

1998 CarswellOnt 5922, 16 C.B.R. (4th) 118

In the Matter of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 as Amended

In the Matter of the Business Corporations Act, R.S.O. 1990, c. B.16, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.

Blair J.

Judgment: November 27, 1998
Docket: 98-CL-3179

Counsel: *David E. Baird*, *Michael B. Rotsztain* and *Richard A. Conway*, for Applicants.
R.G. Marantz, Q.C., and *Andrew Diamond*, for Respondents Province of Ontario and Stadium Corporation.
Derrick Tay and *John Porter*, for Trustee for Bondholders and Bondholder.
James Dube and *Craig Thornburn*, for Respondents The Toronto Blue Jays Baseball Club.
Alex Ilchenko, for Respondent Ticketmaster Canada Ltd.
Ronald Slaght, for Respondent McDonald's Restaurants.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Table of Authorities
Cases considered by *Blair J*:
Anvil Range Mining Corp., Re (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — applied
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to
Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, *(*sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500 (Ont. Gen. Div.) — referred to
Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) — considered
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 8 — considered

s. 11 [rep. & sub. 1997, c. 12, s. 124] — referred to

s. 11(6) [en. 1997, c. 12, s. 124] — considered

APPLICATION by related corporations for protection under *Companies' Creditors Arrangement Act*.

Endorsement. ***Blair J*:**

1 Skydome Corporation, Skydome Food Services and SAI Subco Inc. — all related and presently insolvent companies — apply for the protection of the Court available in appropriate circumstances under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 Once considered to be the Crown Jewel of the sports and entertainment facility world the Skydome, it seems, has developed a few financial fissures. It has insufficient funds or sources of funds to meet all of its ongoing liabilities as they become due. The same is true for all 3 Applicants, which I shall refer to generically in this endorsement as "The Skydome" unless the context requires otherwise. Various reasons are put forward for this in the materials, but in summary they are the following:

> 1. Changes in the sporting, entertainment and economic environment in recent years have place financial strains on the operations of the facility. These changes include, but are not limited to, declining revenues as a result of a significant downturn in attendance at Blue Jays games since the halcyon World Series days of the early 1990's, and the cost of competing for entertainment providers in an environment where the entertainers must be paid in U.S. dollars but the revenue is received in weakened Canadian dollars.
>
> 2. Non-payment of Municipal taxes of approximately $3.6 million (Skydome contests its liability for such taxes in the sense that it has been engaged in a lengthy battle with the taxing authorities over the proper assessment base for its municipal taxes);
>
> 3. The Skydome now faces competition from other entertainment facilities in this City and elsewhere.
>
> 4. The Applicants carry a very heavy debt load, which is the legacy of the construction of the domed stadium and the initial development and marketing of the Skydome.
>
> 5. In connection with the latter, there are various outstanding executory contracts which provide benefits to those who were involved in supporting the initial Sydome venture, in continuing consideration of that support, but which as a result reduce the benefits provided by revenues that can be generated by the Skydome now.
>
> 6. Because renters of Skyboxes were called upon to pay first and last years rent in advance, there are no revenues coming in for the last year of the 10 year leases which are now about to expire; and,
>
> 7. The Skydome faces a major negotiating battle with its primary source of financial life, the Blue Jays, over the Blue Jays sub-lease (or, more accurately, license) of the premises.

3 This latter problem has been resolved, subject to approval and granting of CCAA protection, through the execution of an Interim Licensing Agreement (which I will call the Interim Lease, since everyone else does), under which the Blue Jays will remain in the Skydome for a further one year period (subject to a right to renew for a further one year period) on the same terms as those contained in the present lease which expires at the end of this year. There is also an agreement *in principal only* between Skydome and the Baseball Club with respect to a long-term 10 year arrangement; but this arrangement has not yet been finalized and, indeed, its negotiation and acceptance is proposed to be made the subject of the Plan of Arrangement which the Applicants are hoping to be able to put forward.

4 The Applicants seek the usual declaratory relief that is sought on these applications; namely, an order declaring that they are corporations to which the Act applies; and a broad stay order which, although there are quibbles with certain provisions in it, is more or less of the sort generally sought and granted when Initial Orders are made under s. 11 of the CCAA. They also ask for the appointment of PricewaterhouseCoopers Inc. as monitor. In addition, however, and as part of the package, the Applicants ask the Court to approve the Interim Lease and authorize the parties to enter into it, and they ask the Court to authorize a "Super Priority" loan of up to $3.5 million from the Blue Jays in order to finance their necessary operating expenses,

and certain capital expenditures which they say are essential, and as well the costs of restructuring. Finally, they seek additional authorization to withdraw the sum of $1,260,000 from a capital reserve account with Montreal Trust Company of Canada — which reserve fund is held as part of the security arrangements regarding $58 million of outstanding indebtedness to a group of Skydome Bondholders. The withdrawal would be for the purpose of making necessary capital expenditures with respect to YK2 compliance enhancements, improvements to the Skydome sound system and renovation regarding the Skydome Hotel.

5 No one seriously submits that it is in anyone's interests for the Skydome to be shut down or, indeed, for the Blue Jays not to continue to play ball from that facility. It would be folly to suggest otherwise, at least for the moment. The Skydome is a popular facility which draws about 4 million people to its various functions throughout the year — there have been 270 such events in 1998. It has 160 full-time employees and 1100 part-time employees who work there during the baseball season. Without going into to them in detail, there are very substantial economic and financial ripple effects for merchants, suppliers, entertainers, people working and employed in the tourist industry in Toronto, and Governments in the form of tax revenues of various sorts from the continued operation of the Skydome. It is said, for instance, that Skydome related activities generate $326 million in revenues for the economy of the GTA and $45 million in sales taxes for the Province of Ontario.

6 Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see *Re Anvil Range Mining Corp.*, unreported decision of Ontario Court of Justice General Division August 20, 1998 [reported at(1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List])]. As was stated in that case:

> The Court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

7 The Anvil Range case concerned a CCAA proceeding which had been turned into a receivership, but the same principles apply in my view to a case such as this. While it may be engaging a trifle in hyperbole to raise the interests of Blue Jays fans to the level of "the social and economic fabric" of the region, they too can't be ignored altogether and the true economic ramifications of a failed Skydome are surely something that must be considered.

8 The two issues that raised the most concern were those dealing with the "Super Priority" loan and with the use of the capital reserve fund for the purposes requested. What is at stake here is protection of the Bondholders (who say their outstanding loan, with default ramifications taken into account is about $70 million) and the Province of Ontario (which has secured loans behind that of the Bondholders totalling about $24 million) with regard to a potential $3.5 million loan and the reduction of the Bondholders' security by less than $1.3 million. While these numbers are large numbers to the ordinary person they are really not very significant numbers relevant to the overall numbers involved.

9 There is ample authority in previous decisions of the Court for the granting of a Super Priority in CCAA situations — even to shareholders who are advancing funds — and I see no reason in principle why such a Super Priority should not be approved here. Although the Bondholders oppose the Interim Lease — indeed it is really at the heart of their objections — the Province does not. The two are so closely integrated in the proposal being put forward by the Applicants that I do not see how one can be approved (the Interim Lease) and the other (the Super Priority Loan) not.

10 The Interim Lease is key to the ability of the Skydome to pursue its attempt to put forward a Plan that will be acceptable to its creditors, including the Bondholders who will have the opportunity to vote and to approve or reject that Plan. The proposed Plan, as I have indicated, will include a Long-Term Lease component. The Bondholders main complaint, it seems to me, is that they have been excluded from the negotiation process — as they see it — to this point, and that their consent was not sought with respect to the Interim Lease. Mr. Tay did not say what the response would have been had the consent been sought. The Bondholders are also suspicious that the object of this exercise is to solidify the position of the major shareholders of the Skydome — Labatts and the CIBC — who are also part owners of the Blue Jays, by putting in place an Interim Lease that will

be binding for up to two years regardless of whether the CCAA proceedings succeed or not, and which will in any event put them under subtle pressures to approve a final Plan with a final lease that they might otherwise have been able to resist.

11 There is no evidence to support such a suggestion. Whether there is anything in it or not I do not know, but one of the characteristics of a CCAA restructuring is that by nature, it leaves the debtor company in possession and in charge of the show while it attempts to work out an acceptable arrangement with its creditors. If there are underlying business agenda in that process, they are not precluded; whether they ultimately succeed or fail will depend upon the dynamics of the negotiating game that will follow.

12 In weighing all of these factors, I am satisfied that the importance of stability in the situation at the Skydome for the next year or two in connection with not only the Blue Jays presence but also the ability to attract other revenue generating functions, outweighs other concerns that may arise in relation to the negotiation and execution of the Interim Lease.

13 As to the use of the funds in the capital reserve held by Montreal Trust, it makes sense in my view for them to be used for the purposes suggested by the Applicants. The Capital reserve fund withdrawal will be used for the YK2 enhancements, the improvements in the sound system, and the Hotel renovation — all of which will preserve the overall security. A significant portion of the total funds to be advanced, including the super-priority loan — which were deposited in the first place in order to — will be used to pay Municipal taxes and Rent which are matters that have priority over the Bondholders in any event. Thus there is little overall prejudice in that regard. I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors — in the exercise of balancing the prejudices between the parties which is inherent in these situations — have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

14 What subsection 11(6) of the CCAA requires for purposes of an Initial Order is that the applicant satisfy the court "that circumstances exist that make such an order appropriate". I am satisfied that such circumstances exist here and that it is fair and reasonable to grant the Order requested, although the detailed terms of the Order may require further clarification which the lateness of the day precludes for the present.

15 Mr. Tay raised a substantial issue when he pointed out that the Order as presently drafted, when read in conjunction with the Term Sheet reflecting the agreement between the Skydome and the Blue Jays for the Super Priority loan, could lead to a situation where, if the CCAA proceeding fails, the Blue Jays (called in that context "the CCAA Lender") could move to put in a receiver and to realize upon their security without further court order. I would not have approved such a provision in the circumstances, but it is not necessary to make such a determination because Mr. Dube undertook to the Court on behalf of the Blue Jays that they would not seek to do so without approval of the Court.

16 Mr. Slaght argued on behalf of Macdonalds that the super priority should not extend to his client's lease regarding the food outlets. While I agree that the position of Macdonalds is somewhat different than that of other secured creditors — because Macdonalds must continue to pay a percentage of revenue as rent, and thus pour new monies in — I don't think that that circumstance is in itself sufficient to make distinctions from the position of other secured creditors.

17 As to other matters respecting the form of the Order, I will make the change suggested by Mr. Marantz and accepted by Mr. Baird regarding the necessity of consent of all secured creditors to any out of ordinary course disposition by the Skydome during the CCAA period. Other details I leave to counsel to agree to and to come back for a variation of the Order at a later date.

18 Accordingly, an Initial Order is granted as sought, subject to the foregoing.

Application granted.

End of Document

TAB 25

See pp. 11, 24.

Unofficial English Translation

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-000668-939
(500-05-008364-927)

DATE: June 16, 1993

CORAM: THE HONOURABLE CLAUDE VALLERAND, J.A.
MARIE DESCHAMPS, J.A.
JACQUES DELISLE, J.A.

PIERRE MICHAUD
and
PHILIPPE MICHAUD
APPELLANTS - Respondents
v.

STEINBERG INC.
RESPONDENT– Petitioner
and
PAUL BERTRAND
RESPONDENT – Impleaded party

THE COURT, ruling on the appeal of a judgement rendered on March 24, 1993 by the Superior Court for the District of Montreal (the honourable André Denis), who, among other things, sanctioned an arrangement proposed by the respondent to its creditors under the Companies' Creditors Arrangement Act;

After review of the file, hearing and deliberation;

For the reasons set out in the opinions of Mr. Justice Claude Vallerand, Madam Justice Marie Deschamps and Mr. Justice Jacques Delisle;

ALLOWS the appeal;

SETS ASIDE the judgement in first instance**;**

REFUSES sanctioning of the arrangement;

RETURNS the file to the judge in first instance so that he issues, if necessary, the appropriate orders**;**

WITH COSTS.

CLAUDE VALLERAND, J.A.

MARIE DESCHAMPS, J.A.

JACQUES DELISLE, J.A.

Mtre James A. Woods and
Mtre Christian Immer
Counsel for the Appellants

Mtre Raynold Langlois, Q.C. and
Mtre Guy Turner
Counsel for the Respondent

Mtre Max R. Bernard
Counsel for the Banking Syndicate of Steinberg Inc.

Date of hearing: May 12, 1993

OPINION OF JUDGE VALLERAND

I have had the benefit of studying the opinion of my colleagues. Like them, I have nothing to say with regard to the composition of the classes, which is both equitable as stated by my colleague Delisle and respectful of the commonality of interest as judged by my colleague Deschamps with whom I also share the opinion that the determination of the commonality of interest sometimes goes beyond the simple review of the treatment proposed for each.

Regarding clauses 5.3 and 12.6, I share the reservations and concerns that they provoke with my colleague. It would not be appropriate to swallow the ambiguities and invite litigation to which these clauses might give rise. I am therefore of the opinion that they should be dealt with as proposed by my colleague.

Finally, regarding clause 12.9 - the waiver of all recourses against the company's directors and others – I subscribe to what has been written by my colleagues. However, like my colleague Deschamps and the case law to which she refers, I would go further than simply criticizing the overly broad wording of the clause in question as our colleague Delisle does.

Admittedly, such a clause is not contrary to public order and its acceptance or refusal by the creditors comes within their will. Subject to the condition, however, that such will can be manifested with full respect for the rights of all, as required by the Act. At the risk of repeating it, the classes of creditors must be made up in an equitable manner that takes into account the commonality of interest so as not **to produce confiscation and injustice (SOVEREIGN LIFE ASSURANCE CO. v. DODD,** cited by Judge Deschamps). The Act provides for classes of creditors **of the debtor company** made up in accordance with their commonality of interest. Not isolating the interests particular to those who are creditors of both the company and its officers would carry a substantial risk of these interests being despoiled. If only because if the company is, in principle, insolvent, its officers and employees are not. The creditors of the company only will consider the arrangement proposed to them in light of the alternative: accept it and perhaps recover part of their claim; refuse it and lose everything. It is otherwise for those who also have a claim against the officers of the company. They will consider the proposed arrangement, each according to the relative benefit he derives from it with respect to each of his claims, which are very different in every respect.

This being said, compliance with the principles governing the setting up of the classes of creditors would require that one establish a class of creditors of the company who also have a claim against its officers and sometimes, or even often, a distinct category for each of them since the interests of each may vary with regard to the

respective qualities and amounts of his claim against the company and his claim against its officers.

This is the price of avoiding the creditors of the officers and employees being despoiled, drowned in a sea of creditors of the company only, with whom they have hardly any, or even no, common interest. However, one will find oneself with one or several classes of "dual capacity" creditors who, often quite ready to accept the arrangement insofar as it concerns their claim against the company, will nevertheless reject it due to the release of their claim against the officers and will thus obstruct the will of the company's creditors, the only persons with whom the Act is concerned.

In short, the Act will have become the Companies' **and Their Officers and Employees** Creditors Arrangement Act—an awful mess—and likely not attain its purpose, which is to enable the company to survive in the face of **its** creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

CLAUDE VALLERAND, J.A.

OPINION OF JUDGE DESCHAMPS

I have taken cognizance of the opinion of Judge Delisle. I share his conclusion on the aspect of the classification of unsecured creditors used by the respondent for the purposes of voting on the arrangement proposed to the creditors under the Companies' Creditors Arrangement Act[1] [the "Act"], but by taking a different route. As regards the inclusion in this arrangement of clauses that the appellants claim are foreign to the spirit of the Act, I am of the opinion that clauses 5.3 and 12.6 could not be sanctioned as drafted and that clause 12.9 does not fit within the framework of an arrangement.

1- Classification of the creditors

The Act provides, in section 6, that the votes of the creditors of a company, for the purposes of approval of an arrangement, must be counted by classes. This section provides as follows:

> 6. Where a majority in number representing three-quarters in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding …

Section 4 specifically provides that the unsecured creditors may be summoned by classes:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> [underlining added]

In this file, all the unsecured creditors voted together, in a single class, despite the fact that sub-classes had been created and that different offers had been made for each of the sub-classes.

[1] R.S.C. c. C-36.

The unsecured claims total $275,116,000. The unsecured creditors are mainly the respondent's suppliers, the creditors having litigious claims and the Caisse de dépôt et de placement du Québec [the "Caisse"]. The respondent divided these creditors into six sub-classes and made a different offer to each of them:

1. claims of $1,000 or less: payment in full of their claim from a cash fund of $2,500,000 to be advanced by a banking syndicate if the arrangement is sanctioned [the "Fund"].

2. claims from $1,001 to $5,000: participation in the Fund.

3. claims from $5,001 to $40,000: participation in the Fund, but to a lesser extent than those of the preceding sub-class, in addition to a stake in the proceeds of realization from a portfolio of lawsuits commenced by the respondent.

4. claims of more than $40,000: a stake in the proceeds of realization from the portfolio of lawsuits.

5. litigious claims: same offer as to the creditors in the fourth sub-class.

6. the Caisse: a stake in the share capital.

In addition, the creditors in sub-classes 2, 3, 4 and 5 are offered an additional stake by the issuance of shares in their favour in accordance with terms different from those offered to the Caisse.

On January 12, 1993, the arrangement was proposed to the unsecured creditors. If all these creditors, in a proportion of 83% in number and of 91% in value, approved the arrangement, which constitutes a favourable vote for the purposes of the Act, that would not have been the result if the vote had been calculated in light of sub-classes. Had the calculation been made according to sub-classes, one notices that the votes of the third [$5,001 to $40,000] and fifth [litigious claims] sub-classes would not have attained the threshold opening the way to sanctioning by the Superior Court.

According to the appellants, the examination of the classification of the creditors constitutes a prior step to the consideration of the fair and equitable character of the arrangement. At this stage, the judge must verify the strict application of the Act.

The appellants argue that the class of unsecured creditors consists of creditors having distinct interests, which is illustrated by the fact that the offer varies dramatically from one sub-class to another. According to them, the differences are so important that there is no commonality of interest between the different creditors and that they should have been called upon to vote separately, as provided for by section 4 of the Act.

The respondent replies that the examination of the classification does not constitute a prior condition, but is only one of the elements that the Superior Court judge

must examine in the analysis of the arrangement as a whole. According to it, the first judge has discretion in this regard that must be respected by the Court of Appeal. The respondent states that the judge in first instance was justified in taking into account all the circumstances of the file and, in particular, the clear majority of creditors who voted in favour of the arrangement. It argues that the creditors must be classified according to their legal interests and the means of realization available to them and not according to the offer that was made to them. As the unsecured creditors have in common the fact that they have no security and that in the event of bankruptcy no dividend would be available, the respondent argues that it was within its rights to call upon all the sub-classes of unsecured creditors to vote together.

****

The principles invoked by the parties in support of their positions have their source in the same cases but each party interprets them in his own way.

One can extract from the case In re Alabama, New Orleans, Texas and Pacific Junction Railway Company[2] the rules that should guide a judge called upon to sanction an arrangement. Lord Lindley stated them as follows:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting **bona fide**, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.[3]

This dictum of Lord Lindley is frequently repeated by the courts[4] (4) and highlights the three distinct steps to follow when an arrangement is being sanctioned by the Superior Court:

1. Verification of the formalities provided for in the Act;

2. Verification of respect of the rights of the minority by the majority;

3. Assessment of the fair and reasonable character of the arrangement.

The steps proposed by Lord Lindley clarify the discussion relating to the criterion for intervention by a court of appeal.

In the analysis of the fair and reasonable character of an arrangement, the respondent is correct in asserting that the Superior Court judge has wide-ranging

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[2] [1891] 1 Ch. D. 213.
[3] Supra note 2 at 239.
[4] Re Campeau Corp., (1992) 10 C.B.R. (3d) 104 (Div. Gen. Ont.); Re Northland Properties Ltd, (1988) 73 C.B.R. (N.S.) 175 (B.C.S.C.); Re Dairy Corporation of Canada Ltd, (1934) 3 D.L.R. 347 (Ont. S.C.).

discretionary power because his very role is to assess all of the circumstances that may lead to an arrangement.

However, it cannot be this way for the analysis of compliance with the Act. Indeed, the examination of the method followed to summon the creditors or of the percentage required for the purpose of approving the arrangement are elements that leave little room for discretion. For example, a judge could not rely on his discretion to modify the percentage levels set out in section 6 of the Act.

Similarly, it is difficult to conceive that the examination of the making up of the classes, which is generally the subject of the contestation at the second step, can give rise to an assessment that takes into consideration the arrangement as a whole, as contended by the respondent. Before verifying whether it is acceptable, the making up of the classes must be examined.

The first two steps mentioned by Lord Lindley must therefore be examined in a distinct way. They are elements which may be considered as prior conditions, as was done by Judge Middleton in Re Dairy Corporation of Canada Ltd., one of the first reported Canadian disputes under the Act:[5]

> Upon this motion I think it is incumbent upon the Judge to ascertain if all statutory requirements that are in the nature of conditions precedent have been strictly complied with and I think the Judge also is called upon to determine whether anything has been done or purported to have been done which is not authorized by this statute. Beyond this there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable.
>
> (Underlining added)

The issue of the classification of the creditors has drawn the attention of the courts on numerous occasions. All the cases submitted by the parties are inspired by Sovereign Life Assurance Co. v. Dodd,[6] with, however, more or less coherent results.[7]

In the Sovereign Life case, the Court of Appeal of England had to rule on the right of a creditor to set up compensation for a debt due by a company before the approval of a plan of arrangement by the creditors. The plan had been approved by the required majorities of the creditors consisting of insured persons whose indemnities were due and holders whose policies had not yet expired. The comments of Lord Esher highlight the importance of the classification of creditors. Here is how he expressed himself:

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[5] Supra note 4.
[6] (1891) 4 All E.R. 246.
[7] Re Keddy Motors Inns Ltd, (1992) 13 C.B.R. (3d) 245 (N.S.C.A.) and Fairview Industries Ltd et al. (No. 3), (1991) 109 N.S.R. 2d 32 (N.S.S.C.), where even the criterion of community of interests is departed from.

> "The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes."[8]
>
> (underlining added)

On the same subject, in the same matter, Lord Bowen wrote the following:

> "The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. That being so, in considering the deed of arrangement made with the company which took over the business of the plaintiff company, we must so construe it as not to include in one class those persons whose policies had already ripened into debts and those whose policies might not ripen into debts for some years. The position of a person like the defendant, to whom an ascertained sum of $2,000 was due from the company, was quite different from the position of those policy-holders whose future was entirely uncertain. It was not, therefore, right to summon to a meeting, as members of one and the same class of creditors, those who had an absolute bar to a claim by the company against them and those who had not."[9]
>
> (underlining added)

In establishing the classes of creditors, a company must therefore seek to group together the creditors having between them not identical or equal interests, but common interests. The criterion of identity of interests was specifically rejected by the Alberta Court of Queen's Bench in the case of Norcen Energy Resources Ltd. v. Oakwood Petroleums.[10] The following comments of Judge Forsyth can be adopted without reserve:

> "These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under

[8] Supra note 6 at 249-250.
[9] Supra note 6 at 251-252.
[10] (1988) 72 C.B.R. 20.

> a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve."[11]

The grouping may be made according to commercial interests,[12] security interests or priorities of which certain creditors have the benefit,[13] the offer made to different creditors[14] or according to any other commonality, provided that the interests of the minority creditors are not "confiscated". Judge Kingstone expressed himself in this way in the case of In re Wellington Building Corporation Limited,[15] a judgement that closely follows the Dairy case and follows the same philosophy:

> "It was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company which would permit the holders of junior securities to put through a scheme inimicable to this class and amounting to confiscation of the vested interest of the bondholders."

The appellants argue that the arrangement proposed by the respondent does not permit the different creditors to consult each other because they have no commonality of interest. They point out that the creditors whose claims have been classified as litigious claims (including themselves for nearly $2 million), and who have been offered only a possible dividend coming from the realization of the litigation portfolio and the issuance of shares, have nothing in common with the creditors for less than $1,000 who will be paid at 100%. The creditors whose claims are litigious refused the arrangement in a proportion of 93%.

The respondents reply that the unsecured creditors could legitimately be grouped in one class because they have the same legal interest in that their claims are not guaranteed and none of them would receive any dividend should the respondent be liquidated under the Bankruptcy Act.[16]

The simple fact that the unsecured creditors have the same legal interest is not sufficient to include them in the same class since that would deny the meaning of the words "or any class of them" (unsecured creditors) in section 4 of the Act. This interpretation would also ignore all the case law outlined above. Nor is the Court satisfied with the argument to the effect that the arrangement brings more to the creditors than a forced liquidation. Indeed, it is obvious that any arrangement must theoretically bring more to the creditors than would a liquidation. That is not to say that

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[11] Supra note 10 at 28.
[12] Nova Metal v. Comiskey, (1990) 1 C.B.R. 3d 101 (Ont. C.A.).
[13] In re Wellington Building Corporation Limited, (1934) 16 C.B.R. 48 (Ont. S.C.), NsC Diesel Power Inc., (1990) 79 C.B.R. 1.
[14] La Lainière de Roubaix v. Glen Cove Co., (1926) S.C. 91 (Scott).
[15] Supra note 13 at 54 and comments of Judge Bowen in Sovereign, supra note 9.
[16] R.S.C. c. B-3.

any arrangement must be sanctioned; it still must comply with the conditions set out in the Act, not include any element oppressing the minority and be reasonable.[17]

To note that two sub-classes do not meet the thresholds set out in section 6 of the Act is not in itself decisive because the classification must not be done according to the possible outcome of a vote, which would clearly be a manipulation of the classes.

The study of the proposed arrangement reveals that if 1,200 creditors whose claims total approximately $416,000[18] are paid in full, this constitutes only a small percentage of the $275,116,000[19] representing the total of the unsecured claims, that is, 0.15%. Even if the different treatment given to the creditors for less than $1,000 presents an attractive argument, it is not wise to stop there.

If the creditors for less than $1,000 are set aside because they are quantitatively marginal, there remain elements of the offer that are common to a large number of creditors.

The creditors in the second and third sub-classes certainly have points in common since they are being offered both a participation in the Fund and shares. Those of the fourth and fifth sub-classes are all being offered a stake in the portfolio of lawsuits and shares.

There is, in these groupings, a definite community of interests. The distinction is at the level of participation in the Fund as opposed to the portfolio of lawsuits. However, if the Fund theoretically could have been put at the disposal of all the unsecured creditors in the same proportion, the benefit would have been so diluted that it would have lost its practical interest. Therefore, participation in the Fund should not be used to conclude that there is a conflict between the interests of the creditors in sub-classes 2, 3, 4 and 5.

The Caisse has little in common with the other creditors. It has not been argued that its vote could have been decisive and the results filed in the record do not seem to support such an argument. In addition, no one has claimed that the offer made to it should have been made to the other creditors.

The case law did not impose on the respondent a grouping according to similarity of offer. It had to classify the creditors according to interests that were not so dissimilar that they prevent effective consultation or that they unduly oppress the minority interests. On one hand, the treatment offered to sub-class 3 is similar to that offered to sub-class 2 and, on the other, the offer made to sub-class 5 is the same as that made to sub-class 4. The fact that sub-classes 3 and 5 did not attain the minimum thresholds does not constitute oppression or a confiscation of their rights. They were not

[17] Supra note 2, Alabama.
[18] Affidavit of P. Bertrand, December 22, 1992, paragraph 19, a.f. at 426.
[19] List of creditors attached to the arrangement a.f. at 269.

sufficiently different that they could not consult each other with a view to a vote with sub-classes 2 and 4.

It was therefore not necessary to consider each sub-class independently for voting purposes, which, moreover, would have had the effect of unduly multiplying the classes.[20]

2. Inclusion in the arrangement of clauses foreign to the spirit of the Act

The appellants contest the inclusion in the arrangement of clauses 5.3, 12.6 and 12.9, considering them to be foreign to the spirit of the Act and arguing that they cannot be imposed on creditors within the framework of an arrangement proposed under the Act. The arguments relating to clauses 5.3 and 12.6 are somewhat different from those relating to clause 12.9 because the former concern the effect of the arrangement on the rights of the creditors whereas the latter deal with the impact of the arrangement on the obligations of third parties.

Clauses 5.3 and 12.6 provide as follows:

> [translation] "5.3 The Plan of arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes respectively and, except where it does not in any manner modify the already existing obligations of the Company, and except…"
>
> [translation] 12.6 "**Consents, renunciations and agreements**
> At the time of the Sanction, every Creditor shall be deemed to have consented to all the provisions contained in the Plan in its entirety. In particular, each of the Creditors shall be deemed
>
> a) to have executed, signed and delivered to the Company all consents, renunciations, releases and assignments, statutory or otherwise, required to put in place and carry out the Plan;
>
> b) to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction; and
>
> c) in the event that there is any conflict between any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company at the date of the Sanction (other than those concluded by the Company or taking effect at the date of the Sanction) and

[20] Comments of Judge Forsyth in Norcen, supra note 10 and comments of Judge Kingstone in Wellington, supra note 13.

> the provisions of the Plan, to have consented to the provisions of the Plan taking precedence over those of such contracts or agreements and the latter are amended accordingly."

The appellants argue that the legal foundation of the arrangement is the Act and not the general theory of obligations and that consequently, one can only include in an arrangement clauses that comply with the parameters of the Act.

Upon reading the contested clauses, one notes that the respondent is trying to clarify the legal consequences of the acceptance of the arrangement by the creditors.

Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

To include in an arrangement concepts like those of "contract" (clause 5.3) or of "consent", "renunciation" or "release" amounts to importing therein concepts that are not only foreign but that are contrary to the spirit of the Act.

The text of section 6, reproduced above, provides that if the arrangement is approved by a numerical majority representing 75% in value of the claims of all classes and is sanctioned by the Court, the arrangement **binds** all the creditors, which means that those dissenting do not consent to the arrangement but see it imposed on them.

If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.

It is not illegal or prohibited for a company to take advantage of a meeting summoned under the aegis of the Act to conclude, with its creditors, agreements that are parallel to the arrangement or superimposed on it. In this sense, a company may ask its creditors to consent to benefits for it that go beyond the framework of the Act such as being "…deemed…to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction".[21] This clause is very wide-ranging and may cover defaults that would not be related to the arrangement. These agreements may be valid under the Civil Code and can be set-up against the creditors

[21] Clause 12.6(b) of the arrangement.

who consent to them. However, they do not have to be sanctioned by the Superior Court to be enforceable and cannot be set-up against the creditors who do not consent to them. As a corollary, the Superior Court doe not have to affix its seal to them since the civil law does not require its intervention.

Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.

What should a judge faced with these clauses do? Should he refuse to sanction? I believe that he has no choice, because sanctioning would amount to undermining the effect of his judgment. The judgment of the Superior Court must have a final and uniform character. It cannot have a different effect in respect of certain clauses from that which it has in respect of other clauses without leading to confusion as much for the company as for the creditors. Such a judgment would not serve any of the parties involved. I therefore believe that the judge, called upon to sanction an arrangement, cannot give his approval to such clauses.

The second aspect of the appellants' contestation concerns the release by the creditors in favour of the directors, officers, employees and advisors of the respondent. The contested clause states the following:

> [translation] "12.9 **Release**
>
> With effect from the Sanction, each Creditor shall be presumed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."

The appellants argue that such a clause does not come within the framework of the Act and should not be included in the arrangement. According to them, the release in respect of the directors "is quite exorbitant and constitutes a serious infringement upon their rights".

The respondent argues that the directors have dedicated all their energy to the respondent since the filing of the proceedings and that it would be unfair and inequitable to put responsibility for the current situation on their shoulders. It compares the planned reorganization to the sale of a business and argues that at the time of a sale it is neither unfair nor exorbitant to provide for a release.

The respondent argues that the clause covers a potential liability that is personal to it because the beneficiaries of the clause are not third parties and that, moreover, it

must indemnify its directors and officers both under an internal by-law and under section 123.87 of the Companies Act.[22]

The respondent's position cannot be accepted. One notes that the release provided for in the arrangement covers more wide-ranging obligations than those provided for in the Companies Act or in respondent's internal by-law. Whereas the arrangement imputes a renunciation to any recourse against the directors, officers, employees and advisors, section 123.87 of the Companies Act and the internal by-law only cover the fault of directors and officers sued by a third party for acts done in the performance of their duties.

The judge in first instance opted in favour of the validity of the clause in the following terms:

> [translation] "It is obvious that Steinberg wishes to avoid a legal situation that would allow creditors to do through the back door what is prohibited through the front door. Steinberg's proposal is a proposal that involves the company and its directors. If the company found itself with judgments against its directors for which it had to assume responsibility, it is obvious that those judgments could have an important impact on the plan of arrangement. Once again, it is a global proposal that Steinberg is making to its creditors and it is that proposal which has been accepted under reserve of the restrictions contained in article 9.01 of rule 108 and under reserve of the comments that the Court will draw up in the case of the workers' union. The Michauds' argument is not accepted."

It is difficult to approve the assertion to the effect that the arrangement is a proposal made by the respondent and its directors to respondent's creditors. Even though the Companies Act considers the directors as the agents of the respondent,[23] they are not its alter egos for the purposes of the Act.

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.

The case of Browne v. Southern Canada Power Co. Ltd.[24] provides an example of a dispute arising between a creditor and two guarantors, in that instance the president and the secretary-treasurer of the debtor. They argued that their position had become more onerous due to the modification of the debt due by the debtor further to an arrangement made under the Act. The decision of our Court was unanimous.

Judge Barclay wrote:

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[22] R.S.Q. c. C-38.
[23] Supra note 22, section 123.83.
[24] (1941), 23 C.B.R. 131 (Q.C.A.).

> "The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties."

Judge Walsh expressed himself more explicitly:

> "The Companies' Creditors Arrangement Act, however, intervened in the case of the City Gas Company to grant the company favoured treatment; this Act does not extend its favours to others, who had guaranteed the debt. The appellants cannot claim the benefit of delay that the Act affords to their company, because they became immediately liable by the default of the debtor, with whom they had bound themselves jointly and severally; and they did not demand the benefit of discussion. The appellants cannot set up exceptions personal to their debtor, and The Companies' Creditors Arrangement Act is an exception that favours the company only; nothing was shown to extend its scope to the appellants."

And finally Judge McDougall (ad hoc):

> "Such arrangement enured to the benefit of the company not to that of its guarantors."

The possibility of extending the effect of a stay requested under the Act to directors, officers, employees, agents and consultants was studied recently in the case of Phillip's Manufacturing Ltd.[25] In that case, the debtor did not claim that the Act allowed the directors and others to benefit from the stay, but relied on the Court's inherent powers. The stay was refused to all parties except the debtor.

If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

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.

Moreover, it is doubtful that the sanctioning of the arrangement can be considered definitive regarding the release given to the directors, as another party, the Syndicat des travailleurs unis de l'alimentation et du commerce, also contested the validity of clause 12.9 of the arrangement. The judge in first instance referred the Syndicat's contestation to another judge of the Superior Court. It is difficult to conceive of the clause being valid as regards the appellants but possibly held invalid as regards the Syndicat.

[25] B.C.S.C. [1991] B.C.J. no. 2932.

However, for the purposes of the present appeal, this clause is considered as departing from the Act. The file should be returned to the judge in first instance in order that he grant, if necessary, the orders allowing the respondent to amend its proposal.

For these reasons, I would propose to grant the appeal in part, to declare that clauses 5.3 and 12.6 could not be sanctioned as drafted, to declare that the release contained in clause 12.9 does not fit the framework of an arrangement and to return the file to the judge in first instance to issue the appropriate orders, the whole with costs.

MARIE DESCHAMPS, J.A.

OPINION OF JUDGE DELISLE

The appellants, brothers Pierre and Philippe Michaud, appeal against a judgement rendered on March 24, 1993 by the Superior Court for the District of Montreal that, among other things, sanctioned the definitive arrangement proposed by the respondent to its creditors under the Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) hereinafter referred to as the "CCAA".

That arrangement had previously been approved by the respondent's creditors at a meeting held on January 12, 1993 after having undergone, on earlier dates, various amendments required by the creditors. The approval of the creditors, in accordance with their classification proposed in the arrangement, satisfied the requirements set out in section 6 of the CCAA: a numerical majority, representing three-quarters in value, of the creditors present and voting either in person or by proxy.

The class grouping the unsecured creditors, as defined in section 2 of the CCAA, covered about 3,000 creditors, including the two appellants, having claims in excess of $400,000,000. Among the 1,591 of these creditors, having total claims of $375,715,931.13, who were present at the meeting of January 12, 1993 and who voted either in person or by proxy, 1,213 of these creditors, having claims for $325,677,341.20, accepted the arrangement proposed by the respondent (a.f. 7).

The appellants argue that the judge in first instance committed an error by not declaring the nullity of the arrangement for the following reasons:

a) it did not provide for separate votes by sub-classes of the unsecured creditors; and

b) the illegality of its clauses 5.3,12.6 and 12.9.

The appellants, without success, raised the same arguments before the court of first instance at the time of the presentation of the respondent's motion for sanctioning of its arrangement.

The analysis of the issues raised by the appellants against such a sanctioning should be carried out in light of, firstly, the purpose of the CCAA and, secondly, the principles governing the role of the court seized of a motion for the sanctioning of an arrangement proposed under this statute.

PURPOSE OF THE CCAA

In the case of **Multidev Immobilia Inc. v. Société Anonyme Just Invest**, [1988] R.J.Q. 1928 (S.C.), Mr. Justice Parent recalled the goal aimed at when the statute was enacted (p. 1930):

> [translation] "It is in order here to recall that the Companies' Creditors Arrangement Act was enacted during the Depression to allow companies in financial difficulty, debtors under bonds or other outstanding debt security, to make agreements with their creditors, to settle their problems outside the mechanisms provided for in the Bankruptcy Act and the Liquidations Act. It is a statute of "equity" which promotes arrangements between such a company and all its creditors."

The first purpose of the CCAA was thus to offer companies that satisfied its terms of application an alternative to certain other statutes having more radical effects, the ultimate objective being to allow such companies to survive financial difficulties, with the agreement of their creditors.

Over the years, this curative character of the CCAA was confirmed by the case law, so that today there is unanimous recognition of the statute's raison d'être:

> **"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 in business…" Hongkong Bank v. Chef Ready Foods (1991) 4 C.B.R. (3d) 311 (B.C.C.A.) (p. 315)**
>
> **"… The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation:…"**
>
> **Nova Metal Prods v. Comiskey (Trustee of)**, [1991] 1 C.B.R. (3d) 101 (O.C.A.) (p.122)
>
> [translation] **"The statute wants to permit a debtor company to submit a reorganization plan to all its creditors…"**
>
> **Banque Laurentienne du Canada v. Groupe Bovac Ltée** (1991) R.L. 593 (C.A.) (p.613)

Precisely because of the goal sought, the CCAA should be interpreted liberally. A company that has recourse to this statute should be able to attain its objective.

It is from this perspective that a court seized of a motion for sanctioning of an arrangement should exercise its role.

ROLE OF THE COURT ON A MOTION FOR SANCTIONING OF AN ARRANGEMENT

The case law on the subject is well established. The following principles emerge from it:

a) the first duty of the court is to assure itself that the arrangement has been accepted by the creditors in accordance with the requirements of section 6 of the CCAA: a numerical majority representing three-quarters in value of the creditors or of a class of creditors, as the case may be, present and voting either in person or by proxy at a meeting duly called for that purpose; **In re Dorman, Long & Co., In re South Durham Steel and Iron Co.**, [1934] 1 Ch. 635 (p.655); **Re Northland Properties Ltd**, [1989] 73 C.B.R. 9N.S.) 175 (p.182);

b) the court must thereafter assure itself of the reasonable character of the arrangement; it must be beneficial to both parties present; **In re Alabama, New Orleans Texas and Pacific Junction Railway Co**., [1891] I Ch. 213 (C.A.) (p.243); **In re English Scottish and Australian Chartered Bank**, [1893 3 Ch. 385 (C.A.) (p.408); in the first of these cases, Lord Bowen defines what must be understood as a reasonable arrangement (p.243):

"A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it…"

c) the court should not substitute its own assessment of the arrangement to that of the creditors: **Re Langley's Ltd**, [1938] O.R. 123 (O.C.A.) (p.142); **Carruth v. Imperial Chemical Industries Ltd**, [1937] A.C. 707 (p.770);

d) however, the court must assure itself, and this is surely the most important part of its role, that a minority of creditors is not the object of coercion on the part of the majority or forced to accept unconscionable conditions:

"…In reviewing the arrangement, the Court is placed under an obligation to see that there is not within the apparent majority some undisclosed or unwarranted coercion of the minority who may not have voted or who may have been opposed…"

Re Gold Texas Resources Ltd, British Columbia Supreme Court, A883238, (judgement of February 14 1989; Judge McLachlin);

"…The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable…"

Re Keddy Motors Inns Ltd., [1992] 13 C.B.R. (3d) 245 (N.S.C.A.) (p.258).

It is now appropriate to move on to the grounds invoked by the appellants in support of their appeal.

THE ARRANGEMENT DOES NOT GRANT A SEPARATE VOTE TO EACH CLASS OF UNSECURED CREDITORS

The CCAA essentially provides for two classes of creditors: unsecured and secured. However sections 4 and 5 clearly imply that within one class it is possible to create categories:

> **"4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them…"**
>
> **"5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them…"**

In the present case, the arrangement provides, in its section 5.4, for four classes of creditors:

> **[translation] "The Plan of arrangement proposes the establishment of four (4) classes of creditors: the Secured Creditors, the Crown and the Municipalities, the Unsecured Creditors and the SDI."**

It is for the sake of convenience that the "SDI" and "the Crown and the Municipalities" classes were created, because these creditors could have been, as the case may be, listed in one or the other of the other two classes.

The "unsecured creditors" class is, in sections 8.3 to 8.3.5, divided into six sub-classes:

a) creditors having a claim of $1,000 or less;

b) creditors having a claim of more than $1,000 and less than $5,000;

c) creditors having a claim of more than $5,000 and less than $40,000;

d) creditors having a claim of more than $40,000;

e) persons having litigious claims, whose claim has not been valued definitively at the Date of Payment, as this expression is defined in section 1.1 of the arrangement;

f) the Caisse de dépôt et de placement du Québec and the Société des alcools du Québec.

Despite this creation of sub-classes of unsecured creditors, section 5.4.1 of the arrangement provides that:

> [translation] **“5.4.1 The division into sub-classes, if applicable, has been made only for the sake of convenience and to facilitate the explanations but has no effect on the calculation of votes.”**

This is precisely what the appellants are complaining about.

As mentioned above, it is inferred from sections 4 and 5 of the CCAA that it is permissible to sub-classify a class of creditors. But then, one of two things:

- either the terms of the arrangement are substantially the same for the whole of the class covered and this way of proceeding is only for the purpose of adequately grouping the creditors, thus permitting, on the one hand, more rational interventions toward each class of them and, on the other hand, more relevant discussions between persons having similar claims; in this case, no one can complain about the fact that the votes are computed as if there was only one class;

- or the terms of the arrangement differ from one class to the other, while considering, for the purpose of computing the votes, only the global result; it is then appropriate to seriously analyze the reason for and the consequences of this way of proceeding; if the objective sought (which may not be obvious), achieved in practical terms, is to confiscate the rights of the minority creditors for the benefit of the majority creditors, then the arrangement cannot be qualified as fair or reasonable (**Re Dairy Corp. of Can. Ltd.** [1934] 3 D.L.R. 347 (O.S.C.) (p.349); on the other hand, if the sub-classification is only to group creditors who can anticipate results identical to those proposed to the other classes, but having to get there by different routes with, perhaps, as the only inconvenience, a question of time, then there is nothing unconscionable in there being a global computation of the votes.

In the present case, the appellants, claiming to have a right to a claim of almost $2,000,000, were classified in the class of “persons having litigious claims, whose claim has not been valued definitively at the Date of Payment”.

It appears from the relevant sections of the arrangement (8.3.3, 8.3.4 and 8.3.2) that the fate reserved for these persons is similar to that proposed for the class grouping the creditors having a claim of more than $40,000.

Although the arrangement does not specify it (it did not have to do so), it is obvious that if the claim of such a person is definitively valued before the Date of Payment, the creditor will automatically fall into one of the three classes mentioned above, defined according to the value of the claim.

The appellants therefore not being treated differently from the other creditors, section 5.4.1 of the arrangement is not coercive in their regard.

The only class of unsecured creditors to who is reserved a payment really different from that proposed to the other classes of such creditors is the class grouping the creditors having a claim of $1,000 or less, proved at the Date of Payment.

The amount of money that such class involves, $416,000, is so unimportant relative to the total amount of the claims, in excess of $400,000,000, that I fully endorse the views expressed on this subject by the judge in first instance:

> **[translation]"…Much is made out of the fact that the unsecured creditors for less than $1,000 would be paid cash on the nail. The Court sees nothing abnormal in this proposal, which is no doubt aimed at eliminating a group of small creditors and thus saving time, energy and money dealing with theses claims that are, all in all, unimportant. It is obvious that these creditors are already won over to the plan of arrangement since they will be paid in full. The Court cannot see in this sub-categorization any Machiavellian plan aimed at obtaining a majority of the creditors' votes. Moreover, it must be acknowledged that these creditors have little importance for the vote in value of the mass."**

The following table, attached to the arrangement, illustrates the equitable treatment proposed to the different classes of unsecured creditors, in general, and to that class which includes the appellants, in particular (a.f. 270):

4.– Unsecured Creditors

	1 to $1,000	1,001 to $5,000	5,001 to $40,000	$40,000 & +	CDPQ
Common Shares	NO	YES	YES	YES	YES
%	-	26% (A)	26% (A)	26% (A)	14%
Redemption 5 years	-	YES	YES	YES	NO
AND					
Money - $2.5M Payment	YES 100% of claims	YES Prorata of 50% of balance of $2.5M fund	YES Prorata of 50% of balance of $2.5M fund	NO	NO
OR					
Lawsuits $17.5M plus 50% of excess collected	NO	NO	YES	YES	NO

(A) Represents the same 26% for the unsecured creditors taken globally.

Therefore, I reject the first argument in appeal invoked by the appellants.

CLAUSES 5.3 AND 12.6

These clauses provide, respectively, as follows:

[translation] **"5.3 The Plan of Arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes respectively and, except where it does not in any manner modify the already existing obligations of the Company, and except**

a) for the Banking Syndicate whose rights are governed by the credit agreement existing at the date hereof that will be amended by the agreement attached to the Plan and for the short-term Lenders by the renewable credit agreement existing at the date hereof;

b) for the SDI whose rights are governed by the loan agreement existing at the date hereof that will be modified by an amendment to be entered into between the Company and the SDI and by the letter dated December 11, 1992 which appears in Schedule B hereto;

c) for the Litigious Claims under reserve of paragraph 8.3 below;

d) for Toronto-Dominion (California), Inc. (now Toronto-Dominion (Texas), Inc.) ("T-D Texas") whose rights are governed by the loan agreement dated May 1, 1991 between T-D Texas, Saint-Lawrence, Smitty's and Steinberg and the guarantee of Steinberg in favour T-D Texas dated May 1, 1991, the whole as qualified by the agreement dated December 17, 1992 between the said parties and subordination agreements dated May 1, 1991 between SDI, the Caisse, T-D Texas and Steinberg,

the sanctioned Plan is substituted for the contracts previously made with each of them, constituting novation, the amount of the Dividend being substituted to the amounts due by virtue of the Claims of each of the Creditors and the payment in full of the Dividend being equivalent to a full and final release in favour of the Company."

[translation] **"12.6 Consents, renunciations and agreements**

At the time of the Sanction, every Creditor shall be deemed to have consented to all the provisions contained in the Plan in its entirety. In particular, each of the Creditors shall be deemed

a) to have executed, signed and delivered to the Company all consents, renunciations, releases and assignments, statutory or otherwise, required to put in place and carry out the Plan;

b) to have renounced to any default of the Company mentioned in any provision, express or implied, provided for in any contract or

> **agreement, written or verbal, existing between such Creditor and the Company, that occurred at any time before the date of the Sanction; and**
>
> **c) in the event that there is any conflict between any provision, express or implied, provided for in any contract or agreement, written or verbal, existing between such Creditor and the Company at the date of the Sanction (other than those concluded by the Company or taking effect at the date of the Sanction) and the provisions of the Plan, to have consented to the provisions of the Plan taking precedence over those of such contracts or agreements and the latter are amended accordingly."**

The appellants are not very communicative in their factum about this ground of appeal, limiting themselves to writing:

> **[translation] "The effect of a plan of arrangement is stated by the CCAA. One cannot and should not attempt to insert clauses attempting to do more. The admissions that are attempted to be inserted can have dramatic effect on certain creditors in their relations with third parties. One cannot force them to admit that they have performed the acts stated in paragraph 12.6. For the reasons stated above, the Plan of Arrangement has its effect by the Act."**

One must distinguish between the two clauses.

I do not see anything in clause 12.6 that justifies refusing to sanction the arrangement. However, I agree that this clause is susceptible of conveying a wrong message. It is not further to a consent deemed to have been given by all the creditors that the arrangement produces the effects enumerated in paragraphs a), b) and c) of this clause, but rather, on the one hand, by the effect that the CCAA grants, in its section 6, to an arrangement sanctioned by the authority having jurisdiction and, on the other hand, by the priority granted by the same statute, in its section 8, over any stipulation previously agreed to by the parties:

> **"6. …the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding**
>
> **(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and**
>
> **(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company."**
>
> **"8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class**

> **of them and has full force and effect notwithstanding anything to the contrary contained in that instrument."**

Clause 5.3 raises difficulties. It spreads an erroneous perception of an arrangement, which the judge in first instance took up in his judgement.

The first and last words of this clause provide as follows:

> [translation] **"5.3 The Plan of Arrangement approved by the Creditors and sanctioned by the Court constitutes a contract binding the Company to each of the Creditors of each of the classes…**
>
> **…**
>
> **…**
>
> **the sanctioned Plan is substituted for the contracts previously made with each of them, constituting novation, the amount of the Dividend being substituted to the amounts due by virtue of the Claims of each of the Creditors and the payment in full of the Dividend being equivalent to a full and final release in favour of the Company."**

The judge in first instance took up this idea:

> **[translation] " A plan of arrangement is first and foremost an offer by a company to its creditors that will become a contract upon acceptance by the latter. For this contract to become enforceable, notably against those who oppose it or abstain, there must be, on the one hand, acceptance by the statutory majority provided for in the CCAA (and that is the case) and the sanction by the court."**

It is true that an arrangement is an offer that, to be submitted to the authority having jurisdiction to sanction it, must be accepted by the creditors in the proportions required by the CCAA, but it is not correct, with respect, to qualify the resulting legal situation as a "contract binding the parties". The consequence of the sanctioning of an arrangement is to render it enforceable by the sole effect of the law, not to make compulsory the stipulations flowing from a contract.

This distinction has its importance. It was emphasized by Mr. Justice Jacobs of the Australian New South Wales Court of Appeal in the case of **Hill v. Anderson Meat Industries Ltd**, [1972] 2 N.S.W.L.R. 705 (p.706):

> **"What has been submitted to this Court is that by the terms of the scheme, particularly cl. 3 which I have set out, the debt owing by the packing company to Mrs. Hill was extinguished. Next, because a guarantee is an accessory obligation, upon the extinguishment of the principal indebtedness the guarantee goes also, as a result of the fact that there is no principal debt to which the accessory liability can attach. It is conceded,**

> **as of course it must be, that these principles do not apply where the obligation is extinguished by operation of law, as for instance in the case of bankruptcy or the winding up of a company, but it is submitted that the obligation in the present case is not extinguished by operation of law but rather is extinguished by the terms of the scheme which impose not only upon those creditors who assent to it, but upon all creditors, the effect of the document which constitutes the scheme. In this way it is submitted that the cases which are referred to by Street J. are distinguishable.**
>
> **The argument is not substantially different from that which was propounded before the judge at first instance. He rejected it upon the ground that there is in fact a discharge of the obligation by operation of the law. I agree with this conclusion. Mrs. Hill was never party to the release of the obligation. The release came through the operation of a law which bound her as though she were a party. This seems to me in principle to be within that line of authority which so clearly establishes that the extinguishment of a principal obligation, when it is brought about by operation of law, does not result in a discharge of the surety."**

Despite the erroneous concept contained in clause 5.3 of the arrangement, I am not of the opinion that it is necessary to intervene. The error is not such that it should result in refusal to sanction the arrangement.

It appears, on the one hand, from the juxtaposition of the first and last paragraphs of clause 5.3 and, on the other, from the very purpose of the arrangement, that the novation stipulated therein is limited to the amount of the Dividend, which is substituted to any other amount due to each of the creditors by virtue of his claim. Even so, that clause only expresses the effects of the CCAA. The word "novation" must not, here, be understood as a situation resulting from a contractual process, but as the result, by the effect of a statute, of the sanctioning of an arrangement.

It is not because the judge in first instance sanctioned that clause, without having clarified it, that he extended the effects of the statute.

Therefore, the ground of appeal based on the illegality of clauses 5.3 and 12.6 is rejected.

CLAUSE 12.9

That clause provides as follows:

> [translation] **"12.9 Release**
>
> **With effect from the Sanction, each Creditor shall be deemed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."**

The judge in first instance, among other things, wrote the following about this clause and the arguments raised with regard to it by the appellants, then called ‘the Michauds”:

> **[translation] “The Michauds maintain that the effect of this release is to extend the effects of the plan of arrangement to third parties, which would be illegal. The Court does not agree with this assertion. As we shall see further on in this judgement, the plan of arrangement constitutes an offer by the debtor to all of its creditors to freeze at a point in time the whole of a legal situation and to enable the company to continue carrying on its activities or certain of its activities in the best interests of the company and its creditors. Steinberg filed an extract from by-law 108 of the By-law relating to the general conduct of the affairs of Steinberg Inc. Section 9 of such by-law provides as follows:**
>
> **9.01 The company shall assume the defence of its directors and/or officers sued by a third party for acts in the performance of their duties and the company shall pay, if need be, the damages resulting from such acts, unless the directors and/or officers have committed gross misconduct or a personal fault separable from the performance of their duties.**
>
> **It is obvious that Steinberg wishes to avoid a legal situation that would allow creditors to do through the back door what is prohibited through the front door. Steinberg’s proposal is a proposal that involves the company and its directors. If the company found itself with judgments against its directors for which it had to assume responsibility, it is obvious that those judgments could have an important impact on the plan of arrangement. Once again, it is a global proposal that Steinberg is making to its creditors and it is that proposal which has been accepted under reserve of the restrictions contained in article 9.01 of rule 108 and under reserve of the comments that the Court will draw up in the case of the workers’ union. The Michauds’ argument is not accepted.”**

In their factum, the appellants argue as follows against this clause 12.9 of the arrangement (a.f. 21 and 27):

> **[translation] “In the context of a C-36, and more particularly in the context of a plan of arrangement that has the effect of coordinating the formal liquidation of the assets of Steinberg, a release of the directors who led Steinberg to insolvency is quite exorbitant and a serious infringement of the rights of the appellants and every other person under Quebec’s jurisdiction.**
>
> **…**
>
> **…**
>
> **…**

> **In this instance, it is not a suspension but rather a release in favour of the directors. Thus, a recourse against third parties is eliminated. Nothing in statute C-36 or in the inherent powers of the Superior Court authorizes it to sanction release clauses in favour of third parties to the company. Since this clause did not comply with statute C-36, in accordance with the criteria in the Re Dairy case, supra, the appellants respectfully maintain that the Court should have refused to sanction it."**
>
> For its part, the respondent maintains:
>
> a) that it is not in a process of liquidation, but rather of reorganization; it invokes, in this regard, the judgement rendered in this file by the Superior Court on June 26, 1992;
>
> b) that it would be unfair and inequitable to put responsibility for its current situation on the shoulders of the directors;
>
> c) that the possible claims to which the appellants refer are only pure speculation and hypothetical;
>
> d) that it has an interest in inserting this clause since, both under section 9 of its By-law 108 and section 123.87 of the Companies Act (R.S.Q. c. C-38), it could be required to indemnify its directors, officers and agents;
>
> e) that the clause is not contrary to public order and comes within freedom of contract.

The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this act that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself. From this latter perspective, I can easily understand that this person wishes, by means of a clause provided for in its arrangement, directed at the persons whom it must indemnify, to shelter itself from their recourses in warranty.

Here, however, that is not what the respondent has done in clause 12.9 of its arrangement. Rather, it requests that its creditors renounce any right of action against its directors, officers, employees and advisors:

> **[translation] "With effect from the Sanction, each Creditor shall be deemed to have definitively renounced to any lawsuit, to any action and to any recourse that he may have or may have had against the directors, officers, employees and advisors of the Company."**
>
> The question is whether that clause should be sanctioned.
>
> This question must receive a negative answer.

The clause, as drafted, contains no restriction. It prevents the respondent's creditors from suing the persons therein referred to for any reason whatsoever, even for "a personal fault separable from the performance of their duties" (though this is an exception provided for in section 123.87 of the Companies Act and section 9.01 of the respondent's By-law 108).

The judge in first instance should have realized the excessive impact of this clause and intervened.

CONCLUSIONS

I would reject the grounds of appeal based, on the one hand, on the invalidity of the vote of the unsecured creditors and, on the other hand, on the illegality of clauses 5.3 and 12.6 of the arrangement, I would accept the ground of appeal based on the invalidity of clause 12.9 of the arrangement and, for this reason, quash the judgement in first instance and return the file to the judge in first instance to, if necessary, issue the appropriate orders, with costs in both Courts.

JACQUES DELISLE, J.A.

TAB 26

See paras. 78-79.

TELUS Communications Inc. *Appellant*

v.

Avraham Wellman *Respondent*

and

Attorney General of British Columbia, ADR Chambers Inc., Canadian Chamber of Commerce, Public Interest Advocacy Centre, Consumers Council of Canada, Canadian Federation of Independent Business, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and Consumers' Association of Canada *Interveners*

TELUS Communications Inc. *Appelante*

c.

Avraham Wellman *Intimé*

et

Procureur général de la Colombie-Britannique, ADR Chambers Inc., Chambre de commerce du Canada, Centre pour la défense de l'intérêt public, Consumers Council of Canada, Fédération canadienne de l'entreprise indépendante, Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko et Association des consommateurs du Canada *Intervenants*

INDEXED AS: TELUS COMMUNICATIONS INC. *v.* WELLMAN

2019 SCC 19

File No.: 37722.

2018: November 6; 2019: April 4.

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

RÉPERTORIÉ : TELUS COMMUNICATIONS INC. *c.* WELLMAN

2019 CSC 19

N° du greffe : 37722.

2018 : 6 novembre; 2019 : 4 avril.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Stay — Class actions — Consumer and non-consumer claims — Arbitration clause — Customer filing class action for damages alleging cell phone service provider engaged in deceptive practices — Class consisting of both consumers and non-consumers — Cell phone service provider's standard terms and conditions containing mandatory arbitration clause — Arbitration clause invalidated by provincial consumer protection legislation with respect to claims by consumers — Cell phone service provider relying on arbitration clause to seek stay of proceedings with respect to non-consumers' claims — Whether provincial statute governing arbitration grants court discretion to refuse to stay non-consumers' claims — Arbitration Act, 1991, S.O. 1991,

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Procédure civile — Sursis — Recours collectifs — Réclamations de consommateurs et de non-consommateurs — Clause d'arbitrage — Dépôt par un consommateur d'un recours collectif en dommages-intérêts pour pratiques trompeuses alléguées de la part d'un fournisseur de services de téléphonie cellulaire — Groupe formé à la fois de consommateurs et de non-consommateurs — Clause d'arbitrage obligatoire parmi les conditions types du contrat du fournisseur de services de téléphonie cellulaire — Clause d'arbitrage invalidée par une loi provinciale de protection des consommateurs en ce qui a trait aux réclamations des consommateurs — Clause d'arbitrage invoquée par le fournisseur de services de téléphonie cellulaire pour obtenir le sursis des procédures en ce qui

c. 17, s. 7 — Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A.

W filed a proposed class action for damages against TELUS on behalf of about two million Ontario residents who entered into mobile phone service contracts with TELUS during a specified timeframe. The class consists of both consumers and non-consumers (business customers). W alleges that TELUS engaged in an undisclosed practice of rounding up calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled. The standard terms and conditions of the service contracts included an arbitration clause stipulating that all claims arising out of or in relation to the contract, apart from the collection of accounts, must be determined through mediation and, failing that, arbitration. This clause was invalidated by the *Consumer Protection Act* to the extent that it would otherwise prevent class members who qualify as consumers from pursuing their claims in court. However, since the business customers do not benefit from this protection, TELUS sought to have the proceeding stayed with respect to the business customer claims, relying on the arbitration clause. The motions judge dismissed TELUS's motion for a stay and certified the action. She held that s. 7(5) of the *Arbitration Act, 1991* grants the courts discretion to refuse a stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, thereby allowing all of the matters to proceed in court. She was of the view that this discretion may be exercised to allow non-consumer claims that are otherwise subject to an arbitration clause to participate in a class action, where it is reasonable to do so. The Court of Appeal dismissed TELUS's appeal.

Held (Wagner C.J. and Abella, Karakatsanis and Martin JJ. dissenting): The appeal should be allowed and the claims of the business customers stayed.

a trait aux réclamations des non-consommateurs — La loi provinciale régissant l'arbitrage confère-t-elle au tribunal le pouvoir discrétionnaire de refuser d'ordonner le sursis relativement aux réclamations des non-consommateurs? — Loi de 1991 sur l'arbitrage, L.O. 1991, c. 17, art. 7 — Loi de 2002 sur la protection des consommateurs, L.O. 2002, c. 30, ann. A.

W a déposé un recours collectif projeté en dommages-intérêts contre TELUS au nom d'environ deux millions de résidents ontariens ayant conclu un contrat de services de téléphonie cellulaire avec TELUS pendant une période donnée. Le groupe en cause est composé de consommateurs et de non-consommateurs (soit des clients commerciaux). W allègue que TELUS s'est livrée à une pratique non divulguée consistant à arrondir la durée des appels à la minute suivante, de sorte que les services étaient surfacturés aux consommateurs et que ceux-ci ne recevaient pas le nombre de minutes auquel ils avaient droit. Les contrats de service renfermaient des conditions types, dont une clause d'arbitrage qui stipulait que toutes les réclamations découlant du contrat ou s'y rapportant, sauf en ce qui concerne le recouvrement de créances, doivent faire l'objet d'une médiation ou, à défaut de règlement, d'un arbitrage. Aux termes de la *Loi sur la protection du consommateur*, cette clause d'arbitrage est invalide dans la mesure où elle empêche les membres du groupe qui sont des consommateurs de faire valoir leurs réclamations devant un tribunal. Toutefois, comme les clients commerciaux ne bénéficient pas de ces mesures de protection, TELUS a présenté une motion en sursis de l'instance relativement aux réclamations de ces derniers, invoquant la clause d'arbitrage. La juge des motions a refusé d'ordonner le sursis des réclamations comme TELUS lui demandait de le faire et a certifié le recours. Elle a affirmé que le par. 7(5) de la *Loi de 1991 sur l'arbitrage* confère aux tribunaux le pouvoir discrétionnaire de refuser d'ordonner un sursis dans les cas où il ne serait pas raisonnable de dissocier les questions traitées dans la convention d'arbitrage des autres questions, de manière à ce que toutes les questions puissent être soumises au tribunal. Elle était d'avis que ce pouvoir discrétionnaire peut être exercé pour que les réclamations des non-consommateurs qui sont autrement visées par une clause d'arbitrage puissent être présentées dans le cadre d'un recours collectif, lorsqu'il est raisonnable de le faire. La Cour d'appel a rejeté l'appel de TELUS.

Arrêt (le juge en chef Wagner et les juges Abella, Karakatsanis et Martin sont dissidents) : L'appel est accueilli et le sursis des réclamations des clients commerciaux est ordonné.

Per Moldaver, Gascon, Côté, Brown and Rowe JJ.: Section 7(5) of the *Arbitration Act, 1991* does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. The protections afforded by the *Consumer Protection Act* allow the consumers to pursue their claims in court, but the business customers remain bound by the arbitration agreements into which they entered. Accordingly, the latter are exposed to a stay under s. 7(1) of the *Arbitration Act, 1991*. Since the only potential exception to the general rule under s. 7(1) relied on by W does not apply, the business customer claims should be stayed.

In keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts, s. 6 of the *Arbitration Act, 1991* signals that courts are generally to take a hands off approach to matters governed by that statute. Section 7(1) of the *Arbitration Act, 1991* establishes the general rule that where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement, the court shall, on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. This general rule reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act, 1991* that parties to a valid arbitration agreement should abide by their agreement. Section 7(2) lists five exceptions to the general rule under s. 7(1) where it would be either unfair or impractical to refer the matter to arbitration. Section 7(5) provides a further exception to the general rule under s. 7(1) and consists of two main components. First, s. 7(5)(a) and (b) set out two preconditions. The first precondition is met if the agreement deals with only some of the matters in respect of which the proceeding was commenced. That is, the proceeding must involve at least one matter that is dealt with in the arbitration agreement and at least one matter that is not dealt with in the arbitration agreement. The second precondition is met if it is reasonable to separate the matters dealt with in the agreement from the other matters. Second, if both preconditions are satisfied, then instead of ordering a full stay, the court may allow the matters that are not dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that are dealt with in the agreement. If the preconditions are not met, then the discretionary exception under s. 7(5) is not triggered as s. 7(5) can have effect only if the two preconditions are satisfied. At that point, unless one of the exceptions listed

Les juges Moldaver, Gascon, Côté, Brown et Rowe : Le paragraphe 7(5) de la *Loi de 1991 sur l'arbitrage* ne confère pas aux tribunaux le pouvoir discrétionnaire de refuser d'ordonner le sursis des réclamations qui sont visées par une convention d'arbitrage. Les mesures de protection prévues par la *Loi sur la protection du consommateur* permettent aux consommateurs de présenter leurs réclamations devant les tribunaux, mais les clients commerciaux restent liés par les conventions d'arbitrage dont ils ont convenu. Ils sont donc exposés au sursis prévu au par. 7(1) de la *Loi de 1991 sur l'arbitrage*. Puisque la seule exception potentielle à la règle générale énoncée au par. 7(1) sur laquelle s'est fondé W ne s'applique pas, il y a lieu de surseoir aux réclamations des clients commerciaux.

Conformément à l'approche moderne, selon laquelle l'arbitrage est un processus autonome par lequel les parties conviennent de régler leurs différends en les soumettant à un arbitre et non à un tribunal, l'art. 6 de la *Loi de 1991 sur l'arbitrage* indique que les tribunaux doivent généralement adopter une politique de non-intervention à l'égard des questions régies par cette loi. Le paragraphe 7(1) de cette dernière établit la règle générale selon laquelle, si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question traitée dans la convention, le tribunal doit, sur la motion d'une autre partie à la convention, surseoir à l'instance au profit de l'arbitrage. Cette règle générale confirme le concept de l'autonomie des parties et la politique sous-jacente de la *Loi de 1991 sur l'arbitrage* selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue. Le paragraphe 7(2) énumère cinq exceptions à la règle générale prévue au par. 7(1), soit des cas où il serait injuste ou peu pratique de renvoyer l'affaire à l'arbitrage. Le paragraphe 7(5) prévoit une autre exception à la règle générale prévue au par. 7(1), une exception qui comprend deux éléments principaux. Premièrement, les al. 7(5)a) et b) énoncent deux conditions préalables. Il est satisfait à la première si la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite. Autrement dit, l'instance doit porter sur au moins une question qui est traitée dans la convention d'arbitrage et une question qui n'est pas traitée dans la convention d'arbitrage. Il est satisfait à la deuxième condition préalable s'il est raisonnable de dissocier les questions traitées dans la convention des autres questions. Deuxièmement, s'il est satisfait aux deux conditions préalables, au lieu d'ordonner un sursis complet, le tribunal peut autoriser que les questions qui ne sont pas traitées dans la convention d'arbitrage soient soumises au tribunal. Il est toutefois tenu de surseoir à l'instance malgré tout en ce qui touche les questions qui sont traitées dans la convention d'arbitrage.

in s. 7(2) applies, the general rule under s. 7(1) would apply, meaning that the proceeding must be stayed.

Policy considerations cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make s. 7(5) say something it does not. While policy analysis has a legitimate role in the interpretive process, the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts, through the *Consumer Protection Act*. The legislature made a careful policy choice to exempt consumers — and only consumers — from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.

While there can be no doubt as to the importance of promoting access to justice, this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the *Arbitration Act, 1991*. To do so would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting. It would expand the opportunities for parties to a valid arbitration agreement to avoid their agreement and seek relief in court. Furthermore, this case is not about debating the merits and demerits of enforcing arbitration clauses contained in standard from contracts. Rather, it is about the proper interpretation of s. 7(5) of the *Arbitration Act, 1991*. And, while distinguishing between consumers and non-consumers may be a difficult exercise in certain cases, that difficulty does not bear on the proper interpretation of s. 7(5). Sorting between consumers and non-consumers may be cumbersome in certain cases, but this inconvenience does not permit the

S'il n'est pas satisfait aux conditions préalables, l'exception discrétionnaire prévue au par. 7(5) n'entre pas en jeu, puisque celui-ci ne prend effet que si les deux conditions préalables sont remplies. Dans ce cas, à moins qu'une des exceptions énumérées au par. 7(2) ne s'applique, c'est la règle générale prévue au par. 7(1) qui prévaut et le tribunal doit ordonner le sursis de l'instance.

Des considérations de nature politique ne doivent pas servir à déformer le libellé de la loi, interprété d'une façon qui s'harmonise avec l'économie et l'objet du texte législatif en cause ainsi qu'avec l'intention du législateur, pour donner au par. 7(5) un sens qu'il n'a pas. L'analyse des considérations de politique générale joue un rôle légitime dans le processus d'interprétation des lois, mais le choix des politiques dans une démocratie parlementaire demeure la responsabilité du législateur et non celle des tribunaux. Il en est particulièrement ainsi du fait que, en adoptant la *Loi sur la protection du consommateur*, la législature de l'Ontario a déjà traité de certaines de ces préoccupations de nature politique en protégeant les consommateurs des conséquences possiblement sévères de l'application des conventions d'arbitrage prévues dans les conventions de consommation, qui prennent souvent la forme de contrats types. Le législateur a pris avec soin la décision politique d'exempter les consommateurs — et seulement les consommateurs — de l'application ordinaire des conventions d'arbitrage. Il faut respecter ce choix, et non pas le miner en interprétant le par. 7(5) comme permettant aux tribunaux de traiter les consommateurs et les non-consommateurs sur un pied d'égalité.

L'importance de promouvoir l'accès à la justice ne fait aucun doute. On ne saurait pour autant permettre, à moins d'une directive du législateur, que cet objectif prenne le dessus sur les autres objectifs importants visés par la *Loi de 1991 sur l'arbitrage*. Adopter cette approche minerait l'objectif déclaré du législateur de s'assurer que les parties à une convention d'arbitrage valide la respectent et réduirait le degré de certitude et de prévisibilité associé aux conventions d'arbitrage en plus d'affaiblir le concept d'autonomie des parties dans le contexte commercial. Cela augmenterait les occasions pour les parties à une convention d'arbitrage valide de se soustraire aux obligations qui y sont prévues et d'exiger réparation devant les tribunaux. En outre, cette affaire n'a pas pour but de débattre des avantages et des inconvénients de l'application de clauses d'arbitrage contenues dans des contrats types. Elle concerne plutôt l'interprétation qu'il convient de donner au par. 7(5) de la *Loi de 1991 sur l'arbitrage*. Bien que différencier les consommateurs et les non-consommateurs puisse s'avérer difficile dans certains cas, cette difficulté n'a aucune incidence sur l'interprétation qu'il convient de

court to recast the legislation as it sees fit in order to avoid such difficulties. Permitting non-consumers to tag along with consumers on the basis that it would be cumbersome to sort between the two would also allow commercial entities to find the inside of a courtroom despite having agreed to arbitration, even where the arbitration agreement was fully negotiated. This would reduce the degree of certainty and predictability associated with arbitration agreements and permit parties to those agreements to piggyback onto the claims of others. Lastly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature. Section 7(5) of the *Arbitration Act, 1991* expressly contemplates bifurcation of proceedings, as it permits the court to order a partial stay, thereby potentially resulting in concurrent arbitration and court adjudication.

The sole matter at issue in the proceeding commenced by W is alleged overbilling. This matter is dealt with in the arbitration agreements into which the consumers and business customers entered. Therefore, because there is at least one matter in the proceeding that is dealt with in the arbitration agreements, the general rule under s. 7(1) of the *Arbitration Act, 1991* would ordinarily require a stay of the proceeding as a whole, leaving both consumers and business customers locked out of court. But, s. 7(5) of the *Consumer Protection Act* renders the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commenced by W. The business customers, however, do not qualify as consumers and as such they cannot invoke the protections that the consumers enjoy.

The only potential exception to s. 7(1) of the *Arbitration Act, 1991* sought to be invoked on behalf of the business customers in this case, the partial stay provision under s. 7(5), offers no assistance. This is because the sole matter at issue in the proceeding is dealt with in the arbitration agreements into which the consumers and business customers entered, such that the first precondition set out in s. 7(5)(a) is not met. Consequently, the general rule under s. 7(1) is left intact insofar as the business customers are concerned and the proceeding must be stayed. However,

donner au par. 7(5). De plus, même s'il peut s'avérer encombrant dans certains cas de procéder à cette distinction, cet inconvénient n'autorise pas le tribunal à reformuler la loi comme bon lui semble pour éviter de telles difficultés. Permettre aux non-consommateurs de se joindre aux consommateurs parce qu'il serait encombrant de les distinguer les uns des autres permettrait aussi aux entités commerciales de se retrouver devant les tribunaux judiciaires en dépit de leur consentement à recourir à l'arbitrage, même lorsque la convention d'arbitrage est le fruit d'une négociation en bonne et due forme. Cela réduirait le degré de certitude et de prévisibilité associé aux conventions d'arbitrage et permettrait aux parties à ces conventions de greffer leurs réclamations à celles d'autres parties. Enfin, si l'application d'une loi ontarienne, interprétée correctement, mène à la multiplicité des instances, les tribunaux doivent donner effet à l'intention du législateur. Le paragraphe 7(5) de la *Loi de 1991 sur l'arbitrage* prévoit expressément la tenue possible de recours parallèles, car il permet au tribunal d'ordonner un sursis partiel — ce qui pourrait donner lieu à deux procédures concurrentes, soit une procédure d'arbitrage et une procédure judiciaire.

La seule question en litige dans le recours intenté par W est celle de la surfacturation alléguée. Or, les conventions d'arbitrage qu'ont signé les consommateurs et les clients commerciaux traitent de cette question. Comme l'instance porte sur au moins une question qui est traitée dans les conventions d'arbitrage, la règle générale prévue au par. 7(1) de la *Loi de 1991 sur l'arbitrage* exigerait normalement qu'il soit sursis aux procédures dans leur ensemble, ce qui empêcherait tant les consommateurs que les clients commerciaux de recourir aux tribunaux. Or, le par. 7(5) de la *Loi sur la protection au consommateur* invalide les conventions d'arbitrage dont ont convenu les consommateurs, dans la mesure où elles empêchent par ailleurs ces derniers d'exercer leur droit d'introduire un recours collectif du type de celui déposé par W, ou de se joindre à un tel recours. Les clients commerciaux, par contre, ne sont pas des consommateurs, et ils ne peuvent donc pas se prévaloir des mesures de protection dont profitent ces derniers.

La seule exception potentielle au par. 7(1) de la *Loi de 1991 sur l'arbitrage* qu'on cherche à invoquer au nom des clients commerciaux en l'espèce, soit la disposition relative au sursis partiel prévue au par. 7(5), ne leur est d'aucun secours. Il en est ainsi parce que la seule question en litige dans le recours est visée par les conventions d'arbitrage qu'ont signées tant les consommateurs que les clients commerciaux, de sorte qu'il n'est pas satisfait à la première condition préalable énoncée à l'al. 7(5)a). La règle générale prévue au par. 7(1) reste donc intacte en

this stay must be restricted to the parties who are legally bound by an arbitration agreement — namely, TELUS and the business customers. In sum, the motions judge and the Court of Appeal erred in law by interpreting s. 7(5) of the *Arbitration Act, 1991* incorrectly and refusing to order a stay that, under s. 7(1), was mandatory. Section 7(5) of the *Arbitration Act, 1991* does not permit the court to ignore a valid and binding arbitration agreement.

ce qui a trait aux clients commerciaux et il faut surseoir à l'instance. Toutefois, ce sursis doit être limité aux parties qui sont liées légalement par une convention d'arbitrage — à savoir TELUS et les clients commerciaux. En somme, la juge des motions et la Cour d'appel ont commis une erreur de droit en interprétant incorrectement le par. 7(5) de la *Loi de 1991 sur l'arbitrage* et en refusant d'ordonner un sursis qui, suivant le par. 7(1), était obligatoire. Le paragraphe 7(5) de la *Loi de 1991 sur l'arbitrage* ne permet pas au tribunal d'écarter une convention d'arbitrage valide et exécutoire.

Per Wagner C.J. and Abella, Karakatsanis and Martin JJ. (dissenting): The appeal should be dismissed. Where a proceeding includes matters covered by an arbitration agreement and other matters that are not, s. 7(5) of the *Arbitration Act, 1991* gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause.

Le juge en chef Wagner et les juges Abella, Karakatsanis et Martin (dissidents) : Le pourvoi devrait être rejeté. Lorsque l'instance porte à la fois sur des questions visées par une convention d'arbitrage et d'autres questions qui ne le sont pas, le par. 7(5) de la *Loi de 1991 sur l'arbitrage* investit le juge du pouvoir discrétionnaire de permettre que toute l'instance se poursuive devant le tribunal, même si certaines parties sont par ailleurs assujetties à une clause d'arbitrage.

Section 7(5) of the *Arbitration Act, 1991* reflects an explicit legislative intention to override an otherwise applicable arbitration clause. The words of the provision state that "the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters". This means that the court can either stay the arbitrable matters before it or allow them to proceed. Logically, a discretionary ability to grant a partial stay also includes the power to refuse a partial stay. The only interpretation that gives meaningful effect to the discretionary language of s. 7(5) is one that confers on judges the ability to allow both arbitrable and non-arbitrable disputes to proceed in court. An assertion that a court can never stay arbitrable matters under s. 7(5) renders the opening phrase — "may stay the proceeding with respect to the matters dealt with in the arbitration agreement" — superfluous. By interpreting the provision to apply only to non-arbitrable matters, s. 7(5) adds nothing to a judge's existing discretion.

Le paragraphe 7(5) de la *Loi de 1991 sur l'arbitrage* révèle l'intention explicite du législateur d'écarter la clause d'arbitrage par ailleurs applicable. La disposition prévoit que « [l]e tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions », ce qui signifie que le tribunal peut surseoir à l'instance en ce qui touche les questions arbitrables qui lui sont soumises ou permettre qu'elle se poursuive. Logiquement, le pouvoir discrétionnaire d'accorder un sursis partiel comprend également le pouvoir de refuser d'accorder un sursis partiel. La seule interprétation qui donne véritablement effet au libellé discrétionnaire du par. 7(5) est celle qui confère aux juges le pouvoir de permettre que les différends arbitrables ainsi que les différends non arbitrables soient portés devant le tribunal. L'affirmation selon laquelle le tribunal ne peut jamais surseoir aux questions arbitrables en vertu du par. 7(5) rend superflue la première phrase de cette disposition — « peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage ». Si on interprète la disposition comme s'appliquant seulement aux questions non arbitrables, le par. 7(5) n'ajoute rien au pouvoir discrétionnaire existant du juge.

Ontario's *Arbitration Act, 1991* was enacted to allow parties to design their own settlement processes and resolve their disputes outside the courts. It anticipated two or more parties freely negotiating their arbitral process. To ensure expedient resolution and lower litigation costs, the *Arbitration Act, 1991* limited court intervention in

La *Loi de 1991 sur l'arbitrage* de l'Ontario a été adoptée afin de permettre aux parties d'élaborer leurs propres processus de règlement et de résoudre leurs différends à l'extérieur des tribunaux. Elle prévoyait que deux ou plusieurs parties peuvent négocier librement leur processus d'arbitrage. Afin d'assurer le règlement opportun

arbitrable disputes. But it also gave judges discretion to permit court proceedings in certain limited circumstances, such as where the arbitration agreement was manifestly unfair. Where a proceeding includes both matters covered by an arbitration agreement and other matters that are not, s. 7(5) gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause. Since 2002, the Ontario Court of Appeal has interpreted s. 7(5) as granting the discretion to stay matters that would otherwise be subject to arbitration. Similarly, for nearly a decade, the Ontario Court of Appeal has interpreted s. 7(5) as permitting otherwise arbitrable matters to be joined with class actions in the public interests of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results. This interpretation aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the *Arbitration Act, 1991* but also with the purpose of s. 7(5) itself.

The overall purpose of the *Arbitration Act, 1991* was to promote access to justice. Its chosen means of achieving that goal was to promote accessibility by giving parties the choice of resolving disputes outside the court system. The reason for creating this option was a recognition that the court system could be costly and slow. The courts' discretion to intervene in arbitrable matters was therefore narrowed to further the goals of expedient dispute resolution.

Arbitration was intended to be a means by which parties on a relatively equal bargaining footing chose to design an alternative dispute mechanism. One cannot talk about "equal bargaining power" and "party autonomy" if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot reasonably be said to have "come to the table" and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choices, but of an *absence* of choice. All of TELUS's clients — both business and consumer — signed the same, non-negotiable standard form agreement. TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify

des différends et de diminuer les frais de justice, la *Loi de 1991 sur l'arbitrage* a limité l'intervention judiciaire à l'égard des différends arbitrables. Mais elle a aussi investi les juges du pouvoir discrétionnaire d'autoriser les instances judiciaires dans certaines circonstances précises, par exemple lorsque la convention d'arbitrage était manifestement inéquitable. Lorsque l'instance porte à la fois sur des questions visées par une convention d'arbitrage et d'autres questions qui ne le sont pas, le par. 7(5) investit le juge du pouvoir discrétionnaire de permettre que toute l'instance se poursuive devant le tribunal, même si certaines parties sont par ailleurs assujetties à une clause d'arbitrage. Depuis 2002, la Cour d'appel de l'Ontario a interprété le par. 7(5) comme conférant aux tribunaux le pouvoir discrétionnaire de surseoir aux questions qui seraient par ailleurs soumises à l'arbitrage. De même, depuis une dizaine d'années, la Cour d'appel de l'Ontario a interprété le par. 7(5) comme permettant que des questions par ailleurs arbitrables soient jointes aux recours collectifs afin d'éviter, dans l'intérêt public, le dédoublement des instances, des coûts plus élevés et le risque de résultats incohérents. Cette interprétation s'accorde avec le texte des dispositions et le régime créé par celles-ci et est conforme non seulement aux objets ayant motivé l'adoption de la *Loi de 1991 sur l'arbitrage*, mais aussi à l'objet du par. 7(5) lui-même.

L'objet général de la *Loi de 1991 sur l'arbitrage* était de promouvoir l'accès à la justice. Le moyen choisi pour atteindre cet objectif consistait à favoriser l'accessibilité en donnant aux parties le choix de régler leurs différends en dehors du système judiciaire. Cette possibilité a été offerte en reconnaissance du fait que le système judiciaire peut être lent et coûteux. Le pouvoir discrétionnaire des tribunaux d'intervenir dans les affaires arbitrables a donc été restreint afin de favoriser la réalisation des objectifs du règlement opportun des différends.

L'arbitrage se voulait un moyen permettant à des parties relativement égales en situation de négociation de choisir de créer un mécanisme extrajudiciaire de règlement des différends. On ne peut pas parler de « pouvoir de négociation égal » et d'« autonomie des parties » si la nature même du contrat révèle qu'une partie possède le pouvoir exclusif de décider du contenu du contrat. On ne saurait donc raisonnablement affirmer que les parties aux conventions d'arbitrage individuel obligatoire ont « pris place à la table » et négocié, car il n'y a pas de table de négociation. La signature de ces contrats par les particuliers et les sociétés est fonction non pas de choix négociés, mais d'une *absence* de choix. Tous les clients de TELUS — tant les clients commerciaux que les clients consommateurs — ont signé le même contrat type non

the expense. And its mandatory nature illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen.

By inserting the reasonableness requirement in s. 7(5)(b) of the *Arbitration Act, 1991*, the provincial legislature clearly contemplated that in certain circumstances, it would be unreasonable to separate the matters dealt with in the arbitration agreement from the other matters. The availability of judicial discretion in s. 7(5) does not require judges to allow a class action including arbitrable claims to proceed: it simply lets them decide when it is reasonable to do so. Eliminating judicial discretion, on the other hand, effectively eliminates access to justice. In this light, s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims. This interpretation applies with equal force whether the proceeding is between two or more named parties, or is a class action. An interpretation of s. 7(5) of the *Arbitration Act, 1991* which permits otherwise arbitrable matters to be joined with class actions in the public interest of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating the enactment of the *Arbitration Act, 1991* but also with the purpose of s. 7(5) itself.

TELUS's interpretation would result in costly and time-consuming factual inquiries on how to divide the arbitrable and non-arbitrable claims even where the substance of both claims is identical, as in this case. Both parties acknowledged the potential difficulties associated with drawing the line between a "consumer" as defined by the *Consumer Protection Act*, who is exempt from arbitration, and a business customer, who is not. This distinction may be especially difficult to determine for those individuals who use their cell phone for both personal and business purposes. For these individuals, determining whether they fall within the scope of the exception in the *Consumer Protection Act* adds unnecessary complexity.

négociable. La clause d'arbitrage individuel de TELUS empêche en fait les clients commerciaux d'avoir accès à la justice lorsqu'une réclamation de faible valeur ne justifie pas la dépense. Son caractère obligatoire, en outre, indique que les principes sous-jacents de l'autonomie des parties et de la liberté contractuelle brillent par leur absence.

En insérant l'exigence du caractère raisonnable dans l'al. 7(5)b) de la *Loi de 1991 sur l'arbitrage*, le législateur provincial a manifestement prévu que, dans certains cas, il ne serait pas raisonnable de dissocier les questions traitées dans la convention d'arbitrage des autres questions. La possibilité d'avoir recours au pouvoir discrétionnaire prévu au par. 7(5) n'a pas pour effet d'obliger les juges à permettre que l'instance relative à un recours collectif comportant des réclamations arbitrables se poursuive : ils peuvent simplement décider quand il est raisonnable de le faire. L'élimination de ce pouvoir discrétionnaire, par contre, réduit à néant l'accès à la justice. Dans ce contexte, le par. 7(5) doit être interprété de façon à conférer aux juges le pouvoir discrétionnaire de refuser de surseoir aux réclamations arbitrables s'il n'est pas raisonnable de les dissocier des réclamations non arbitrables. Cette interprétation s'applique tout autant lorsque l'instance oppose deux parties désignées ou plus que lorsqu'il s'agit d'un recours collectif. Une interprétation du par. 7(5) de la *Loi de 1991 sur l'arbitrage* qui permet que des questions par ailleurs arbitrables soient jointes aux recours collectifs afin d'éviter, dans l'intérêt public, le dédoublement des instances, des coûts plus élevés et le risque de résultats incohérents s'accorde avec le texte des dispositions et le régime créé par celles-ci et est conforme non seulement aux objets ayant motivé l'adoption de la *Loi de 1991 sur l'arbitrage*, mais aussi à l'objet du par. 7(5) lui-même.

L'interprétation préconisée par TELUS donnerait lieu à des examens des faits longs et coûteux quant à la façon dont les réclamations arbitrables seraient dissociées de celles qui ne le sont pas, même lorsque le fond des réclamations est identique, comme en l'espèce. Les deux parties ont reconnu les difficultés éventuelles que peut susciter le fait d'établir une distinction entre le « consommateur » au sens de la *Loi sur la protection du consommateur*, qui échappe à l'arbitrage, et le client commercial, qui n'y échappe pas. Cette distinction pourrait être particulièrement difficile à établir pour les personnes qui utilisent leur téléphone cellulaire tant à des fins personnelles que dans le cadre de leur entreprise. Établir si ces personnes tombent sous le coup de l'exception prévue dans la *Loi sur la protection du consommateur* rendrait l'analyse inutilement plus complexe.

The purpose of the *Arbitration Act, 1991*, was to facilitate the ability of parties to negotiate their own process for resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge. To impose arbitration on unwilling parties violates the spirit of the *Arbitration Act, 1991* and the arbitral process. This operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from accountability contrary to our most fundamental notions of civil justice. Section 7(5)(b) of the *Arbitration Act, 1991* gave the motions judge discretion to consider whether it was reasonable to separate the matters dealt with in the agreement (claims of business customers) from the other matters (the consumer claims). The discretion was properly exercised in this case to allow the business claims to be joined with the consumer class action dealing with the same issues.

L'objet de la *Loi de 1991 sur l'arbitrage* était d'accroître la capacité des parties de négocier leur propre processus de règlement extrajudiciaire des différends, en partant du principe que l'accès à la justice avait autant à voir avec l'accès à un résultat qu'avec l'accès à un juge. Imposer l'arbitrage à des parties qui n'en veulent pas va à l'encontre de l'esprit de la *Loi de 1991 sur l'arbitrage* et du processus arbitral. Cela tient lieu de barrière invisible, mais énorme, à la réparation et fait en sorte que les auteurs d'actes répréhensibles sont présumés soustraits à leur responsabilité, contrairement à nos notions les plus fondamentales de justice civile. L'alinéa 7(5)b) de la *Loi de 1991 sur l'arbitrage* conférait à la juge des requêtes le pouvoir discrétionnaire de décider s'il était raisonnable de dissocier les questions traitées dans la convention (les réclamations des clients commerciaux) des autres questions (les réclamations des consommateurs). Le pouvoir discrétionnaire dans la présente affaire a été correctement exercé pour permettre la jonction des réclamations des clients commerciaux au recours collectif intenté par des consommateurs et traitant des mêmes questions.

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Appeal allowed, Wagner C.J., Abella, Karakatsanis and Martin JJ. dissenting.

D. Geoffrey G. Cowper, *Q.C.*, *Andrew D. Borrell*, *Alexandra Mitretodis* and *Alan Dabb*, for the appellant.

Joel P. Rochon, *Peter R. Jervis*, *Golnaz Nayerahmadi* and *Eli Karp*, for the respondent.

Jonathan Eades and *James L. Maxwell*, for the intervener the Attorney General of British Columbia.

Michael Eizenga, *Andrew Little*, *Ranjan Agarwal* and *Charlotte Harman*, for the intervener ADR Chambers Inc.

Brandon Kain, *Adam Goldenberg* and *Ljiljana Stanić*, for the intervener the Canadian Chamber of Commerce.

Mohsen Seddigh and *Daniel Hamson*, for the interveners the Public Interest Advocacy Centre and the Consumers Council of Canada.

Anthony Daimsis, for the intervener the Canadian Federation of Independent Business.

Marina Pavlović and *Cynthia Khoo*, for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Daniel E. H. Bach, *Tyler J. Planeta* and *Michael Sobkin*, for the intervener the Consumers' Association of Canada.

The judgment of Moldaver, Gascon, Côté, Brown and Rowe JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] This appeal requires the Court to decide what happens when a series of arbitration agreements, the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17

16562 (WL Can.). Pourvoi accueilli, le juge en chef Wagner et les juges Abella, Karakatsanis et Martin sont dissidents.

D. Geoffrey G. Cowper, *c.r.*, *Andrew D. Borrell*, *Alexandra Mitretodis* et *Alan Dabb*, pour l'appelante.

Joel P. Rochon, *Peter R. Jervis*, *Golnaz Nayerahmadi* et *Eli Karp*, pour l'intimé.

Jonathan Eades et *James L. Maxwell*, pour l'intervenant le procureur général de la Colombie-Britannique.

Michael Eizenga, *Andrew Little*, *Ranjan Agarwal* et *Charlotte Harman*, pour l'intervenante ADR Chambers Inc.

Brandon Kain, *Adam Goldenberg* et *Ljiljana Stanić*, pour l'intervenante la Chambre de commerce du Canada.

Mohsen Seddigh et *Daniel Hamson*, pour les intervenants le Centre pour la défense de l'intérêt public et Consumers Council of Canada.

Anthony Daimsis, pour l'intervenante la Fédération canadienne de l'entreprise indépendante.

Marina Pavlović et *Cynthia Khoo*, pour l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko.

Daniel E. H. Bach, *Tyler J. Planeta* et *Michael Sobkin*, pour l'intervenante l'Association des consommateurs du Canada.

Version française du jugement des juges Moldaver, Gascon, Côté, Brown et Rowe rendu par

LE JUGE MOLDAVER —

I. Aperçu

[1] La Cour est appelée à déterminer ce qui arrive lorsqu'une série de conventions d'arbitrage, la *Loi de 1991 sur l'arbitrage*, L.O. 1991, c. 17 (« *Loi sur*

("*Arbitration Act*"),[1] the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A ("*Consumer Protection Act*"), and a consumer/non-consumer class action collide.

[2] This collision occurred when the respondent, Avraham Wellman, filed a proposed class action in Ontario against the appellant, TELUS Communications Inc. ("TELUS"), on behalf of about two million Ontario residents who entered into mobile phone service contracts with the company during a specified timeframe. The class consists of both consumers and non-consumers, the latter being business customers. The action centres on the allegation that TELUS engaged in an undisclosed practice of "rounding up" calls to the next minute such that customers were overcharged and were not provided the number of minutes to which they were entitled.

[3] The contracts in question, which were not negotiated, contain standard terms and conditions drafted by TELUS, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and, failing that, arbitration.

[4] By virtue of the *Consumer Protection Act*, however, this arbitration clause is invalid to the extent that it would otherwise prevent class members who qualify as "consumers" from commencing or joining a class action of the kind commenced by Mr. Wellman. Indeed, as we shall see, the *Consumer Protection Act* expressly shields consumers from a stay of proceedings under the *Arbitration Act*. Consequently, they are free to pursue their claims in court. The business customers, however, do not benefit from these protections. So where does this leave them?

[1] Unless indicated otherwise, all section number references are to the *Arbitration Act*.

l'arbitrage »)[1], la *Loi de 2002 sur la protection du consommateur*, L.O. 2002, c. 30, ann. A (« *Loi sur la protection du consommateur* »), et un recours collectif visant à la fois des consommateurs et des non-consommateurs entrent en conflit.

[2] C'est ce qui est survenu lorsque l'intimé, Avraham Wellman, a déposé un recours collectif projeté en Ontario contre l'appelante, TELUS Communications Inc. (« TELUS »), au nom d'environ deux millions de résidents ontariens ayant conclu un contrat de service de téléphonie cellulaire avec la société pendant une période donnée. Le groupe en cause est composé de consommateurs et de non-consommateurs, ces derniers étant des clients commerciaux. L'action porte sur l'allégation selon laquelle TELUS s'est livrée à une pratique non divulguée consistant à « arrondir » la durée des appels à la minute suivante, de sorte que les services étaient surfacturés aux clients et que ceux-ci ne recevaient pas le nombre de minutes auquel ils avaient droit.

[3] Les contrats en question, qui n'ont pas été négociés, renferment des conditions types rédigées par TELUS, dont une clause d'arbitrage qui stipule, en gros, que toutes les réclamations découlant du contrat ou s'y rapportant, sauf en ce qui concerne le recouvrement de créances par TELUS, doivent faire l'objet d'une médiation ou, à défaut de règlement, d'un arbitrage.

[4] Aux termes de la *Loi sur la protection du consommateur*, cette clause d'arbitrage est toutefois invalide dans la mesure où elle empêche les membres du groupe qui sont des « consommateurs » d'introduire un recours collectif ou de participer à un tel recours comme celui qu'a intenté M. Wellman. En effet, comme nous le verrons, la *Loi sur la protection du consommateur* protège expressément les consommateurs contre le sursis de l'instance qui serait prononcé en application de la *Loi sur l'arbitrage*. Ces membres du groupe peuvent donc présenter leurs réclamations devant les tribunaux. Par contre, les clients commerciaux ne bénéficient pas de ces mesures de protection. Dans quelle situation cela les place-t-il?

[1] Sauf indication contraire, tous les renvois à des dispositions législatives se rapportent à la *Loi sur l'arbitrage*.

[5] The answer, Mr. Wellman says, lies in s. 7(5) of the *Arbitration Act* which, read alongside s. 7(1), provides as follows:

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

. . .

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[6] In Mr. Wellman's submission, s. 7(5) grants the court discretion to allow *all* of the class members, consumers and business customers alike, to pursue their claims together in court, provided it would not be reasonable to separate their claims. This is so, Mr. Wellman maintains, despite the fact that the business customers contracted to resolve their claims through arbitration and would otherwise be bound by that agreement. The courts below, following *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, leave to appeal refused, [2010] 1 S.C.R. viii, agreed with Mr. Wellman.

[7] TELUS sees things differently. It contends that under s. 7(5), a court has no authority to refuse to

[5] Selon M. Wellman, la réponse se trouve au par. 7(5) de la *Loi sur l'arbitrage* qui, lu conjointement avec le par. 7(1), prévoit :

Sursis

7 (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.

. . .

Convention s'appliquant à une partie du différend

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

[6] Dans ses observations, M. Wellman fait valoir que le par. 7(5) confère aux tribunaux le pouvoir discrétionnaire de permettre à *tous* les membres du groupe, qu'il s'agisse de consommateurs ou de clients commerciaux, de présenter ensemble leurs réclamations devant les tribunaux, pourvu qu'il ne soit pas raisonnable de dissocier leurs réclamations. Selon M. Wellman, il en est ainsi en dépit du fait que les clients commerciaux ont convenu par contrat de soumettre leurs réclamations à l'arbitrage et qu'ils sont par ailleurs liés par ce contrat. Les tribunaux d'instances inférieures ont souscrit à l'argument de M. Wellman, sur le fondement de la décision *Griffin c. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, demande d'autorisation de pourvoi refusée, [2010] 1 R.C.S. viii.

[7] TELUS n'est pas du même avis. Selon elle, le par. 7(5) ne confère pas aux tribunaux le pouvoir

stay claims that are subject to an otherwise valid and enforceable arbitration agreement. Rather, it says that the only exceptions to the general stay provision under s. 7(1) are found in s. 7(2), and unless one of those exceptions applies, claims that are subject to arbitration *must* be stayed — full stop. It submits that since none of these exceptions applies, the business customer claims must be stayed.

[8] For reasons that follow, I am of the view that s. 7(5) of the *Arbitration Act* does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement. To borrow the language from this Court's decision in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, it is not "a legislative override of the parties' freedom to choose arbitration" (para. 40). Instead, as I will develop, when the s. 7 framework is considered along with the protections afforded by the *Consumer Protection Act*, it becomes clear that while the consumers remain free to pursue their claims in court, the business customers do not. Rather, they remain bound by the arbitration agreements into which they entered, thereby leaving them exposed to a stay under s. 7(1) of the *Arbitration Act*. The only potential exception to s. 7(1) sought to be invoked on behalf of the business customers in this case, the partial stay provision under s. 7(5), offers no assistance. This is because the sole "matter" at issue in the proceeding — alleged overbilling — is dealt with in the arbitration agreements into which the consumers and business customers entered, such that the first precondition set out in s. 7(5)(a) is not met. Consequently, the general rule under s. 7(1) is left intact insofar as the business customers are concerned.

[9] I would therefore allow the appeal and stay the business customer claims accordingly.

de refuser d'ordonner le sursis des réclamations qui sont visées par une convention d'arbitrage par ailleurs valide et exécutoire. Elle est plutôt d'avis que les seules exceptions possibles à la règle générale relative au sursis prévue au par. 7(1) sont énoncées au par. 7(2) et que, si aucune de ces exceptions ne s'applique, les réclamations qui sont assujetties à l'arbitrage *doivent* être suspendues, point. Toujours selon TELUS, comme ni l'une ni l'autre de ces exceptions ne s'appliquent, le tribunal doit ordonner le sursis des réclamations des clients commerciaux.

[8] Pour les motifs qui suivent, je suis d'avis que le par. 7(5) de la *Loi sur l'arbitrage* ne confère pas aux tribunaux le pouvoir discrétionnaire de refuser d'ordonner le sursis des réclamations qui sont visées par une convention d'arbitrage. Pour reprendre les propos de la Cour dans l'arrêt *Seidel c. TELUS Communications Inc.*, 2011 CSC 15, [2011] 1 R.C.S. 531, il ne s'agit pas d'une « dérogation législative à la liberté des parties de choisir l'arbitrage » (par. 40). Comme je l'expliquerai plus en détail ultérieurement, lorsque l'art. 7 est envisagé conjointement avec les protections conférées par la *Loi sur la protection du consommateur*, il devient évident que si les consommateurs sont libres de présenter leurs réclamations devant les tribunaux, les clients commerciaux ne le sont pas. Ces derniers restent plutôt liés par les conventions d'arbitrage dont ils ont convenu, ce qui les expose au sursis prévu au par. 7(1) de la *Loi sur l'arbitrage*. La seule exception potentielle à cette disposition, qu'on cherche à invoquer au nom des clients commerciaux en l'espèce, soit la disposition relative au sursis partiel prévue au par. 7(5), ne leur est d'aucun secours. Il en est ainsi parce que la seule « question » en litige dans la présente affaire — soit la prétendue surfacturation — est visée par les conventions d'arbitrage qu'ont signées tant les consommateurs que les clients commerciaux, de sorte qu'il n'est pas satisfait à la première condition préalable énoncée à l'al. 7(5)a). La règle générale prévue au par. 7(1) reste donc intacte en ce qui a trait aux clients commerciaux.

[9] Je suis donc d'avis d'accueillir l'appel et d'ordonner le sursis des réclamations des clients commerciaux.

II. Background

A. *TELUS Mobile Phone Service Contracts*

[10] Mobile phone services arrived in Canada in the mid-1980s. For about a decade, the main service providers, including TELUS, billed customers on a per-minute basis. TELUS then started offering per-second billing but returned to per-minute billing in 2002.

[11] Throughout the relevant period, TELUS's monthly plans included a fixed number of minutes for a set fee, with additional charges for excess usage. For example, TELUS offered a plan giving customers 50 minutes of service plus 50 local minutes for $30, with a charge of 30 cents for each additional local minute. Usage was calculated by rounding up call length to the next minute. So, for example, a call lasting one minute and one second was rounded up to two minutes.

[12] Each customer who signed up for a per-minute plan entered into a written contract incorporating TELUS's standard terms and conditions, including an arbitration clause which, broadly speaking, stipulates that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, must be determined by private and confidential mediation and, failing that, private, confidential, and binding arbitration.

B. *Mr. Wellman's Class Action*

[13] In 2006, Mr. Wellman entered into a per-minute plan with TELUS. Years later, he filed a proposed class action in Ontario against TELUS[2] alleging that between 2002 and 2010, TELUS's standard terms

[2] Mr. Wellman in fact sued three defendants — TELUS, TELUS Communications Company, and Tele-Mobile Company — but TELUS is the only remaining defendant, as the other two have ceased to exist and their assets and liabilities have been transferred to TELUS.

II. Le contexte

A. *Les contrats de service de téléphonie cellulaire de TELUS*

[10] Des services de téléphonie cellulaire sont offerts au Canada depuis le milieu des années 1980. Pendant environ une dizaine d'années, les principaux fournisseurs de services, dont TELUS, facturaient les services aux clients à la minute. TELUS a ensuite commencé à facturer à la seconde, mais elle est revenue à la facturation à la minute en 2002.

[11] Tout au long de la période en cause, les plans mensuels de TELUS offraient un nombre fixe de minutes pour un prix donné, et prévoyaient des frais additionnels pour toute utilisation excédentaire. Par exemple, TELUS offrait un plan qui donnait aux clients 50 minutes de service plus 50 minutes d'appels locaux pour 30 $, et des frais de 30 cents s'appliquaient pour chaque minute locale additionnelle. L'utilisation était calculée en arrondissant la durée de chaque appel à la minute suivante. Par exemple, la durée d'un appel d'une minute et une seconde était arrondie à deux minutes.

[12] Tous les clients qui ont souscrit à un plan de service de téléphonie à la minute ont conclu un contrat écrit comprenant les conditions types de TELUS, dont une clause d'arbitrage. Celle-ci prévoit, en gros, que toute réclamation découlant du contrat ou s'y rapportant, sauf en ce qui concerne le recouvrement de créances par TELUS, doit faire l'objet d'une médiation privée et confidentielle ou, à défaut de règlement, d'un arbitrage privé, confidentiel et final.

B. *Le recours collectif introduit par M. Wellman*

[13] En 2006, M. Wellman a souscrit à un plan à la minute avec TELUS. Des années plus tard, il a déposé un recours collectif projeté en Ontario contre TELUS[2], alléguant que, entre 2002 et 2010,

[2] En fait, M. Wellman a nommé trois défenderesses — TELUS, TELUS Communications Company et Tele-Mobile Company — mais TELUS est la seule demanderesse qui reste, car les deux autres ont cessé leurs activités; leurs actifs et leurs passifs ont été transférés à TELUS.

and conditions made no mention of the practice of rounding up. The action consists of some two million Ontario residents who entered into per-minute plans with TELUS between August 2006 and July 2010. Seventy percent of the class members (about 1,400,000) are consumers who purchased plans for personal use, while 30 percent (about 600,000) are non-consumers who purchased plans for business use.

[14] Mr. Wellman, who pleads that he qualifies as a consumer, alleges that TELUS's undisclosed practice of rounding up accelerated the depletion of the fixed number of minutes class members purchased and prematurely subjected them to excess usage charges. Consequently, he says, class members were overcharged and were not provided the number of minutes to which they were entitled. On this basis, he asserts three causes of action: breach of contract, breach of the *Consumer Protection Act*, and unjust enrichment. He claims $500 million in damages and $20 million in punitive damages on behalf of the class.

[15] Mr. Wellman brought a motion to have the action certified as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*").[3] In response, TELUS brought a motion to have the proceeding stayed with respect to the non-consumer claims, relying on the arbitration clause contained in its standard terms and conditions.

III. Statutory Provisions

[16] Two statutes lie at the heart of this appeal: the *Arbitration Act* and the *Consumer Protection*

[3] Another proposed class action, commenced by Jason Corless, advances substantially similar allegations against Bell Mobility Inc., and the certification application in that action was heard together with the application in the TELUS litigation. This appeal does not concern the Bell action.

les conditions types de TELUS ne mentionnaient pas la pratique consistant à arrondir la durée des appels. L'action vise quelque deux millions de résidents ontariens qui ont souscrit à un plan à la minute avec TELUS entre août 2006 et juillet 2010. Soixante-dix pour cent des membres du groupe (soit environ 1 400 000 membres) sont des consommateurs qui ont acheté des plans pour leur usage personnel, et 30 pour 100 des membres (soit environ 600 000 membres) sont des non-consommateurs qui ont acheté des plans pour un usage commercial.

[14] M. Wellman, qui soutient être un consommateur, allègue que la pratique non divulguée de TELUS consistant à arrondir la durée des appels a fait en sorte que les membres du groupe ont épuisé plus rapidement le nombre fixe de minutes qu'ils avaient acheté et que des frais d'utilisation excédentaire leur ont été facturés de façon prématurément. Il affirme que les membres du groupe ont donc fait l'objet d'une surfacturation et n'ont pas reçu le nombre de minutes auquel ils avaient droit. Sur ce fondement, il fait valoir trois causes d'action : la rupture de contrat, la violation de la *Loi sur la protection du consommateur* et l'enrichissement injustifié. Il réclame des dommages-intérêts de 500 millions de dollars et des dommages-intérêts punitifs de 20 millions de dollars au nom du groupe.

[15] M. Wellman a présenté une motion en vue de faire certifier le recours collectif sous le régime de la *Loi de 1992 sur les recours collectifs*, L.O. 1992, c. 6 (« *Loi sur les recours collectifs* »)[3]. En réponse, TELUS a présenté une motion en sursis de l'instance relativement aux réclamations des non-consommateurs, invoquant la clause d'arbitrage énoncée dans les conditions types de ses contrats.

III. Les dispositions législatives applicables

[16] Deux lois sont au cœur du présent appel : la *Loi sur l'arbitrage* et la *Loi sur la protection du*

[3] Des allégations similaires ont été faites contre Bell Mobilité Inc. dans le cadre d'un autre recours collectif projeté, introduit par Jason Corless. La demande de certification dans cette affaire a été entendue en même temps que la demande présentée dans l'affaire TELUS. Le présent pourvoi ne concerne pas l'action contre Bell.

Act. The key sections of these two pieces of legislation are set out below. As it happens, there is some overlap in terms of section numbers, so care must be taken to keep in mind which statute is being discussed when a section number is referred to in these reasons.

Arbitration Act, 1991, S.O. 1991, c. 17

Definitions

1 In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them;

. . .

Court Intervention

Court intervention limited

6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.

2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

3. To prevent unequal or unfair treatment of parties to arbitration agreements.

4. To enforce awards.

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

consommateur. Les articles clés de ces deux textes législatifs sont reproduits ci-après. Il se trouve que les numéros des dispositions en cause sont partiellement les mêmes; lorsque je réfère à un article dans les présents motifs, il importe donc de garder à l'esprit de quelle loi il est question.

Loi de 1991 sur l'arbitrage, L.O. 1991, c. 17

Définitions

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« convention d'arbitrage » Convention par laquelle plusieurs personnes conviennent de soumettre à l'arbitrage un différend survenu ou susceptible de survenir entre elles.

. . .

Intervention du tribunal judiciaire

Intervention limitée du tribunal judiciaire

6 Aucun tribunal judiciaire ne doit intervenir dans les questions régies par la présente loi, sauf dans les cas prévus par celle-ci et pour les objets suivants :

1. Faciliter la conduite des arbitrages.

2. Veiller à ce que les arbitrages soient effectués conformément aux conventions d'arbitrage.

3. Empêcher que des parties aux conventions d'arbitrage soient traitées autrement que sur un pied d'égalité et avec équité.

4. Exécuter les sentences.

Sursis

7 (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

1. Une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique.

2. La convention d'arbitrage est nulle.

3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.

4. La motion a été présentée avec un retard indu.

5. La question est propre à un jugement par défaut ou à un jugement sommaire.

Poursuite de l'arbitrage

(3) L'arbitrage du différend peut être engagé et poursuivi pendant que la motion est devant le tribunal judiciaire.

Conséquences du refus de surseoir

(4) Si le tribunal judiciaire refuse de surseoir à l'instance :

a) d'une part, aucun arbitrage du différend ne peut être engagé;

b) d'autre part, l'arbitrage qui a été engagé ne peut être poursuivi, et tout ce qui a été fait dans le cadre de l'arbitrage avant que le tribunal judiciaire ne rende sa décision est sans effet.

Convention s'appliquant à une partie du différend

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

No appeal

(6) There is no appeal from the court's decision.

Consumer Protection Act, *2002*, S.O. 2002, c. 30, Sch. A

No waiver of substantive and procedural rights

7 (1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

Limitation on effect of term requiring arbitration

(2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

. . .

Non-application of *Arbitration Act, 1991*

(5) Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

Class proceedings

8 (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

Décision sans appel

(6) La décision du tribunal judiciaire n'est pas susceptible d'appel.

Loi de 2002 sur la protection des consommateurs, L.O. 2002, c. 30, ann. A

Aucune renonciation aux droits substantiels et procéduraux

7 (1) Les droits substantiels et procéduraux accordés en application de la présente loi s'appliquent malgré toute convention ou renonciation à l'effet contraire.

Restriction de l'effet d'une condition exigeant l'arbitrage

(2) Sans préjudice de la portée générale du paragraphe (1), est invalide, dans la mesure où elle empêche le consommateur d'exercer son droit d'introduire une action devant la Cour supérieure de justice en vertu de la présente loi, la condition ou la reconnaissance, énoncée dans une convention de consommation ou une convention connexe, qui exige ou a pour effet d'exiger que les différends relatifs à la convention de consommation soient soumis à l'arbitrage.

. . .

Non-application de la *Loi de 1991 sur l'arbitrage*

(5) Le paragraphe 7(1) de la *Loi de 1991 sur l'arbitrage* ne s'applique pas à l'instance visée au paragraphe (2), sauf si, après la naissance du différend, le consommateur consent à le soumettre à l'arbitrage.

Recours collectif

8 (1) Le consommateur peut, en vertu de la *Loi de 1992 sur les recours collectifs*, introduire une instance au nom des membres d'un groupe ou devenir membre d'un groupe dans une telle instance à l'égard d'un différend relatif à une convention de consommation malgré toute condition ou reconnaissance, énoncée dans la convention de consommation ou une convention connexe, qui aurait ou a pour effet de l'empêcher d'introduire un recours collectif ou de devenir membre d'un tel groupe.

IV. Decisions Below

A. *Ontario Superior Court (Conway J.), 2014 ONSC 3318, 63 C.P.C. (7th) 50*

[17] Before the motions judge, Conway J., TELUS conceded that s. 7(2) of the *Consumer Protection Act* shielded the consumers from the effect of the arbitration clause. It maintained, however, that the claims of the business customers, who enjoy no protection under the *Consumer Protection Act*, had to be stayed because they were subject to a valid and binding arbitration agreement.

[18] The motions judge disagreed. Relying on the Ontario Court of Appeal's decision in *Griffin*, she held that s. 7(5) of the *Arbitration Act* grants the courts discretion to refuse a stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, thereby allowing *all* of the matters to proceed in court. She added that pursuant to *Griffin*, "this discretion may be exercised to allow non-consumer claims (that are otherwise subject to an arbitration clause) to participate in a class action, where it is reasonable to do so" (para. 89). She rejected TELUS's contention that *Griffin* had been overruled by this Court's decision in *Seidel*.

[19] She then turned to the application of s. 7(5) of the *Arbitration Act*. She found that it would not be reasonable to separate the consumer claims from the business customer claims, observing that:

- the consumer claims represented 70 percent of all claims;
- the liability and damage issues for both consumers and business customers were the same;

IV. Les décisions des juridictions d'instances inférieures

A. *Cour supérieure de justice de l'Ontario (la juge Conway), 2014 ONSC 3318, 63 C.P.C. (7th) 50*

[17] Devant la juge des motions, à savoir la juge Conway, TELUS a admis que le par. 7(2) de la *Loi sur la protection du consommateur* protégeait les consommateurs contre les effets de la clause d'arbitrage. Elle a toutefois fait valoir qu'il fallait surseoir aux réclamations des clients commerciaux, qui ne bénéficient d'aucune protection sous le régime de la *Loi sur la protection du consommateur*, parce qu'elles étaient visées par une convention d'arbitrage valide et exécutoire.

[18] La juge des motions n'était pas d'accord. Sur le fondement de la décision *Griffin* de la Cour d'appel de l'Ontario, elle a affirmé que le par. 7(5) de la *Loi sur l'arbitrage* confère aux tribunaux le pouvoir discrétionnaire de refuser d'accorder un sursis dans les cas où il ne serait pas raisonnable de dissocier les questions traitées dans la convention d'arbitrage des autres questions, de manière à ce que *toutes* les questions puissent être soumises au tribunal. Elle a ajouté que, suivant la décision *Griffin*, [TRADUCTION] « ce pouvoir discrétionnaire peut être exercé pour que les réclamations des non-consommateurs (qui sont autrement visées par une clause d'arbitrage) puissent être présentées dans le cadre d'un recours collectif, lorsqu'il est raisonnable de le faire » (par. 89). Elle a rejeté la prétention de TELUS selon laquelle la décision *Griffin* aurait été supplantée par l'arrêt *Seidel*, rendu par la Cour.

[19] La juge des motions s'est ensuite penchée sur l'application du par. 7(5) de la *Loi sur l'arbitrage*. Elle a conclu qu'il ne serait pas raisonnable de dissocier les réclamations des consommateurs de celles des clients commerciaux. Elle a souligné que :

- les réclamations des consommateurs représentaient 70 pour 100 de l'ensemble des réclamations;
- les questions de la responsabilité et des dommages étaient les mêmes pour les consommateurs et les clients commerciaux;

- group arbitration was not permitted for the business customer claims; and

- separating the two proceedings could lead to inefficiency, risk inconsistent results, and create a multiplicity of proceedings.

[20] Given her finding that it would not be reasonable to separate the consumer claims from the business customer claims, the motions judge declined to stay the business customer claims. Further, she applied the five-part test for certification and concluded that it had been met, certifying the action accordingly. TELUS appealed her dismissal of the stay application.[4]

B. *Ontario Court of Appeal (Weiler, Blair and van Rensburg JJ.A.), 2017 ONCA 433, 138 O.R. (3d) 413*

(1) Majority Reasons (van Rensburg J.A., Weiler J.A. Concurring)

[21] Justice van Rensburg, writing for herself and Justice Weiler, stated that the "sole issue" on appeal was whether *Griffin* had been overtaken by *Seidel* (para. 97). She answered "no". She considered that *Griffin* was "consistent in principle with *Seidel* but was decided in a different legislative context" (para. 59), adding that "[t]he outcomes in the two cases were driven, not by competing attitudes toward arbitration as a dispute resolution mechanism, but by the specific legislative framework in each jurisdiction respecting arbitration and consumer protection" (para. 60). She reasoned that while *Seidel* recognizes the value and importance of private arbitration and affirms that arbitration clauses will generally be upheld, *Griffin* "does not contradict the general principle that contractual

[4] TELUS also sought leave to appeal the certification order to the Divisional Court. That motion was dismissed (see *Corless v. Bell Mobility Inc.*, 2015 ONSC 7682). The Divisional Court's decision is not challenged in this appeal, nor are the merits of Mr. Wellman's allegations in the underlying class action.

- les réclamations des clients commerciaux ne pouvaient pas être soumises à un arbitrage collectif;

- la dissociation des deux instances pourrait créer de l'inefficacité, mener à des résultats incohérents et entraîner la multiplicité des instances.

[20] Vu sa conclusion selon laquelle il ne serait pas raisonnable de dissocier les réclamations des consommateurs de celles des clients commerciaux, la juge des motions a refusé d'ordonner le sursis des réclamations des clients commerciaux. De plus, elle a appliqué le critère à cinq volets en vue de la certification et a conclu qu'il y était satisfait. Elle a donc certifié le recours. TELUS a interjeté appel de ce rejet de la demande de sursis[4].

B. *Cour d'appel de l'Ontario (les juges Weiler, Blair et van Rensburg), 2017 ONCA 433, 138 O.R. (3d) 413*

(1) Les motifs des juges majoritaires (la juge van Rensburg, avec l'accord de la juge Weiler)

[21] S'exprimant en son nom et en celui de la juge Weiler, la juge van Rensburg a affirmé que la [TRADUCTION] « seule question » en appel était celle de savoir si la décision *Griffin* avait été supplantée par l'arrêt *Seidel* (par. 97). Elle y a répondu par la négative. Selon elle, la décision *Griffin* est « compatible sur le plan des principes avec l'arrêt *Seidel*, mais a été rendue dans un contexte législatif différent » (par. 59). Elle a ajouté que « [l]'issue de ces deux affaires a été dictée non pas par des points de vue divergents à l'égard de l'arbitrage en tant que mécanisme de résolution des différends, mais plutôt par le cadre législatif propre à chaque juridiction en matière d'arbitrage et de protection des consommateurs » (par. 60). Selon la juge van Rensburg, l'arrêt *Seidel* reconnaît bel et bien l'utilité

[4] TELUS a aussi demandé l'autorisation d'interjeter appel de l'ordonnance de certification devant la Cour divisionnaire. Cette motion a été rejetée (voir *Corless c. Bell Mobility Inc.*, 2015 ONSC 7682). La décision rendue par la Cour divisionnaire n'est pas contestée dans le cadre du présent pourvoi — le bien-fondé des allégations de M. Wellman dans le recours collectif sous-jacent ne l'est pas non plus.

arbitration clauses presumptively will be enforced" (para. 62).

[22] Having determined that *Griffin* remained good law, she described the s. 7 regime as follows:

> While s. 7(1) of Ontario's *Arbitration Act* provides that a court "shall" stay a court proceeding commenced by a party to an arbitration agreement on the motion of another party to the agreement, this is subject to the exceptions set out in s. 7(2). The exceptions confer a discretion on the court to intervene (1) where a party entered into the agreement while under a legal incapacity, (2) where the arbitration agreement is invalid, (3) where the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law, (4) where the motion was brought with undue delay and (5) where the matter is a proper one for default or summary judgment . . . .
>
> Section 7(5) of the *Arbitration Act* is an extension of the court's discretion and operates where an action has been commenced and the arbitration agreement covers some, but not all, claims. In such a case, the court may grant a partial stay, but only where it is "reasonable to separate the matters dealt with in the agreement from the other matters". Section 7(5) anticipates that when an action contains claims that are subject to an arbitration agreement and claims that are not, bifurcated proceedings will result when it is reasonable to impose a partial stay. When a partial stay is not reasonable, the proceedings will not be bifurcated.
>
> In Ontario, accordingly, courts have the discretion to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration. It is this legislative choice that drives the analysis. [paras. 71-73]

[23] She went on to consider two further arguments advanced by TELUS. First, relying on this Court's decision in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, TELUS maintained

et l'importance de l'arbitrage privé et confirme que les clauses d'arbitrage sont généralement maintenues, mais la décision *Griffin* « ne contredit pas le principe général selon lequel il faut présumer que les clauses d'arbitrage contractuelles seront appliquées » (par. 62).

[22] Ayant jugé que la décision *Griffin* demeurait un précédent valable, la juge van Rensburg a décrit ainsi le régime prescrit par l'art. 7 :

> [TRADUCTION] Bien que le paragraphe 7(1) de la *Loi sur l'arbitrage* de l'Ontario prévoie qu'un tribunal « doit » surseoir à l'instance introduite par une partie à une convention d'arbitrage, sur la motion d'une autre partie à la convention, cette règle est assujettie aux exceptions énoncées au par. 7(2). Ces exceptions confèrent au tribunal le pouvoir discrétionnaire d'intervenir dans les cas où : (1) une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique, (2) la convention d'arbitrage est nulle, (3) l'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario, (4) la motion a été présentée avec un retard indu, et (5) la question est propre à un jugement par défaut ou à un jugement sommaire . . .
>
> Le paragraphe 7(5) de la *Loi sur l'arbitrage* élargit le pouvoir discrétionnaire du tribunal. Il s'applique lorsqu'une action a été introduite et que la convention d'arbitrage ne traite que de certaines des réclamations. Dans ce cas, le tribunal peut accorder un sursis partiel, mais seulement s'il est « raisonnable de dissocier les questions traitées dans la convention des autres questions ». Le paragraphe 7(5) prévoit que lorsqu'une action concerne des réclamations visées par une convention d'arbitrage et des réclamations qui ne le sont pas, l'instance est scindée s'il est raisonnable d'accorder un sursis partiel et vice versa.
>
> Par conséquent, en Ontario, les tribunaux ont le pouvoir discrétionnaire de refuser d'appliquer une clause d'arbitrage qui vise certaines des réclamations à l'égard desquelles l'action a été introduite lorsque certaines autres réclamations ne sont pas soumises à un arbitrage interne. C'est ce choix législatif qui dicte l'analyse. [par. 71-73]

[23] La juge van Rensburg a ensuite examiné deux autres arguments avancés par TELUS. Premièrement, en s'appuyant sur l'arrêt de la Cour dans *Bisaillon c. Université Concordia*, 2006 CSC 19, [2006] 1 R.C.S.

that the procedural device of a class action proceeding does not alter the parties' substantive right to choose arbitration. Second, TELUS claimed that s. 7(5) cannot be read as conferring jurisdiction over claims that the parties have agreed to submit to arbitration and that such claims are subject to the mandatory stay under s. 7(1).

[24] Justice van Rensburg rejected both of these arguments. She stated that TELUS had misinterpreted *Seidel* and ignored its main teaching: ". . . the enforceability of an arbitration clause depends on the legislative context and whether the legislature intended to limit the freedom to arbitrate" (para. 81). She added that *Seidel* did not characterize the issue as one of jurisdiction, nor did it speak in terms of procedural versus substantive rights. Instead, the issue was one of statutory interpretation. She also saw nothing in the *Arbitration Act* suggesting that an arbitration clause removes or ousts the court's jurisdiction over a dispute, adding that "injecting the question of jurisdiction into the discussion of whether a partial stay of proceedings can be granted under Ontario's *Arbitration Act* is both unnecessary and misleading" (para. 86).

[25] In the result, the Court of Appeal dismissed the appeal and upheld the motions judge's decision to refuse a stay.

(2) Concurring Reasons (Blair J.A.)

[26] In brief concurring reasons, Blair J.A. agreed in the result but arrived at this outcome "on a more restricted basis" (para. 100). He agreed that *Griffin* had not been overtaken by *Seidel* and that *Griffin* was dispositive of the issue before the court. However, he expressed "reservations about the correctness of the decision in *Griffin* as it relates to a partial stay of the non-consumer claims" (para. 101). In particular, he raised two questions which he said were not

666, TELUS a soutenu que le mécanisme procédural du recours collectif ne modifie pas le droit substantiel des parties de choisir d'avoir recours à l'arbitrage. Deuxièmement, elle a fait valoir que le par. 7(5) ne doit pas être interprété comme attribuant aux tribunaux la compétence de statuer sur des réclamations que les parties ont convenu de soumettre à l'arbitrage et que ces réclamations sont donc visées par le sursis obligatoire prévu au par. 7(1).

[24] La juge van Rensburg a rejeté ces deux arguments. À son avis, TELUS avait mal interprété l'arrêt *Seidel* et n'avait pas tenu compte du principe le plus important qui découle de cet arrêt, soit que : [TRADUCTION] « . . . l'applicabilité d'une clause d'arbitrage dépend du contexte législatif et de la question de savoir si le législateur avait eu l'intention de limiter la liberté des parties d'avoir recours à l'arbitrage » (par. 81). Elle a ajouté que l'arrêt *Seidel* ne qualifie pas le sujet de question de compétence et qu'il ne parle pas non plus de droits procéduraux ou substantiels qu'il faudrait traiter distinctement. Selon elle, cet arrêt porte plutôt sur une question d'interprétation législative. La juge van Rensburg a par ailleurs ajouté que rien dans la *Loi sur l'arbitrage* ne donne à penser qu'une clause d'arbitrage retire ou écarte la compétence du tribunal à l'égard d'un différend, ajoutant que « l'introduction de la notion de compétence dans l'analyse de la question de savoir si un sursis partiel peut être accordé en application de la *Loi sur l'arbitrage* de l'Ontario est inutile et trompeuse » (par. 86).

[25] En conséquence, la Cour d'appel a rejeté l'appel et confirmé la décision de la juge des motions de refuser de surseoir à l'instance.

(2) Les motifs concordants (le juge Blair)

[26] Dans ses brefs motifs concordants, le juge Blair est parvenu au même résultat, mais [TRADUCTION] « de façon plus restrictive » (par. 100). Il a convenu que la décision *Griffin* n'avait pas été supplantée par l'arrêt *Seidel* et qu'elle était déterminante en ce qui concerne la question en litige dont la cour était saisie. Cependant, il a indiqué avoir des « réserves quant à la justesse de la décision *Griffin* en ce qui a trait au sursis partiel des réclamations

addressed in *Griffin* but which "may warrant further consideration" (para. 103).

[27] First, he asked, "as a matter of statutory interpretation, may the words 'other matters' in s. 7(5) of the *Arbitration Act, 1991* — when considered in the context of s. 7 as a whole and the purposes of that Act — be read in a way that cross-pollinates the partial-refusal-to-stay power from a single arbitration agreement context to other arbitration agreements involving different parties and containing arbitration clauses that are otherwise valid and enforceable? Or do 'other matters' refer to other matters arising between the same contracting parties but that are not covered by the arbitration agreement between them?" (para. 104). He observed that s. 7 of the *Arbitration Act* "appears to address circumstances relating to a single arbitration agreement, and not the interconnection between a number of such agreements involving different parties" (para. 104).

[28] Second, he asked, "more generally, ought litigants be entitled to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed, by virtue of the *Consumer Protection Act*), to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding? Put another way, may the *Class Proceedings Act* (a procedural rights statute) be used to override the provisions of the *Arbitration Act, 1991* affording contractual parties the right to agree to binding arbitration (a substantive right)?" (para. 105).

présentées par les non-consommateurs » (par. 101). Il a traité plus particulièrement de deux questions qui, selon lui, n'ont pas été abordées dans la décision *Griffin*, mais qui « mériteraient peut-être qu'on s'y attarde davantage » (par. 103).

[27] Il a d'abord posé la question suivante : [TRADUCTION] « compte tenu des principes d'interprétation législative, l'expression "autres questions" employée au par. 7(5) de la *Loi de 1991 sur l'arbitrage* — dans le contexte de l'art. 7 dans son ensemble et de l'objet de la Loi — peut-elle être interprétée comme signifiant que le pouvoir d'accorder un sursis partiel dans le contexte d'une convention d'arbitrage s'applique aussi dans le contexte d'autres conventions d'arbitrage conclues par des parties différentes et contenant des clauses d'arbitrage par ailleurs valides et exécutoires, ou renvoie-t-elle plutôt à d'autres questions visant les mêmes parties contractantes, mais non traitées dans la convention d'arbitrage conclue par elles? » (par. 104). À son avis, l'art. 7 de la *Loi sur l'arbitrage* « semble traiter de circonstances se rapportant à une convention d'arbitrage particulière et non de liens entre différentes conventions conclues par des parties différentes » (par. 104).

[28] Le juge Blair a aussi posé la question suivante : [TRADUCTION] « de façon plus générale, les parties à un litige devraient-elles avoir le droit de contourner les obstacles par ailleurs substantiels et législatifs liés à la présentation devant le tribunal d'une réclamation devant être soumise à l'arbitrage en ajoutant tout simplement les réclamations de consommateurs (qui ne peuvent faire l'objet d'un sursis, en application de la *Loi sur la protection du consommateur*) aux réclamations des non-consommateurs (qui font généralement l'objet d'un sursis obligatoire) et en regroupant toutes les réclamations dans un seul recours collectif? Autrement dit, la *Loi sur les recours collectifs* (une loi portant sur un droit procédural) peut-elle être invoquée pour déroger aux dispositions de la *Loi de 1991 sur l'arbitrage* qui accordent aux parties contractantes le droit de convenir du recours à l'arbitrage exécutoire (un droit substantiel)? » (par. 105).

V. Issue

[29] In the context of a proposed consumer/non-consumer class action where only the non-consumer claims are subject to an otherwise valid and binding arbitration agreement, does s. 7(5) of the *Arbitration Act* grant the court discretion to refuse to stay the non-consumer claims?

VI. Analysis

A. *Standard of Review*

[30] The issue on appeal is one of statutory interpretation and is therefore properly characterized as a question of law (see *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33). As such, the standard of review is correctness (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

B. *Key Precedents*

[31] The two main jurisprudential pillars on which the parties' arguments rest are *Griffin* and *Seidel*. The relationship between these two decisions was at the heart of the courts' decisions below. Accordingly, as a preliminary matter, it will be useful to provide a brief overview of these two key decisions.

(1) *Griffin*

[32] *Griffin* involved a proposed class action brought in Ontario on behalf of purchasers — both consumers and non-consumers[5] — of allegedly defective Dell computers. Dell's standard form agreement contained a mandatory arbitration clause. The plaintiff brought a motion to certify the action as a class proceeding, to which Dell responded with a

[5] The representative plaintiff who qualified as a "consumer" was added only after certification was granted (see *Griffin*, at para. 2).

V. La question en litige

[29] Dans le contexte d'un recours collectif projeté mettant en jeu des consommateurs et des non-consommateurs, lorsque seules les réclamations présentées par les non-consommateurs sont visées par une convention d'arbitrage par ailleurs valide et exécutoire, le par. 7(5) de la *Loi sur l'arbitrage* confère-t-il au tribunal le pouvoir discrétionnaire de refuser d'accorder un sursis à l'égard des réclamations de ces derniers?

VI. Analyse

A. *La norme de contrôle*

[30] La question en appel est une question d'interprétation législative et est par conséquent proprement qualifiée de question de droit (voir *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135, par. 33). Ainsi, la norme de contrôle applicable est celle de la décision correcte (voir *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 8).

B. *Les précédents clés*

[31] Les deux piliers jurisprudentiels sur lesquels reposent les arguments des parties sont la décision *Griffin* et l'arrêt *Seidel*. Le lien entre ces deux jugements a été au cœur des décisions rendues par les tribunaux d'instances inférieures. Il est donc utile, à titre préliminaire, de donner un aperçu de ces deux décisions clés.

(1) La décision *Griffin*

[32] L'affaire *Griffin* portait sur un recours collectif projeté intenté en Ontario au nom d'acheteurs — consommateurs et non-consommateurs[5] — ayant acheté des ordinateurs Dell qui auraient été défectueux. Le contrat d'adhésion type de Dell contenait une clause d'arbitrage obligatoire. Le demandeur a présenté une motion en vue de faire certifier le

[5] Le représentant demandeur, qui était un « consommateur », avait été ajouté seulement après que l'instance a été certifiée (voir *Griffin*, par. 2).

motion for a stay under s. 7 of the *Arbitration Act*. The motions judge refused Dell's request for a stay and granted certification. Dell appealed.

[33] Justice Sharpe, writing for a unanimous five-member panel, dismissed the appeal. First, he held that s. 7(2) of the *Consumer Protection Act* applied such that the arbitration clause did not bar the consumer claims from proceeding in court. He then considered whether a stay of the non-consumer claims should be granted. He set out the general approach to the enforceability of arbitration agreements as follows:

> Contracting parties often specify that any disputes arising from their relationship are to be arbitrated rather than litigated in the courts. When they do, they are ordinarily entitled to have their chosen method of dispute resolution respected by the courts. The modern approach, reflected by [*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801], is to require parties to adhere to their choice and to view arbitration as an autonomous, self-contained and self-sufficient process, presumptively immune from judicial intervention: [*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161], at para. 14. [para. 28]

[34] Turning to the relevant statutory provisions, Sharpe J.A. interpreted s. 7(5) of the *Arbitration Act* as "confer[ring] a discretion to grant a partial stay where an action involves some claims that are subject to an arbitration and some claims that are not" (para. 45). He stated that such an order may be made where it would be reasonable to separate the matters dealt with in the arbitration agreement from the other matters. He also referred to a line of cases in which courts refused a stay and allowed the action to proceed on the basis that only some of the litigants were bound by an arbitration clause and the claims were so closely related that it would be unreasonable to separate them (see *Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (S.C.J.), aff'd 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79; *Penn-Co Construction Canada (2003) Ltd. v.*

recours collectif. En réponse, Dell a présenté une motion en sursis en application de l'art. 7 de la *Loi sur l'arbitrage*. La juge des motions a rejeté la demande de sursis et certifié l'action comme recours collectif. Dell a interjeté appel.

[33] S'exprimant au nom d'une formation de cinq juges unanimes, le juge Sharpe a rejeté l'appel. Il a tout d'abord statué que le par. 7(2) de la *Loi sur la protection du consommateur* s'appliquait, de sorte que la clause d'arbitrage n'empêchait pas que les réclamations des consommateurs soient portées devant le tribunal. Il s'est ensuite demandé s'il convenait d'ordonner le sursis des réclamations des non-consommateurs et énoncé comme suit l'approche générale relative au caractère exécutoire des conventions d'arbitrage :

> [TRADUCTION] Les parties contractantes précisent souvent que tout différend qui pourrait découler de leur relation doit être soumis à un arbitrage, plutôt qu'à un examen par les tribunaux. Dans ce cas, elles ont normalement droit à ce que les tribunaux respectent le mode de règlement des différends qu'elles ont choisi. L'approche moderne, énoncée dans [*Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34, [2007] 2 R.C.S. 801], consiste à exiger que les parties respectent leur choix et à considérer l'arbitrage comme un processus autonome, qu'il faut présumer à l'abri du contrôle judiciaire : [*Inforica Inc. c. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161], par. 14. [par. 28]

[34] Le juge Sharpe a par ailleurs interprété le par. 7(5) de la *Loi sur l'arbitrage* comme [TRADUCTION] « conférant aux tribunaux le pouvoir discrétionnaire d'accorder un sursis partiel lorsqu'une action porte sur des réclamations qui doivent être soumises à l'arbitrage et des réclamations qui n'ont pas à l'être » (par. 45). Il a affirmé qu'une ordonnance peut être rendue en ce sens lorsqu'il est raisonnable de dissocier les questions traitées dans la convention d'arbitrage des autres questions. Il a également mentionné une série de décisions dans lesquelles les tribunaux ont refusé d'accorder un sursis et autorisé que l'action se poursuive, parce que seules certaines parties au litige étaient liées par une clause d'arbitrage et parce que les réclamations étaient à ce point semblables qu'il n'aurait pas été raisonnable de les dissocier (voir

Constance Lake First Nation (2007), 66 C.L.R. (3d) 78 (S.C.J.), aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364 (Ont. S.C.J.); *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184 (involving a provision in the corresponding Alberta legislation that is equivalent to s. 7(5) of the *Arbitration Act*)).

[35] On the facts, he concluded that it would not be reasonable to separate the consumer claims from the non-consumer claims, noting (among other things) that: (1) 70 percent of the claims were consumer claims and would be litigated in the class proceeding; (2) the liability and damages issues were the same for consumers and non-consumers; and (3) group arbitration was not permitted, so the non-consumer claims would have to be arbitrated on an individual basis. He considered that granting a stay would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. He also stressed that it was clear on the record that staying any claims would not result in those claims being arbitrated because, as the motions judge put it, it was "fanciful to think that any claimant could pursue an individual claim in a complex products liability case" (para. 1, citing *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.), at para. 92). Thus, he stated, "[t]he choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective goods sold to non-consumers and giving those purchasers the same day in court afforded to consumers by way of the class proceeding" (para. 57).

Radewych c. Brookfield Homes (Ontario) Ltd., 2007 CanLII 23358 (C.S.J.), conf. par 2007 ONCA 721; *Johnston c. Goudie* (2006), 212 O.A.C. 79; *Penn-Co Construction Canada (2003) Ltd. c. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78 (C.S.J.), conf. par 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. c. Romandale Farms Ltd.*, 2007 CanLII 55364 (C.S.J. Ont.); *New Era Nutrition Inc. c. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184 (qui portait sur la disposition équivalente de la loi albertaine au par. 7(5) de la *Loi sur l'arbitrage*)).

[35] Compte tenu des faits, le juge Sharpe a conclu qu'il ne serait pas raisonnable de dissocier les réclamations des consommateurs de celles des non-consommateurs. Il a fait remarquer (entre autres) que : (1) 70 pour 100 des réclamations avaient été présentées par des consommateurs et seraient examinées dans le cadre du recours collectif; (2) les questions de la responsabilité et des dommages étaient les mêmes pour les consommateurs que pour les non-consommateurs; et (3) l'arbitrage collectif n'était pas permis, de sorte que les réclamations des non-consommateurs devaient être soumises à l'arbitrage de façon individuelle. Il était d'avis que l'octroi d'un sursis créerait de l'inefficacité, pourrait entraîner la multiplicité des instances et accroîtrait les coûts et les retards. À son avis, le dossier illustrait aussi clairement que le fait de surseoir aux réclamations ne signifiait pas que celles-ci seraient soumises à l'arbitrage, puisque, comme l'avait précisé la juge des motions, il était [TRADUCTION] « illusoire de penser qu'un demandeur pourrait présenter une réclamation individuelle dans une affaire complexe de responsabilité du fabricant » (par. 1, citant *Griffin c. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (C.S.J. Ont.), par. 92). Le juge Sharpe a donc affirmé que [TRADUCTION] « [l]e choix qui s'offre à nous n'est pas un choix entre l'arbitrage et le recours collectif. En réalité, il s'agit d'un choix entre exonérer Dell de toute responsabilité à l'égard des produits défectueux vendus à des non-consommateurs ou accorder à ces acheteurs la même possibilité qu'aux consommateurs de se faire entendre devant le tribunal par la voie d'un recours collectif » (par. 57).

[36] In the result, the Court of Appeal dismissed the appeal. This Court denied Dell's application for leave to appeal.

(2) *Seidel*

[37] *Seidel*, which came not long after *Griffin*, involved a proposed class action filed in British Columbia against TELUS. As in the present case, the dispute arose out of mobile phone service contracts containing an arbitration clause. The representative plaintiff, a consumer, asserted a variety of claims, including (but not limited to) statutory causes of action under the B.C. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), alleging that TELUS falsely represented to her and other consumers how it calculates air time for billing purposes. Section 172 of the *BPCPA* contains a remedy whereby a person other than a supplier may bring an action to enforce the statute's consumer protection standards, while s. 3 stipulates that any agreement between the parties that would waive or release the protections afforded by the *BPCPA* is void.

[38] The plaintiff brought an application to have the action certified as a class proceeding. In response, TELUS applied for a stay, relying on the arbitration clause and s. 15 of the B.C. *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*), which provides that if a party to an arbitration agreement commences proceedings against another party to the agreement in respect of a matter to be submitted to arbitration, then a party to the proceeding may apply for a stay, and the court must grant that stay unless the agreement is void, inoperative, or incapable of being performed.

[39] The application judge denied TELUS's application for a stay, holding that it would be premature to determine whether the action should be stayed before dealing with the certification application. The B.C. Court of Appeal allowed TELUS's

[36] Par conséquent, la Cour d'appel a rejeté l'appel. Notre Cour a ensuite rejeté la demande d'autorisation de pourvoi présentée par Dell.

(2) L'arrêt *Seidel*

[37] L'arrêt *Seidel*, qui a été rendu peu de temps après la décision *Griffin*, portait sur un recours collectif projeté déposé en Colombie-Britannique contre TELUS. Comme en l'espèce, le différend découlait de contrats de service de téléphonie cellulaire contenant une clause d'arbitrage. La demanderesse-représentante, une consommatrice, a invoqué diverses causes d'action, notamment un recours prévu par la *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, de la Colombie-Britannique (« *BPCPA* »), prétendant que TELUS lui avait faussement indiqué, ainsi qu'à d'autres consommateurs, la façon dont elle calculait le temps d'antenne à des fins de facturation. L'article 172 de la *BPCPA* prévoit un recours suivant lequel une personne autre qu'un fournisseur peut intenter une action en vue de faire respecter les normes relatives à la protection des consommateurs prévues par la loi. L'article 3 consacre par ailleurs la nullité de toute entente entre les parties qui comporte une renonciation aux protections prévues par la *BPCPA*.

[38] La demanderesse a présenté une demande en vue de faire certifier l'action comme recours collectif. En réponse, TELUS a cherché à obtenir le sursis de l'instance, en invoquant la clause d'arbitrage, mais aussi l'art. 15 de la *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, de la Colombie-Britannique (aujourd'hui intitulée *Arbitration Act*), qui prévoit que si une partie à une convention d'arbitrage intente contre une autre partie à la convention une action relative à une question qui devait être soumise à l'arbitrage, une partie à l'instance peut demander le sursis de cette dernière, et le tribunal doit accueillir cette demande à moins que la convention d'arbitrage soit nulle, inopérante ou non susceptible d'être exécutée.

[39] Le juge des motions a rejeté la demande de sursis de TELUS. Selon lui, il était prématuré de décider s'il fallait surseoir à l'action tant qu'il n'avait pas été statué sur la demande de certification. La Cour d'appel de la Colombie-Britannique a accueilli

appeal, staying the action in its entirety. The plaintiff appealed.

[40] Justice Binnie, writing for a five-justice majority, allowed the appeal in part and lifted the stay in relation to the plaintiff's claims under s. 172 of the *BPCPA*. At the outset of his reasons, he described the proper approach to determining the validity and enforceability of arbitration clauses contained in commercial contracts:

> The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause. The important question raised by this appeal, however, is whether the *BPCPA* manifests a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to "private and confidential" mediation/arbitration and, if so, under what circumstances.
>
> . . . Respectfully, I believe the Court's job is neither to promote nor detract from private and confidential arbitration. The Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes. [paras. 2-3]

[41] Justice Binnie acknowledged that "[t]he virtues of commercial arbitration have been recognized and indeed welcomed by our Court" (para. 23, citing *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *Bisaillon*; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178). He noted, however, that from the perspective of the *BPCPA*, private, confidential, and binding arbitration would "almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct" (para. 24), and several provincial legislatures had intervened by placing limitations on arbitration clauses contained in consumer contracts.

l'appel de TELUS et ordonné le sursis de l'action dans sa totalité. La demanderesse a interjeté appel.

[40] Le juge Binnie, s'exprimant au nom des cinq juges majoritaires, a accueilli le pourvoi en partie et levé le sursis relativement aux réclamations de la demanderesse fondées sur l'art. 172 de la *BPCPA*. Au début de ses motifs, le juge Binnie a décrit l'approche qu'il convient d'appliquer pour juger de la validité et du caractère exécutoire des clauses d'arbitrage figurant dans les contrats commerciaux :

> La décision de restreindre ou non les clauses d'arbitrage dans les contrats de consommation revient à la législature. En l'absence d'intervention de la législature, les tribunaux donnent généralement effet aux clauses d'un contrat commercial librement conclu dans lequel figure une clause d'arbitrage, et ce, même s'il s'agit d'un contrat d'adhésion. Le présent pourvoi soulève la question importante de savoir si la législature a exprimé, dans la *BPCPA*, la volonté d'intervenir dans les rapports commerciaux pour libérer les consommateurs de leur engagement contractuel de soumettre leur éventuel litige à une médiation ou à un arbitrage « priv[é] et confidenti[el] » et, si oui, dans quelles circonstances.
>
> . . . Avec égards, j'estime qu'il ne revient pas à la Cour de promouvoir ou de critiquer l'arbitrage privé et confidentiel; il revient à la Cour de donner effet à l'intention exprimée par la législature dans les dispositions de ses lois. [par. 2-3]

[41] Le juge Binnie a reconnu que « [l]es avantages de l'arbitrage commercial ont été reconnus et accueillis favorablement par notre Cour » (par. 23, citant *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34, [2007] 2 R.C.S. 801; *Rogers Sans-fil inc. c. Muroff*, 2007 CSC 35, [2007] 2 R.C.S. 921; *Bisaillon*; *GreCon Dimter inc. c. J.R. Normand inc.*, 2005 CSC 46, [2005] 2 R.C.S. 401; *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 CSC 17, [2003] 1 R.C.S. 178). Il a toutefois fait remarquer que, du point de vue de la *BPCPA*, « il ne fait guère de doute que » l'arbitrage privé, confidentiel et final « freinera au lieu de favoriser la publicité à grande échelle visant les pratiques de commerce trompeuses ou abusives (et, par conséquent, la prévention de celles-ci) » (par. 24). Il a ajouté que plusieurs provinces sont intervenues en assujettissant les clauses d'arbitrage

Accordingly, he stated, the substantive question on appeal was "whether, as a matter of statutory interpretation, s. 172 of the *BPCPA* contains such a limitation and, if so, its extent and effect on Ms. Seidel's action" (para. 26).

[42] After performing a textual, contextual, and purposive interpretation of s. 172 of the *BPCPA*, Binnie J. concluded that the provision "constitutes a legislative override of the parties' freedom to choose arbitration" (para. 40), emphasizing that it "stands out as a public interest remedy" (para. 36). He observed, however, that this "legislative override" was incomplete — unlike in certain other provinces, "the B.C. legislature sought to ensure only that certain claims proceed to the court system, leaving others to be resolved according to the agreement of the parties" (para. 40). He stressed that it was "incumbent on the courts to give effect to that legislative choice" (para. 40).

[43] He further clarified that this result was not inconsistent with *Dell* and *Rogers*, where the Court denied an attempt by consumers in Quebec to pursue class actions arising out of product supply contracts in the face of arbitration clauses. In those cases, he said, "[t]he outcome turned on the terms of the Quebec legislation" (para. 41); the B.C. legislation was different and supported a different result. In this regard, he stated that "the relevant teaching of *Dell* and *Rogers Wireless* is simply that whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. *Dell* and *Rogers Wireless* stand . . . for the enforcement of arbitration clauses *absent legislative language to the contrary*" (para. 42 (emphasis in original)).

[44] In the result, the majority allowed the appeal in part, permitting the plaintiff to pursue her claims under s. 172 of the *BPCPA* but upholding the stay of her other claims pursuant to s. 15 of the *Commercial*

figurant dans les contrats de consommation à des restrictions. Ainsi, comme le juge Binnie l'a indiqué, la question de fond dans cet appel consistait à savoir « si, selon les règles d'interprétation législative, l'art. 172 de la *BPCPA* contient une restriction de cette nature et, dans l'affirmative, quelle en est la portée et l'effet sur l'action de M^me^ Seidel » (par. 26).

[42] Après avoir interprété l'art. 172 de la *BPCPA* de manière textuelle, contextuelle et téléologique, le juge Binnie a conclu que cette disposition « constitue une dérogation législative à la liberté des parties de choisir l'arbitrage » (par. 40), et il a précisé qu'il s'agit d'une « mesure d'intérêt public » (par. 36). Il a toutefois fait remarquer que cette « dérogation législative » était incomplète. En effet, contrairement à ceux d'autres provinces, « le législateur de la C.-B. a choisi de faire en sorte que seuls certains types de réclamations soient réservés aux tribunaux, et de laisser les parties s'entendre sur la manière de régler les autres » (par. 40). Il a souligné que « les tribunaux sont tenus de donner effet à ce choix législatif » (par. 40).

[43] Le juge Binnie a précisé que ce résultat n'était pas incompatible avec les arrêts *Dell* et *Rogers*, où la Cour avait rejeté, en raison de clauses d'arbitrage, la tentative de certains consommateurs d'engager des recours collectifs au Québec dans des litiges relatifs à des contrats de fourniture de produits. Il a expliqué que « [l]'issue de ces arrêts se fonde sur la législation québécoise » (par. 41); or, celle de la Colombie-Britannique était différente et justifiait un résultat différent. À son avis il « [fallait] simplement retenir de *Dell* et de *Rogers Sans-fil* que, pour déterminer si et dans quelle mesure la liberté des parties de soumettre un litige à l'arbitrage est restreinte par la loi, il faut procéder à un examen attentif de la loi de l'instance où les consommateurs mécontents ont intenté leur action. *Dell* et *Rogers Sans-fil* posent le principe [. . .] selon lequel il y a lieu d'appliquer la clause d'arbitrage *en l'absence de disposition contraire de la loi* » (par. 42 (en italique dans l'original)).

[44] En définitive, les juges majoritaires ont accueilli l'appel en partie et permis à la demanderesse de poursuivre l'instance en ce qui concerne ses réclamations fondées sur l'art. 172 de la *BPCPA*. Ils

Arbitration Act. While Binnie J. recognized that this could lead to bifurcated proceedings in the event the claims falling outside the scope of s. 172 proceed to arbitration, he noted that "[s]uch an outcome . . . is consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 as narrowly as it did" (para. 50).

[45] Justices LeBel and Deschamps, writing on behalf of four dissenting justices, were not persuaded that s. 172 of the *BPCPA* constituted a legislative override of the parties' freedom to choose arbitration (para. 161).

[46] The central theme emerging from *Seidel*, consistent with its predecessors *Dell* and *Rogers*, is that arbitration clauses, even those contained in adhesion contracts (at para. 2), will generally be enforced "absent legislative language to the contrary" (para. 42 (emphasis deleted)). Accordingly, this Court's task is to apply the relevant principles of statutory interpretation and determine whether s. 7(5) of the *Arbitration Act*, which has no equivalent in the B.C. legislation at issue in *Seidel*, contains language overriding the principle that arbitration clauses will generally be enforced.

C. *Interpretation of Section 7 of the Arbitration Act*

[47] The proper interpretation of s. 7 of the *Arbitration Act* falls to be determined by applying the modern approach to statutory interpretation: ". . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26). To be clear, while my colleagues Abella and Karakatsanis JJ. maintain that the following analysis "represents the return of textualism" (para. 109), I respectfully disagree. Rather, the approach set out below starts with the

ont toutefois confirmé le sursis en ce qui concerne ses autres réclamations fondées sur l'art. 15 de la *Commercial Arbitration Act*. Le juge Binnie a reconnu que, certes, ce dispositif pourrait donner lieu à des recours parallèles si les réclamations non fondées sur l'art. 172 étaient soumises à l'arbitrage. Il a toutefois fait remarquer qu'une « telle issue s'accorde avec le choix du législateur de la Colombie-Britannique d'assortir l'art. 172 de limites aussi étroites » (par. 50).

[45] Les juges LeBel et Deschamps, s'exprimant au nom des quatre juges dissidents, n'étaient pas convaincus que l'art. 172 de la *BPCPA* constituait une dérogation législative à la liberté des parties de choisir l'arbitrage (par. 161).

[46] Ce qui ressort de l'arrêt *Seidel*, comme des arrêts *Dell* et *Rogers* qui l'ont précédé, c'est que les clauses d'arbitrage, même celles qui figurent dans un contrat d'adhésion (par. 2), sont généralement appliquées « en l'absence de disposition contraire de la loi » (par. 42 (italique omis)). La Cour a donc pour tâche d'appliquer les principes d'interprétation législative pertinents et de décider si le libellé du par. 7(5) de la *Loi sur l'arbitrage*, qui n'a pas d'équivalent dans la loi de la Colombie-Britannique en jeu dans l'arrêt *Seidel*, permet de déroger au principe selon lequel les clauses d'arbitrage sont généralement appliquées.

C. *L'interprétation de l'art. 7 de la Loi sur l'arbitrage*

[47] Pour interpréter l'art. 7 de la *Loi sur l'arbitrage* correctement, il faut appliquer la méthode moderne d'interprétation législative, soit en : « . . . lire les termes [. . .] dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du législateur » (E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26). Je précise que je m'inscris en faux contre le point de vue de mes collègues les juges Abella et Karakatsanis selon lesquelles l'analyse qui suit « représente en réalité le retour du textualisme » (par. 109). L'approche décrite plus loin préconise de

purpose and scheme of the *Arbitration Act* and reads the text of s. 7 in light of its full context, in a way that is both conscious of and consistent with the policy choices made by the legislature in the *Arbitration Act* itself and in other relevant statutes such as the *Consumer Protection Act* and the *Class Proceedings Act*. This is no "return to textualism"; instead, it is a careful reading of the statute, considered in its full context. With that in mind, I turn to the purpose and scheme of the Act.

(1) Purpose and Scheme of the *Arbitration Act*

[48] Throughout the better part of the 20th century, Canadian courts displayed "overt hostility" to arbitration, treating it as a "second-class method of dispute resolution" (*Seidel*, at para. 89, per LeBel and Deschamps JJ., dissenting (but not on this point)). Courts guarded their jurisdiction jealously and "did not look with favour upon efforts of the parties to oust it by agreement" (*Seidel*, at para. 93, citing *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300 (Ont. H.C.J.), at p. 304). The prevailing view was that only the courts were capable of granting remedies for legal disputes and that, as a result, any agreement by the parties to oust the courts' jurisdiction was contrary to public policy, regardless of the nature of the substantive legal issues (see *Seidel*, at para. 96). This judicial hostility, coupled with a lack of modern legislation supporting arbitration, inhibited the growth of arbitration in Canada (see *Seidel*, at para. 89, citing J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at pp. 2-3).

[49] It was against this backdrop that, in 1991, the Ontario legislature enacted the *Arbitration Act*, which was based on the *Uniform Arbitration Act* adopted by the Uniform Law Conference of Canada a year earlier (online) (see J. K. McEwan and

commencer l'analyse par l'examen de l'objet et de l'économie de la *Loi sur l'arbitrage* et interprète le libellé de l'art. 7 à la lumière de l'ensemble de son contexte, d'une manière qui à la fois tient compte des choix de politique du législateur que reflètent tant la *Loi sur l'arbitrage* elle-même que d'autres lois pertinentes comme la *Loi sur la protection du consommateur* et la *Loi sur les recours collectifs* et est compatible avec eux. Il ne s'agit pas d'un « retour au textualisme »; il s'agit plutôt d'une interprétation minutieuse de la loi, envisagée dans son contexte global. Gardant cela à l'esprit, je vais maintenant examiner l'objet et l'économie de la Loi.

(1) L'objet et l'économie de la *Loi sur l'arbitrage*

[48] Pendant la majeure partie du 20e siècle, les tribunaux canadiens se sont montrés « ouvertement hostiles » à l'arbitrage, qu'ils considéraient comme « un mécanisme de résolution des différends de deuxième ordre » (*Seidel*, par. 89, les juges LeBel et Deschamps, dissidents (mais non sur ce point)). Les tribunaux protégeaient jalousement leur compétence et « n'accueillaient pas [TRADUCTION] "favorablement les efforts des parties visant à l'écarter par contrat" » (voir *Seidel*, par. 93, citant *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, [1952] 4 D.L.R. 300 (H.C.J. Ont.), p. 304). Selon l'opinion prépondérante, seuls les tribunaux judiciaires pouvaient prononcer les ordonnances requises pour régler des litiges d'ordre juridique. En conséquence, ils estimaient que tout contrat conclu par les parties pour écarter leur compétence violait l'ordre public, sans égard à la nature des questions de droit substantiel en jeu (voir *Seidel*, par. 96). Cette hostilité judiciaire ainsi que l'absence de législation moderne favorisant l'arbitrage ont freiné l'évolution de ce dernier au Canada (voir *Seidel*, par. 89, citant J. B. Casey et J. Mills, *Arbitration Law of Canada : Practice and Procedure* (2005), p. 2-3).

[49] C'est dans ce contexte que le législateur ontarien a adopté la *Loi sur l'arbitrage* en 1991, en se basant sur la *Loi uniforme sur l'arbitrage* adoptée un an plus tôt par la Conférence pour l'harmonisation des lois au Canada (en ligne) (voir J. K. McEwan et

L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-9 to 1-15). The purpose and underlying philosophy of the *Arbitration Act* was discussed by Blair J. (as he then was) in *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (WL Can.) (Gen. Div.):

> The *Arbitration Act, 1991* came into effect on January 1, 1992. It repealed the former *Arbitrations Act*, R.S.O. 1980 c. 25, and enacted a new regime for the conduct of arbitrations in Ontario . . . . It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.
>
> In this latter respect, the new *Act* entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a "presumptive" stay of court proceedings in favour of arbitration. [paras. 8-9]

[50] During legislative debate on the bill that later became the *Arbitration Act*, the Attorney General of Ontario stated that one of the "guiding principles" of the *Arbitration Act* is that "the parties to a valid arbitration agreement should abide by their agreements" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, at p. 256). He later emphasized that under the new legislation, "the law and the courts will ensure that the parties stick to their agreement to arbitrate" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., November 5, 1991, at p. 3384).

[51] Issuing a stay of court proceedings is one of the ways in which courts may give effect to the policy that the parties to a valid arbitration agreement should abide by their agreement. As the authors of *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* explain, a stay of court proceedings is simply "an indirect

L. B. Herbst, *Commercial Arbitration in Canada : A Guide to Domestic and International Arbitrations* (feuilles mobiles), p. 1-9 à 1-15). L'objet et la philosophie qui sous-tend la *Loi sur l'arbitrage* ont été examinés par le juge Blair (alors juge puîné) dans la décision *Ontario Hydro c. Denison Mines Ltd.*, 1992 Carswell Ont 3497 (WL Can.) (Div. gén.) :

> [TRADUCTION] La *Loi de 1991 sur l'arbitrage* est entrée en vigueur le 1er janvier 1992. Elle a remplacé la loi intitulée *Loi sur l'arbitrage*, L.R.O. 1980, c. 25, et promulgué un nouveau régime relatif à la conduite de l'arbitrage en Ontario. [. . .] Ce nouveau régime est conçu, à mon avis, en vue d'encourager les parties à recourir à l'arbitrage pour régler les différends liés à des questions commerciales et autres, et pour les obliger à respecter leurs engagements, une fois qu'ils ont convenu de procéder par arbitrage.
>
> À cet égard, la nouvelle *Loi* consacre la primauté de la procédure d'arbitrage par rapport à la procédure judiciaire dans le cas où les parties ont conclu une convention d'arbitrage, en enjoignant aux tribunaux de ne pas intervenir, en général, et en prévoyant le sursis « présumé » de l'instance judiciaire pour favoriser l'arbitrage. [par. 8-9]

[50] Lors des débats législatifs sur le projet de loi qui ont précédé l'adoption de la *Loi sur l'arbitrage*, le procureur général de l'Ontario a affirmé que l'un des [TRADUCTION] « principes directeurs » de ce texte législatif est que « les parties à une convention d'arbitrage valide doivent respecter l'entente qu'elles ont conclue » (Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, 1re sess., 35e lég., 27 mars 1991, p. 256). Il a plus tard souligné que [TRADUCTION] « la [nouvelle] loi et les tribunaux permettront de veiller à ce que les parties respectent la convention d'arbitrage qu'elles ont conclue » (Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, 1re sess., 35e lég., 5 novembre 1991, p. 3384).

[51] Ordonner le sursis de l'instance judiciaire est un des moyens dont disposent les tribunaux pour donner effet à la politique portant que les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue. Comme les auteurs de l'ouvrage *Commercial Arbitration in Canada : A Guide to Domestic and International Arbitrations*

method of enforcing an arbitration agreement" (McEwan and Herbst, at p. 3-29). They continue:

> Traditionally it has been said that the courts will not order specific performance of arbitration agreements, in the sense that they will not order parties to proceed to arbitration. Courts do not compel arbitration; enforcement is negative in that they stay the court proceedings in specified circumstances . . . . A party is refused the alternative of having the disputes settled by a court of law, *i.e.*, that party is left in the position of having no remedy other than to proceed by arbitration. [Footnotes omitted; p. 3-29.]

[52] The policy that parties to a valid arbitration agreement should abide by their agreement gives effect to the concept of party autonomy — which, in the arbitration context, stands for the principle that parties should generally be allowed to craft their own dispute resolution mechanism through consensual agreement (see J. B. Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at pp. 49, 51 and 195; Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act: Stay and Appeal Issues* (2013), at para. 10). Consensual arbitration and party autonomy are inseparable — an arbitration agreement is "a product of party autonomy . . . [and] crystallizes the parties' consent" to private dispute resolution (M. Pavlović and A. Daimsis, "Arbitration", in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), at p. 485). It "is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes" (*Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87, as quoted in *Re Arbitration Act* (1964), 47 W.W.R. 544 (Alta. S.C.), at p. 555).

[53] Of course, the concept of party autonomy, which is always engaged to at least some extent where arbitration agreements are involved, may speak more or less forcefully depending on the context. For example, party autonomy has weaker force in the context of non-negotiated, "take it or leave

l'ont expliqué, le sursis de l'instance est tout simplement [TRADUCTION] « un moyen indirect d'appliquer une convention d'arbitrage » (McEwan et Herbst, p. 3-29). Ils ont ajouté :

> Traditionnellement, il a été dit que les tribunaux n'ordonneront pas l'exécution en nature des conventions d'arbitrage, en ce sens qu'ils n'ordonneront pas aux parties de recourir à l'arbitrage. Les tribunaux n'imposent pas l'arbitrage, ils sursoient plutôt à l'instance judiciaire dans certaines circonstances. [. . .] On enlève à une partie l'option de soumettre le différend à un tribunal judiciaire, c.-à-d. que cette partie n'a d'autre choix que de soumettre l'affaire à l'arbitrage. [Notes en bas de page omises; p. 3-29.]

[52] La politique selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue donne effet au concept de l'autonomie des parties — ce qui, dans le contexte de l'arbitrage, signifie qu'elles devraient généralement avoir le droit de choisir comment régler leurs différends au moyen d'un accord consensuel (voir J. B. Casey, *Arbitration Law of Canada : Practice and Procedure* (3e éd. 2017), p. 49, 51 et 195; Alberta Law Reform Institute, Final Report No. 103, *Arbitration Act : Stay and Appeal Issues* (2013), par. 10). L'arbitrage consensuel et l'autonomie des parties sont indissociables — la convention d'arbitrage est [TRADUCTION] « le produit de l'autonomie des parties [. . .] [et] cristallise leur consentement » à l'égard du règlement privé de différends (M. Pavlović et A. Daimsis, « Arbitration », dans J. C. Kleefeld et autres, dir., *Dispute Resolution : Readings and Case Studies* (4e éd. 2016), p. 485). Elle [TRADUCTION] « est essentiellement une création contractuelle, un contrat par lequel les parties chargent elles-mêmes un tribunal privé de résoudre leurs différends » (*Astoria Medical Group c. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), p. 87, cité dans *Re Arbitration Act* (1964), 47 W.W.R. 544 (C.S. Alb.), p. 555).

[53] Bien entendu, le concept d'autonomie des parties, qui est toujours en jeu — à tout le moins dans une certaine mesure — lorsqu'il est question de conventions d'arbitrage, a plus ou moins de poids selon le contexte. Par exemple, il en a moins dans le contexte des contrats non négociés, « à prendre

it" contracts than it does in the context of fully negotiated agreements. It is not surprising, therefore, that legislatures across Canada have put in place various statutes shielding consumers — the weakest and most vulnerable contracting parties (*Dell*, at para. 90) — from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts.

[54] That said, in the years since the *Arbitration Act* was passed, the jurisprudence — both from this Court and from the courts of Ontario — has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting. For example, in *Desputeaux*, LeBel J. observed "the trend in the case law and legislation . . . to accept and even encourage the use of civil and commercial arbitration" (para. 38). In *Seidel*, Binnie J. noted that "[t]he virtues of commercial arbitration have been recognized and indeed welcomed by our Court" (para. 23), and he stated that "absent legislative language to the contrary" (para. 42 (emphasis deleted)), "the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause" (para. 2). More recently, the Ontario Court of Appeal observed that "[t]he law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence" (*Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1, at para. 10).

[55] The policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters. This latter principle finds expression throughout modern Canadian arbitration legislation (see McEwan and Herbst, at pp. 10-7 to 10-11; Casey, at p. 319) and has been described as a "fundamental principle underlying modern arbitration law" (Alberta Law Reform Institute, at para. 19). This principle is embedded most visibly in ss. 6 and 7 of the *Arbitration Act*, which are

ou à laisser », que dans le contexte des accords entièrement négociés. Il n'est donc pas surprenant que les législatures canadiennes aient adopté diverses lois de protection des consommateurs — les parties contractantes les plus faibles et les plus vulnérables (*Dell*, par. 90) — contre les résultats potentiellement sévères de l'application des conventions d'arbitrage contenues dans les conventions de consommation, qui prennent souvent la forme de contrats types.

[54] Cela dit, depuis l'adoption de la *Loi sur l'arbitrage*, la jurisprudence — tant celle de la Cour que celle des cours ontariennes — a établi de façon constante que les tribunaux doivent faire preuve de déférence à l'égard des conventions d'arbitrage et de l'arbitrage en général, particulièrement dans le contexte commercial. Par exemple, dans l'arrêt *Desputeaux*, le juge LeBel a noté l'existence d'un « mouvement jurisprudentiel et législatif qui [. . .] accepte et même favorise le recours à l'arbitrage civil et commercial » (par. 38). Dans l'arrêt *Seidel*, le juge Binnie a affirmé que « [l]es avantages de l'arbitrage commercial ont été reconnus et accueillis favorablement par notre Cour » (par. 23) et que, « en l'absence de disposition contraire de la loi » (par. 42 (italique omis)), « les tribunaux donnent généralement effet aux clauses d'un contrat commercial librement conclu dans lequel figure une clause d'arbitrage, et ce, même s'il s'agit d'un contrat d'adhésion » (par. 2). Plus récemment, la Cour d'appel de l'Ontario a fait remarquer que [TRADUCTION] « [l]e droit préconise qu'il soit donné effet aux conventions d'arbitrage. Cela ressort clairement tant de la loi que de la jurisprudence » (*Haas c. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1, par. 10).

[55] La politique selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue va de pair avec le principe de l'intervention limitée des tribunaux dans le contexte de l'arbitrage. Ce principe est exprimé à maintes reprises dans la législation canadienne moderne en matière d'arbitrage (voir McEwan et Herbst, p. 10-7 à 10-11; Casey, p. 319) et a été décrit comme étant un [TRADUCTION] « principe fondamental qui sous-tend la législation en matière d'arbitrage » (Alberta Law Reform Institute, par. 19).

both contained in the part of the Act labelled "Court Intervention". Section 6 reads:

Court intervention limited

6 No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.

2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

3. To prevent unequal or unfair treatment of parties to arbitration agreements.

4. To enforce awards.

[56] Stated succinctly, s. 6 signals that courts are generally to take a "hands off" approach to matters governed by the *Arbitration Act*. This is "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts" (*Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14).

[57] This brings us to the focal point of this appeal: s. 7 of the *Arbitration Act*.

(2) Section 7 of the *Arbitration Act*

(a) *Text*

[58] The text of s. 7 of the *Arbitration Act*, which governs stays, is reproduced above in the "Statutory Provisions" section of these reasons. It is also worth noting that the term "arbitration agreement" is defined in s. 1 as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them". The words "matter" and "proceeding" are left undefined, though

Il est consacré le plus visiblement aux art. 6 et 7 de la *Loi sur l'arbitrage*, qui se trouvent tous les deux dans la section intitulée « Intervention du tribunal judiciaire ». L'article 6 est ainsi libellé :

Intervention limitée du tribunal judiciaire

6 Aucun tribunal judiciaire ne doit intervenir dans les questions régies par la présente loi, sauf dans les cas prévus par celle-ci et pour les objets suivants :

1. Faciliter la conduite des arbitrages.

2. Veiller à ce que les arbitrages soient effectués conformément aux conventions d'arbitrage.

3. Empêcher que les parties aux conventions d'arbitrage soient traitées autrement que sur un pied d'égalité et avec équité.

4. Exécuter les sentences.

[56] En résumé, l'art. 6 indique que les tribunaux doivent généralement adopter une politique de « non-intervention » à l'égard des questions régies par la *Loi sur l'arbitrage*. Cette façon de faire est [TRADUCTION] « conforme à l'approche moderne, selon laquelle l'arbitrage est un processus autonome par lequel les parties conviennent de régler leurs différends en les soumettant à un arbitre et non à un tribunal » (*Inforica Inc. c. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642, 97 O.R. (3d) 161, par. 14).

[57] Cela nous amène au cœur du présent appel : l'art. 7 de la *Loi sur l'arbitrage*.

(2) L'article 7 de la *Loi sur l'arbitrage*

a) *Le libellé*

[58] Le libellé de l'art. 7 de la *Loi sur l'arbitrage*, qui régit le sursis, a été reproduit précédemment sous la rubrique « dispositions législatives » des présents motifs. Il vaut également la peine de noter que le terme « convention d'arbitrage » est défini ainsi à l'article premier : « [c]onvention par laquelle plusieurs personnes conviennent de soumettre à l'arbitrage un différend survenu ou susceptible de survenir

"proceeding" is defined in r. 1.03(1) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as "an action or application".

(b) *Parties' Positions*

[59] TELUS takes the position that s. 7(1) establishes a general rule: if a party to an arbitration agreement commences a proceeding, and one or more of the matters in respect of which the proceeding was commenced is dealt with in the arbitration agreement, then the court shall, on the motion of another party to the agreement, stay the proceeding. TELUS further submits that while s. 7(5) permits the court to allow matters that are *not* dealt with in the arbitration agreement to proceed in court, it does not grant the court discretion to refuse to stay matters that *are* dealt with in the agreement — those matters *must* be stayed. In support of its proposed interpretation, TELUS relies primarily (though not exclusively) on *Seidel* and *Alberici Western Constructors Ltd v. Saskatchewan Power Corp.*, 2016 SKCA 46, 476 Sask. R. 255 (interpreting an equivalent provision in the corresponding Saskatchewan legislation).

[60] By contrast, Mr. Wellman contends that if the arbitration agreement in question deals with only some of the matters in respect of which the proceeding was commenced, and it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters, then s. 7(5) grants the court an independent, freestanding discretion that is entirely separate from s. 7(1) and (2) to refuse to stay the matters dealt with in the arbitration agreement. In a nutshell, Mr. Wellman submits that s. 7(5) offers a choice between staying *some* of the matters (i.e., ordering a partial stay) and staying *none* of the matters (i.e., refusing to order any stay). In support of his proposed interpretation, he relies primarily (though not exclusively) on *Griffin*, *New Era Nutrition* (interpreting an equivalent provision in the corresponding Alberta legislation), and *Briones v. National Money Mart Co.*, 2013 MBQB 168, 295 Man R. (2d) 101, aff'd 2014 MBCA 57, 306 Man.

entre elles ». Les termes « question » et « instance » ne sont pas définis dans la *Loi sur l'arbitrage*, mais le second est défini au par. 1.03(1) des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, comme une « [a]ction ou requête ».

b) *La position des parties*

[59] TELUS fait valoir que le par. 7(1) établit une règle générale : si une partie à une convention d'arbitrage introduit une instance à l'égard d'une ou de plusieurs questions qui sont traitées dans la convention d'arbitrage, le tribunal doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance. TELUS fait également valoir que, bien que le par. 7(5) autorise le tribunal à permettre que des questions qui *ne* sont *pas* traitées dans la convention d'arbitrage soient soumises au tribunal, il ne lui confère pas le pouvoir discrétionnaire de refuser de surseoir aux questions qui *sont* traitées dans la convention — le sursis est *obligatoire* dans ce cas. À l'appui de son interprétation, TELUS se fonde principalement (mais non exclusivement) sur l'arrêt *Seidel* et sur la décision *Alberici Western Constructors Ltd. c. Saskatchewan Power Corp.*, 2016 SKCA 46, 476 Sask. R. 255 (qui porte sur l'interprétation d'une disposition équivalente de la loi de la Saskatchewan).

[60] En revanche, M. Wellman fait valoir que si la convention d'arbitrage en cause ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite et qu'il ne serait pas raisonnable de dissocier les questions traitées dans la convention des autres questions, le par. 7(5) accorde au tribunal le pouvoir discrétionnaire indépendant, totalement distinct des par. 7(1) et (2), de refuser d'ordonner le sursis des questions qui sont traitées dans la convention d'arbitrage. En un mot, M. Wellman soutient que le par. 7(5) permet d'ordonner le sursis de *certaines* des questions (c.-à-d. d'ordonner un sursis partiel) ou de ne l'ordonner pour *aucune* des questions (c.-à-d. de refuser d'ordonner un sursis). À l'appui de son interprétation, il se fonde principalement (mais non exclusivement) sur les décisions *Griffin*, *New Era Nutrition* (cette dernière portant sur l'interprétation d'une disposition équivalente dans la loi de l'Alberta) et *Briones c. National Money Mart Co.*, 2013

R. (2d) 129, leave to appeal refused, [2014] 3 S.C.R. ix (interpreting an equivalent provision in the corresponding Manitoba legislation).

[61] Although the parties lock horns over whether s. 7(5) of the *Arbitration Act* grants the court discretion to refuse to stay claims that are otherwise subject to a valid and binding arbitration agreement, they agree on several key points, including the following:

(1) arbitration clauses contained in commercial agreements will generally be enforced absent legislative override;

(2) the business customer claims are dealt with in an arbitration agreement;

(3) by virtue of the *Consumer Protection Act*, the consumers are entitled to pursue their claims in court; and

(4) if the two conditions identified in s. 7(5) of the *Arbitration Act* are satisfied, then the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters.

[62] These points of agreement narrow the focus of this appeal, placing it squarely on the following issue: Does s. 7(5) of the *Arbitration Act* grant the court discretion to refuse to stay the business customer claims? With that in mind, I would interpret s. 7 as follows.

(c) *Section 7 Framework*

(i) Section 7(1) — General Rule

[63] First, s. 7(1) establishes a general rule: where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement — that is, at least one matter in the proceeding is dealt with in the arbitration agreement — the court

MBQB 168, 295 Man. R. (2d) 101, conf. par 2014 MBCA 57, 306 Man. R. (2d) 129, demande d'autorisation de pourvoi refusée, [2014] 3 R.C.S. ix (qui porte sur l'interprétation d'une disposition équivalente de la loi du Manitoba).

[61] Bien que les parties ne s'entendent pas quant à la question de savoir si le par. 7(5) de la *Loi sur l'arbitrage* confère au tribunal le pouvoir discrétionnaire de refuser de surseoir aux réclamations qui sont par ailleurs assujetties à une convention d'arbitrage valide et exécutoire, elles s'entendent sur plusieurs autres points importants, notamment sur ce qui suit :

(1) les clauses d'arbitrage contenues dans les ententes commerciales sont généralement appliquées en l'absence de dérogation législative;

(2) les réclamations des clients commerciaux sont traitées dans une convention d'arbitrage;

(3) en application de la *Loi sur la protection du consommateur*, les consommateurs ont le droit de présenter leurs réclamations devant les tribunaux;

(4) s'il est satisfait aux deux conditions énoncées au par. 7(5) de la *Loi sur l'arbitrage*, le tribunal peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions.

[62] Ce terrain d'entente permet de mieux délimiter le présent pourvoi, qui porte entièrement sur la question suivante : le par. 7(5) de la *Loi sur l'arbitrage* confère-t-il au tribunal le pouvoir discrétionnaire de refuser de surseoir aux réclamations des clients commerciaux? Dans cette optique, voici comment j'interpréterais l'art. 7.

c) *Le cadre de l'analyse relative à l'art. 7*

(i) Le paragraphe 7(1) — la règle générale

[63] Tout d'abord, le par. 7(1) établit une règle générale : si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question traitée dans la convention — autrement dit, si la convention d'arbitrage traite d'au moins une des

"shall", on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. The use of the word "shall" in s. 7(1) indicates a mandatory obligation (see *Haas*, at paras. 10-12; see also R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 90). This general rule reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.

[64] However, as I will explain, this general rule is not absolute.

(ii) Section 7(2) — List of Five Exceptions

[65] Section 7(2) lists five exceptions to the general rule under s. 7(1). Where any of the following conditions are met, the court "may" refuse to stay the proceeding: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is invalid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; (4) the motion was brought with undue delay; or (5) the matter is a proper one for default or summary judgment. These are "all cases where it would be either unfair or impractical to refer the matter to arbitration" (*MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, 92 O.R. (3d) 4, at para. 36).

(iii) Section 7(5) — Partial Stay Provision

[66] Section 7(5) provides a further exception to the general rule under s. 7(1). Structurally, s. 7(5) consists of two main components:

(1) **Preconditions** — Section 7(5)(a) and (b) set out two preconditions: (a) "the agreement deals with only some of the matters in respect of which the proceeding was commenced" and (b) "it is reasonable to separate the matters dealt with in the agreement from the other matters".

questions soulevées dans le cadre de l'instance — le tribunal « doit », sur la motion d'une autre partie à la convention, surseoir à l'instance au profit de l'arbitrage. L'impératif « doit » au par. 7(1) indique qu'il s'agit d'une obligation (voir *Haas*, par. 10-12; voir également R. Sullivan, *Statutory Interpretation* (3e éd. 2016), p. 90). Cette règle générale confirme le concept de l'autonomie des parties et la politique sous-jacente de la *Loi sur l'arbitrage*, selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue.

[64] Toutefois, comme je l'expliquerai, cette règle générale n'est pas absolue.

(ii) Le paragraphe 7(2) — les cinq exceptions

[65] Le paragraphe 7(2) énumère cinq exceptions à la règle générale prévue au par. 7(1). Le tribunal « peut » refuser de surseoir à l'instance si l'une des situations suivantes s'applique : (1) une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique; (2) la convention d'arbitrage est nulle; (3) l'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario; (4) la motion a été présentée avec un retard indu; (5) la question est propre à un jugement par défaut ou à un jugement sommaire. Il s'agit [TRADUCTION] « dans tous les cas de situations dans lesquelles il serait injuste ou peu pratique de renvoyer l'affaire à l'arbitrage » (*MDG Kingston Inc. c. MDG Computers Canada Inc.*, 2008 ONCA 656, 92 O.R. (3d) 4, par. 36).

(iii) Le paragraphe 7(5) — Disposition relative à un sursis partiel

[66] Le paragraphe 7(5) prévoit une autre exception à la règle générale prévue au par. 7(1). Sur le plan structural, le par. 7(5) comprend deux éléments principaux :

(1) **Des conditions préalables** — Les alinéas 7(5)a) et b) énoncent deux conditions préalables : a) « la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite » et b) « il est raisonnable de dissocier les questions traitées dans la convention des autres questions ».

(2) **Discretionary exception** — If both of these preconditions are satisfied, then the court "may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters".

[67] Starting with the two preconditions, the first precondition is met if "the agreement deals with only some of the matters in respect of which the proceeding was commenced". Put differently, the proceeding must involve both (1) at least one matter that *is* dealt with in the arbitration agreement and (2) at least one matter that *is not* dealt with in the arbitration agreement.

[68] The second precondition is met if "it is reasonable to separate the matters dealt with in the agreement from the other matters". Naturally, the "other matters" to which this precondition refers are the matters that *are not* dealt with in the arbitration agreement, as there are only two categories of "matters" contemplated by s. 7(5): those that *are* dealt with in the arbitration agreement, and those that *are not*.

[69] If both preconditions are satisfied, then instead of ordering a full stay, the court "may" allow the matters that are *not* dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that *are* dealt with in the agreement. To illustrate, where the parties to an arbitration agreement have chosen to include "A" but not "B" in their agreement, s. 7(5) allows the court, where the two preconditions are met, to hear a court proceeding in respect of "B", despite the fact that the proceeding must be stayed in respect of "A". Because it gives effect to the parties' agreement to submit only certain types of disputes to arbitration, this interpretation reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.

(2) **Une exception discrétionnaire** — S'il est satisfait à ces deux conditions préalables, le tribunal « peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions ».

[67] Examinons dans un premier temps les deux conditions préalables. Il est satisfait à la première si « la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite ». Autrement dit, l'instance doit porter sur (1) au moins une question qui *est* traitée dans la convention d'arbitrage et (2) au moins une question qui *n'est pas* traitée dans la convention d'arbitrage.

[68] La deuxième condition préalable est remplie s'il « est raisonnable de dissocier les questions traitées dans la convention des autres questions ». Naturellement, les « autres questions » sont celles qui *ne sont pas* traitées dans la convention d'arbitrage, car le par. 7(5) ne prévoit que deux catégories de « questions » : celles qui *sont* traitées dans la convention d'arbitrage et celles qui *ne le sont pas*.

[69] S'il est satisfait aux deux conditions préalables, au lieu d'ordonner un sursis complet, le tribunal « peut » autoriser que les questions qui *ne* sont *pas* traitées dans la convention d'arbitrage soient soumises au tribunal. Il doit toutefois surseoir à l'instance malgré tout en ce qui touche les questions qui *sont* traitées dans la convention d'arbitrage. Par exemple, si les parties à une convention d'arbitrage ont choisi d'inclure « A », mais non « B », dans la convention, le par. 7(5) permet au tribunal, lorsqu'il est satisfait aux deux conditions préalables, d'instruire une instance à l'égard de « B », même s'il doit surseoir à l'instance à l'égard de « A ». Puisqu'elle donne effet à l'entente que les parties ont conclue de soumettre seulement certains types de différends à l'arbitrage, cette interprétation confirme le concept de l'autonomie des parties ainsi que la politique sous-jacente de la *Loi sur l'arbitrage* selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue.

[70] However, if the preconditions are *not* met, then the discretionary exception under s. 7(5) is not triggered. This follows as a matter of logic: s. 7(5) can have effect only "if" the two preconditions are satisfied, so if those preconditions are not met, then s. 7(5) has nothing to say. In those circumstances, unless one of the five exceptions listed in s. 7(2) applies, the general rule under s. 7(1) would apply, meaning that the proceeding must be stayed.

[71] This interpretation finds support in the academic/practitioner commentary. In *Arbitration Law of Canada: Practice and Procedure*, J. B. Casey, commenting on equivalent provisions in the relevant Alberta statute, writes:

> Section 7(1) sets out the basic provision that if a party proceeds with the court action with respect to matters governed by an arbitration agreement the court "shall" stay the proceeding. Section 7(5) then grants a partial exception to this general provision by providing that the court may allow proceedings to continue with respect to matters not covered by the arbitration agreement provided it is reasonable to separate those matters from the matters that are covered by the arbitration agreement. Nothing in the words of section 7(5) appears to give the court jurisdiction to allow the entire action to proceed where it is not reasonable to separate the matters in dispute and then say section 7(4) permits a stay of the arbitration.
>
> Section 7(5) provides that the court may permit those matters not covered by the arbitration agreement to continue to be litigated if it is reasonable to separate those matters from those which are being arbitrated. It does not deal with the reverse situation; that is where the court finds that the matters cannot reasonably be separated. In such a case, it is submitted, the court would stay its own proceedings to await the outcome of the arbitration, and then determine if the court action needed to proceed. [pp. 349-50]

[72] The author goes on to state that "[s]ection 7(5) does not permit a court action to proceed and allow a valid arbitration to be stayed simply because the court claims appear to overlap with the arbitration claims and cannot reasonably be separated", adding that "[s]ection 7(5) deals with whether or not to permit separate claims not covered by the arbitration

[70] Cependant, s'il *n'*est *pas* satisfait aux conditions préalables, l'exception discrétionnaire prévue au par. 7(5) n'entre pas en jeu. Cela est logique : le par. 7(5) ne prend effet que « si » les deux conditions préalables sont remplies; si elles ne le sont pas, le par. 7(5) ne s'applique pas. Dans ce cas, à moins qu'une des cinq exceptions énumérées au par. 7(2) s'applique, c'est la règle générale prévue au par. 7(1) qui prévaut et le tribunal doit ordonner le sursis de l'instance.

[71] Cette interprétation est étayée par la doctrine. Dans l'ouvrage *Arbitration Law of Canada : Practice and Procedure*, J. B. Casey a formulé les commentaires suivants au sujet des dispositions équivalentes de la loi de l'Alberta :

> [TRADUCTION] Le paragraphe 7(1) énonce la règle générale selon laquelle, si une partie introduit une action en justice à l'égard de questions régies par une convention d'arbitrage, le tribunal « doit » surseoir à l'instance. Le paragraphe 7(5) énonce ensuite une exception partielle à cette règle générale. Il prévoit que le tribunal peut autoriser la poursuite d'une instance à l'égard de questions qui ne sont pas visées par la convention d'arbitrage, pourvu qu'il soit raisonnable de les dissocier de celles qui sont visées par la convention en question. Rien dans le libellé du paragraphe 7(5) ne semble conférer au tribunal la compétence d'autoriser que toute l'action soit instruite lorsqu'il n'est pas raisonnable de dissocier les questions en litige, et d'affirmer que le paragraphe 7(4) permet de surseoir à la procédure d'arbitrage.
>
> Le paragraphe 7(5) prévoit que le tribunal peut autoriser la poursuite de l'instance à l'égard des questions qui ne sont pas visées par la convention d'arbitrage s'il est raisonnable de les dissocier des questions qui sont soumises à l'arbitrage. Il ne traite pas de la situation inverse, c'est-à-dire de celle où le tribunal conclut qu'il n'est pas raisonnable de dissocier les questions. Dans ce cas, à notre avis, le tribunal suspendrait l'instance en attendant l'issue de l'arbitrage, puis déciderait s'il est nécessaire de poursuivre l'action en justice. [p. 349-350]

[72] L'auteur affirme par la suite que [TRADUCTION] « [l]e paragraphe 7(5) ne permet pas d'autoriser l'instruction d'une action et la suspension d'une convention d'arbitrage valide simplement parce qu'il semble y avoir un chevauchement entre les réclamations soumises au tribunal et celles soumises à l'arbitrage et qu'il n'est pas raisonnable de

agreement to proceed by court action. It does not deal with whether or not the claims covered by the arbitration agreement should be stayed" (pp. 352-53).

[73] Mr. Wellman resists this logic. In effect, he submits that s. 7(5) must be read as meaning "may stay, [or may refuse to stay,] the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters", and s. 7(5)(b) must be understood as authorizing this refusal where "it is [not] reasonable to separate the matters dealt with in the agreement from the other matters". Respectfully, I cannot accede to this submission. Mr. Wellman's interpretation reads language into s. 7(5) that simply is not there. Not only that, it reads language into s. 7(5) that *is* contained elsewhere in the statute — namely, in s. 7(2), which provides that "the court may refuse to stay the proceeding in any of the following cases". Section 7(2) thus demonstrates that where the legislature intended to authorize the court to refuse a stay, it did so through the words "may refuse to stay".

[74] In addition, I am respectfully of the view that Mr. Wellman's contention that s. 7(5) is an independent, standalone provision to be read and applied in isolation from s. 7(1) and (2) cannot be sustained. Grammatically, s. 7(5) uses the definite article "the" in referring to "the proceeding", "the matters", and "the arbitration agreement". The only way of identifying "the proceeding", "the matters", and "the arbitration agreement" referred to in s. 7(5) is to look to s. 7(1), which uses indefinite articles in referring to "a proceeding", "a matter", and "an arbitration agreement". Hence, there is a logical and necessary link between the two provisions, which belies the argument that s. 7(5) stands on its own.

[75] Furthermore, while I agree that s. 7(5) should be read in the context of the statutory scheme as a

les dissocier ». Il ajoute que « [l]e paragraphe 7(5) porte sur la question de savoir si le tribunal peut autoriser ou non que des réclamations distinctes qui ne sont pas visées par la convention d'arbitrage soient soumises au tribunal par voie d'action. Il ne porte pas sur la question de savoir si les réclamations visées par la convention d'arbitrage devraient ou non être suspendues » (p. 352-353).

[73] M. Wellman n'est pas d'accord. Essentiellement, il fait valoir que le par. 7(5) doit être interprété comme signifiant que le tribunal « peut surseoir[, ou refuser de surseoir,] à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions », et que l'al. 7(5)b) doit être interprété comme autorisant le tribunal à refuser de surseoir à l'instance lorsqu'il « [n'est pas] raisonnable de dissocier les questions traitées dans la convention des autres questions ». Avec égards, je ne peux pas accepter cette prétention. L'interprétation du par. 7(5) proposée par M. Wellman se fonde sur des termes qui ne figurent tout simplement pas dans la disposition. Qui plus est, ces termes *figurent* ailleurs dans la loi, à savoir au par. 7(2), qui prévoit que « le tribunal peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants ». Le paragraphe 7(2) illustre donc que, dans les cas où le législateur a voulu autoriser le tribunal à refuser d'accorder un sursis, il a utilisé l'expression « peut refuser de surseoir ».

[74] En outre, soit dit en tout respect, je suis d'avis que l'argument de M. Wellman selon lequel le par. 7(5) est une disposition autonome qui doit être interprétée indépendamment des par. 7(1) et (2) ne peut pas être retenu. Le paragraphe 7(5) emploie l'article défini devant les termes « instance », « questions » et « convention d'arbitrage ». La seule façon de définir « l'instance », « les questions » et « la convention d'arbitrage » visées au par. 7(5) est par renvoi au par. 7(1), qui emploie l'article indéfini devant ces mêmes termes. Il y a donc un lien logique et nécessaire entre les deux dispositions, ce qui contredit l'argument selon lequel le par. 7(5) est une disposition indépendante.

[75] Par ailleurs, bien que je convienne que le par. 7(5) devrait être lu dans le contexte du régime

whole and that s. 6-3 permits the court to intervene "[t]o prevent unequal or unfair treatment of parties to arbitration agreements", I also note that s. 6 allows such intervention only "in accordance with this Act". Therefore, even though Mr. Wellman's interpretation of s. 7(5) would ostensibly give the court greater scope to intervene in an effort to prevent perceived unequal or unfair treatment of parties to arbitration agreements, the words "in accordance with this Act" indicate that s. 6 was not intended to override or change the meaning of other sections of the *Arbitration Act*.

[76] More fundamentally, Mr. Wellman's interpretation sits at odds with the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to "piggyback" onto the claims of others. Ultimately, this would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes. Clearly, this was not what the legislature had in mind when it passed the *Arbitration Act*.

[77] Mr. Wellman and various interveners also raise a number of policy concerns that, they say, support their proposed interpretation, including the following:

- **Access to justice and the courts** — *Griffin* improves access to justice by removing barriers to seeking relief in court.

- **Abuse of arbitration clauses in adhesion contracts** — Large companies with overwhelming bargaining power should not be permitted to include unfair arbitration clauses in their standard form customer contracts and thereby shield themselves from liability by requiring private, individual arbitration for all disputes, even

législatif dans son ensemble et que l'art. 6-3 permet au tribunal d'intervenir pour « [e]mpêcher que des parties aux conventions d'arbitrage soient traitées autrement que sur un pied d'égalité et avec équité », je constate aussi que l'art. 6 limite l'intervention du tribunal aux « cas prévus par [la Loi] ». Ainsi, même si l'interprétation que donne M. Wellman au par. 7(5) donnerait manifestement au tribunal une plus grande marge de manœuvre pour intervenir afin d'empêcher la perception que des parties à des conventions d'arbitrage sont traitées autrement que sur un pied d'égalité et avec équité, l'expression « dans les cas prévus par [la Loi] » indique que l'art. 6 ne vise pas à écarter ou à modifier le sens des autres dispositions de la *Loi sur l'arbitrage*.

[76] Plus fondamentalement, l'interprétation proposée par M. Wellman va à l'encontre de la politique qui sous-tend la *Loi sur l'arbitrage* selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue. Si elle était acceptée, cette interprétation réduirait le degré de certitude et de prévisibilité associé aux conventions d'arbitrage, et permettrait à des personnes qui sont parties à une entente de ce type de « se greffer » aux réclamations présentées par d'autres. Au bout du compte, cela minerait la confiance dans le fait que les conventions d'arbitrage seront appliquées et pourrait décourager les parties d'utiliser l'arbitrage comme moyen efficace et économique pour régler leurs différends. Manifestement, ce n'est pas ce que le législateur avait à l'esprit quand il a adopté la *Loi sur l'arbitrage*.

[77] M. Wellman et divers intervenants soulèvent également un certain nombre de considérations de nature politique énoncées ci-après qui, selon eux, appuient l'interprétation qu'ils proposent :

- **Accès à la justice et aux tribunaux** — La décision *Griffin* facilite l'accès à la justice en éliminant les obstacles liés à l'obtention d'une réparation devant les tribunaux.

- **Abus des clauses d'arbitrage dans les contrats d'adhésion** — Les grandes entreprises dotées d'un important pouvoir de négociation ne devraient pas avoir le droit d'inclure des clauses d'arbitrage injustes dans les contrats types qu'ils font signer à leurs clients et de se dégager ainsi de toute responsabilité en exigeant que tout

low-value claims that would be uneconomical to pursue through arbitration.

- **Shrinking class sizes** — The interpretation of s. 7(5) outlined above would cut non-consumers out of consumer/non-consumer class actions where an arbitration agreement is present. Consequently, these class actions will shrink in size, making them less economically viable and decreasing the likelihood that they will be brought in the first place.

- **Multiplicity of proceedings** — *Griffin* enhances the courts' ability to avoid a multiplicity of proceedings, which raises the risk of inconsistent results, decreases efficiency, and increases overall costs. Further, s. 138 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43 stipulates that courts shall, as far as possible, avoid a multiplicity of proceedings.

- **Difficulty distinguishing between consumers and non-consumers** — Distinguishing between consumers and non-consumers can be challenging, particularly given the rise of "hybrid consumers" and "near consumers", making it preferable to treat consumers and non-consumers alike.

[78] In their interpretation of s. 7(5), my colleagues Abella and Karakatsanis JJ. rely on many of these policy considerations, placing particular emphasis on the importance of promoting access to justice, the difficulty of distinguishing between consumers and non-consumers, and the potential unfairness caused by enforcing arbitration clauses contained in standard form contracts.

[79] While I appreciate these concerns, I am respectfully of the view that they cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy

différend soit soumis à un arbitrage privé et individuel, même les réclamations de faible valeur qu'il ne serait pas économique de soumettre à une procédure d'arbitrage.

- **Réduction du groupe** — Selon l'interprétation du par. 7(5) énoncée précédemment, les non-consommateurs seraient exclus des recours collectifs mettant en jeu à la fois des consommateurs et des non-consommateurs dans les cas où les parties ont conclu une convention d'arbitrage. Le groupe visé serait donc réduit, ce qui rendrait les recours collectifs moins viables sur le plan économique et diminuerait la probabilité qu'ils soient introduits.

- **Multiplicité des instances** — La décision *Griffin* renforce la capacité des tribunaux d'éviter la multiplicité des instances, laquelle augmente le risque de résultats contradictoires, réduit l'efficacité et augmente les coûts globaux. En outre, l'art. 138 de la *Loi sur les tribunaux judiciaires* de l'Ontario, L.R.O. 1990, c. C.43, prévoit que les tribunaux doivent éviter, dans la mesure du possible, la multiplicité des instances.

- **Difficulté à distinguer les consommateurs des non-consommateurs** — La distinction entre les consommateurs et les non-consommateurs peut être difficile à faire, en particulier compte tenu de l'apparition de « consommateurs hybrides » et de « quasi-consommateurs », de sorte qu'il est préférable de traiter les consommateurs et les non-consommateurs de la même façon.

[78] Dans leur interprétation du par. 7(5), mes collègues les juges Abella et Karakatsanis se fondent sur plusieurs de ces considérations de nature politique, en insistant particulièrement sur l'importance de promouvoir l'accès à la justice, sur la difficulté d'établir une distinction entre les consommateurs et les non-consommateurs et sur l'injustice que risquerait d'entraîner l'application des clauses d'arbitrage qui figurent dans des contrats types.

[79] Je suis conscient de ces considérations. Soit dit avec respect, je suis toutefois d'avis qu'elles ne doivent pas servir à déformer le libellé de la loi, interprété d'une façon qui s'harmonise avec l'économie et l'objet du texte législatif en question ainsi qu'avec l'intention du législateur, pour donner à la disposition un sens qu'elle

analysis has a legitimate role in the interpretative process (see Sullivan, at pp. 223-50), the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to rewrite the legislation.

[80] This is particularly so given that the Ontario legislature has already spoken to some of these policy concerns by shielding consumers from the potentially harsh results of enforcing arbitration agreements contained in consumer agreements, which often take the form of standard form contracts. The legislature made a careful policy choice to exempt consumers — and *only* consumers — from the ordinary enforcement of arbitration agreements. That choice must be respected, not undermined by reading s. 7(5) in a way that permits courts to treat consumers and non-consumers as one and the same.

[81] Moreover, as I will develop, I respectfully cannot agree with a number of specific points raised by my colleagues relating to the policy considerations outlined above.

[82] First, while my colleagues characterize the "overall purpose" of the *Arbitration Act* as being to "promote access to justice" (para. 137), it is worth reiterating that this policy objective was by no means the legislature's sole objective in adopting the Act. As indicated, a number of "guiding principles" inform the *Arbitration Act*, one of which is that "the parties to a valid arbitration agreement should abide by their agreements" (Legislative Assembly of Ontario, March 27, 1991, at p. 256). Similarly, as Blair J. stated in *Denison Mines*, the *Arbitration Act* was designed "to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so" (para. 8).

n'a pas. L'analyse des considérations de politique générale joue un rôle légitime dans le processus d'interprétation des lois (voir Sullivan, p. 223-250), mais le choix des politiques dans une démocratie parlementaire demeure la responsabilité du législateur et non celle des tribunaux. Selon moi, le rôle principal des tribunaux consiste à interpréter et à appliquer ces lois en fonction de leur libellé, pourvu qu'elles aient été édictées légalement. La Cour n'a pas pour rôle de récrire la loi.

[80] Il en est particulièrement ainsi du fait que la législature de l'Ontario a déjà traité de certaines de ces préoccupations de nature politique en protégeant les consommateurs des conséquences possiblement sévères de l'application des conventions d'arbitrage prévues dans les conventions de consommation, qui prennent souvent la forme de contrats types. Le législateur a pris avec soin la décision politique d'exempter les consommateurs — et *seulement* les consommateurs — de l'application ordinaire des conventions d'arbitrage. Il faut respecter ce choix, et non pas le miner en interprétant le par. 7(5) comme permettant aux tribunaux de traiter les consommateurs et les non-consommateurs sur un pied d'égalité.

[81] Qui plus est, comme je l'expliquerai, je ne saurais souscrire à plusieurs des points précis soulevés par mes collègues en ce qui concerne les considérations de nature politique énoncées précédemment.

[82] Premièrement, bien que mes collègues considèrent que l'« objet général » de la *Loi sur l'arbitrage* est de « promouvoir l'accès à la justice » (par. 137), il convient de réitérer que cet objectif était loin d'être le seul que poursuivait le législateur lorsqu'il a adopté cette Loi. Comme je l'ai déjà dit, un certain nombre de « principes directeurs » servent de base à la *Loi sur l'arbitrage*, dont l'un prévoit que [TRADUCTION] « les parties à une convention d'arbitrage valide doivent respecter l'entente qu'elles ont conclue » (Assemblée législative de l'Ontario, 27 mars 1991, p. 256). De même, comme l'a affirmé le juge Blair dans la décision *Denison Mines*, la *Loi sur l'arbitrage* a été conçue [TRADUCTION] « en vue d'encourager les parties à recourir à l'arbitrage pour régler les différends liés à des questions commerciales et autres, et pour les obliger à respecter leurs engagements une fois qu'ils ont convenu de procéder par arbitrage » (par. 8).

[83] Hence, while there can be no doubt as to the importance of promoting access to justice (see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 1), this objective cannot, absent express direction from the legislature, be permitted to overwhelm the other important objectives pursued by the *Arbitration Act*, including ensuring that parties to a valid arbitration agreement abide by their agreement. Respectfully, my colleagues' approach would undermine the legislature's stated objective of ensuring parties to a valid arbitration agreement abide by their agreement, reduce the degree of certainty and predictability associated with arbitration agreements, and weaken the concept of party autonomy in the commercial setting. It would expand the opportunities for parties to a valid arbitration agreement — even a heavily negotiated one between sophisticated commercial entities — to avoid their agreement and seek relief in court. This would in turn steer parties away from a "good and accessible method of seeking resolution for many kinds of disputes" that "can be more expedient and less costly than going to court" (Legislative Assembly of Ontario, March 27, 1991, at p. 245).

[84] Second, my colleagues stress that the *Arbitration Act* was designed with a "freely negotiat[ed]" arbitration agreement in mind (at para. 131), that TELUS's "standard form contract hardly represents a bargain freely entered into" (para. 160), and that "[t]o impose arbitration on unwilling parties violates the spirit of the *Arbitration Act, 1991* and the arbitral process" (para. 167). But with respect, my colleagues lose sight of the issue actually before this Court. This case is not about debating the merits and demerits of enforcing arbitration clauses contained in standard form contracts. Rather, it is about the proper interpretation of s. 7(5) of the *Arbitration Act*. Moreover, while my colleagues maintain that the Act was designed with "freely negotiat[ed]" arbitration agreements in mind, nothing in the *Arbitration Act* suggests that standard form arbitration agreements, which are characterized by an absence of meaningful negotiation, are *per se* unenforceable. Indeed, this Court's decision in *Seidel* — as well as its

[83] Certes, l'importance de promouvoir l'accès à la justice ne fait aucun doute (voir *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87, par. 1). On ne saurait pour autant permettre, à moins d'une directive du législateur, que cet objectif prenne le dessus sur les autres objectifs importants visés par la *Loi sur l'arbitrage*, y compris celui de veiller à ce que les parties à une convention d'arbitrage valide respectent l'entente qu'elles ont conclue. Soit dit avec respect, l'approche adoptée par mes collègues minerait l'objectif déclaré du législateur de s'assurer que les parties à une convention d'arbitrage valide la respectent et réduirait le degré de certitude et de prévisibilité associé aux conventions de ce type en plus d'affaiblir le concept d'autonomie des parties dans le contexte commercial. Cette approche augmenterait les occasions pour les parties à une convention d'arbitrage valide — même une convention durement négociée entre des entités commerciales averties — de se soustraire aux obligations qui y sont prévues et d'exiger réparation devant les tribunaux. En retour, cela éloignerait les parties d'une [TRADUCTION] « bonne méthode accessible pour parvenir à régler un grand nombre de différends », laquelle « peut s'avérer plus efficace et moins coûteuse que de recourir aux tribunaux » (Assemblée législative de l'Ontario, 27 mars 1991, p. 245).

[84] Deuxièmement, mes collègues insistent sur le fait que la *Loi sur l'arbitrage* a été conçue dans une optique de convention d'arbitrage « négoci[ée] librement » (par. 131), que le « contrat type [de TELUS] ne représente guère un accord librement conclu » (par. 160), et qu'« [i]mposer l'arbitrage à des parties qui n'en veulent pas va à l'encontre de l'esprit de la *Loi de 1991 sur l'arbitrage* et du processus arbitral » (par. 167). Or, à mon avis, mes collègues perdent de vue la question dont est réellement saisie la Cour. En effet, la présente espèce n'a pas pour but de débattre des avantages et des inconvénients de l'application de clauses d'arbitrage contenues dans des contrats types. Elle concerne plutôt l'interprétation qu'il convient de donner au par. 7(5) de la *Loi sur l'arbitrage*. De plus, tandis que mes collègues affirment que la Loi a été conçue dans une optique de convention d'arbitrage « négoci[ée] librement », rien dans la *Loi sur l'arbitrage* ne donne à penser que les conventions d'arbitrage types, qui se caractérisent par une absence

predecessors *Dell*, *Rogers*, and *Desputeaux* — confirms that the starting presumption is the opposite.

[85] Furthermore, Mr. Wellman has not argued, either before this Court or the courts below, that the standard form arbitration agreement in question was unconscionable, which if proven would render it invalid and thereby provide a basis for refusing a stay pursuant to s. 7(2)2 of the *Arbitration Act*. In my view, arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability, which was the approach taken in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, rather than indirectly by attempting to stretch the language of s. 7(5) to address a perceived problem it was never designed to address.

[86] Third, my colleagues underscore the difficulty in distinguishing between consumers and non-consumers, insisting that TELUS's interpretation of s. 7(5) would render the class certification process "cumbersome" and potentially turn the certification stage into "a search by the defendant of the precise status of each member of the class" (para. 158).

[87] While distinguishing between consumers and non-consumers may be a difficult exercise in certain cases, that difficulty does not, in my view, bear on the proper interpretation of s. 7(5). The challenge identified by my colleagues is a product of two factors: (1) the requirement under the *Class Proceedings Act* that any person seeking to join a class action must pass through an objective class definition; and (2) the legislature's decision to accord enhanced protections only to "consumers", which it chose to define in a particular way under the *Consumer Protection Act* — namely, as "an individual acting for personal, family or household purposes" but not including "a person who is acting for business purposes" (s. 1). While sorting between consumers and non-consumers may be "cumbersome" in

de négociation véritable, sont en soi inexécutoires. En effet, l'arrêt *Seidel* de la Cour — de même que ses prédécesseurs *Dell*, *Rogers* et *Desputeaux* — confirme que la présomption initiale est l'inverse.

[85] Qui plus est, M. Wellman n'a pas invoqué, ni devant la Cour ni devant les tribunaux de juridictions inférieures, que le contrat d'arbitrage type en question était inéquitable. Cet argument, s'il s'avérait fondé, rendrait le contrat invalide et permettrait au tribunal de refuser de surseoir à l'instance en application de l'al. 7(2)2 de la *Loi sur l'arbitrage*. À mon sens, les arguments relatifs à l'injustice que risquerait d'entraîner l'application des clauses d'arbitrage qui figurent dans des contrats types devraient plutôt être tranchés directement par application du principe de l'iniquité, soit l'approche adoptée dans la décision *Heller c. Uber Technologies Inc.*, 2019 ONCA 1, plutôt qu'indirectement en tentant d'élargir la portée du par. 7(5) en vue de régler un problème perçu qu'il n'a jamais eu pour but de régler.

[86] Troisièmement, mes collègues insistent sur la difficulté d'établir une distinction entre les consommateurs et les non-consommateurs, insistant sur le fait que l'interprétation que donne TELUS au par. 7(5) rendrait la procédure d'autorisation des recours collectifs « encombrant » et risquerait de faire de l'étape de l'autorisation « une recherche par le défendeur du statut précis de chaque membre du groupe » (par. 158).

[87] Bien que différencier les consommateurs et les non-consommateurs puisse s'avérer difficile dans certains cas, cette difficulté, à mon sens, n'a aucune incidence sur l'interprétation qu'il convient de donner au par. 7(5). La difficulté relevée par mes collègues résulte de deux facteurs : (1) l'exigence prévue dans la *Loi sur les recours collectifs* voulant que toute personne souhaitant participer à un recours collectif doit correspondre à une définition objective du groupe; et (2) la décision du législateur d'accorder des protections supplémentaires uniquement aux « consommateurs », qu'il a choisi de définir de façon particulière dans la *Loi sur la protection du consommateur* — comme étant un « [p]articulier qui agit à des fins personnelles, familiales ou domestiques, mais non commerciales »

certain cases, this inconvenience does not permit the court to recast the legislation as it sees fit in order to avoid such difficulties. Instead, the courts must work within the framework established by the legislature, including at the class certification stage.

[88] Furthermore, reading s. 7(5) of the *Arbitration Act* in a way that permits non-consumers to "tag along" with consumers on the basis that it would be "cumbersome" to sort between the two would also allow commercial entities to find the inside of a courtroom despite having agreed to arbitration, even where the arbitration agreement was fully negotiated. Again, this would reduce the degree of certainty and predictability associated with arbitration agreements and permit parties to those agreements to "piggy-back" onto the claims of others.

[89] It would, of course, be open to the Ontario legislature to respond to the policy concerns outlined above, should it see fit to do so. While I make no comment on the wisdom of any particular reform, a range of responses are theoretically available. To offer just one example, it could amend the *Arbitration Act* to grant the courts discretion to refuse to stay the proceeding where the arbitration agreement deals with some but not all of the matters in dispute. In this regard, I note that in 2002, the *Uniform Arbitration Act* (1990),[6] the model legislation on which the *Arbitration Act* was based, was amended to provide as follows:

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter that another party to the

[6] As the Alberta Law Reform Institute observes, "the [Uniform Law Conference of Canada] materials do not discuss or even mention section 7(5)'s intended purpose, meaning or effect" (para. 34, citing Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (August 1989), at pp. 77-78 and Appendix B; Uniform Law Conference of Canada, *Proceedings of the Seventy-second Annual Meeting* (August 1990), at p. 36 and Appendix A).

(art. 1). Bien que différencier les consommateurs et les non-consommateurs puisse s'avérer « encombrant » dans certains cas, cet inconvénient n'autorise pas le tribunal à reformuler la loi comme bon lui semble pour contourner de telles difficultés. Les tribunaux doivent plutôt respecter le cadre établi par le législateur, y compris à l'étape de la certification du recours collectif.

[88] En outre, interpréter le par. 7(5) de la *Loi sur l'arbitrage* comme autorisant les non-consommateurs à « se joindre » aux consommateurs parce qu'il serait « encombrant » de les distinguer les uns des autres permettrait aux entités commerciales de se retrouver devant les tribunaux judiciaires en dépit de leur consentement à recourir à l'arbitrage, même lorsque la convention d'arbitrage est le fruit d'une négociation en bonne et due forme. Je le répète, cela réduirait le degré de certitude et de prévisibilité associé aux conventions d'arbitrage et permettrait aux parties à ces conventions de « greffer » leurs réclamations à celles d'autres parties.

[89] Bien entendu, le législateur ontarien pourrait répondre aux préoccupations de nature politique énoncées précédemment s'il jugeait qu'il est indiqué de le faire. Bien que je ne formule aucun commentaire sur la pertinence de quelque réforme que ce soit, je note que, en théorie, diverses réponses sont possibles. Pour ne donner qu'un exemple, le législateur pourrait modifier la *Loi sur l'arbitrage* pour accorder aux tribunaux le pouvoir discrétionnaire de refuser de surseoir à l'instance lorsque la convention d'arbitrage ne traite que de certaines des questions en litige. À cet égard, je fais remarquer que la loi type sur laquelle la *Loi sur l'arbitrage* est basée, à savoir la *Loi uniforme sur l'arbitrage* de 1990[6], a été modifiée comme suit en 2002 :

7(1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention

[6] Comme l'Alberta Law Reform Institute l'a fait remarquer, [TRADUCTION] « les documents de la [Conférence pour l'harmonisation des lois au Canada] ne comportent aucune analyse de l'objet, du sens et de l'effet prévus du paragraphe 7(5); ils n'en font même pas mention » (par. 34, citant la Conférence pour l'harmonisation des lois au Canada, *Proceedings of the Seventy-first Annual Meeting* (août 1989), p. 77-78 et annexe B; Conférence pour l'harmonisation des lois au Canada, *Proceedings of the Seventy-Second Annual Meeting* (août 1990), p. 36 et annexe A).

arbitration agreement is entitled to submit to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of the other party, stay the proceeding.

. . .

(3) Despite subsection (1), where an arbitration agreement deals with one or more but not all of the matters in dispute in respect of which the proceeding was commenced, the court may

(a) refuse to stay the proceeding, or

(b) stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to the other matters in dispute.

(4) In making a decision under subsection (3), the court shall have regard to

(a) the importance of enforcing arbitration agreements, and

(b) whether it is reasonable to separate the matters in dispute dealt with in the arbitration agreement from the other matters in dispute. [Emphasis added.]

(Uniform Law Conference of Canada, *Arbitration Amendment Act* (2002) (online))

[90] Lastly, while s. 138 of the *Courts of Justice Act* stipulates that courts "shall" avoid a multiplicity of proceedings, it tempers this language by indicating that the court must do so only "as far as possible". Accordingly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature, even if the consequence is to potentially create a multiplicity of proceedings. This is consistent with *Seidel*, where the Court recognized that even where a multiplicity of proceedings could result, the court must nonetheless give effect to the "legislative choice" embodied in the legislation in question (para. 50). Indeed, here, s. 7(5) of the *Arbitration Act* expressly contemplates bifurcation of proceedings, as it permits the court to order a *partial* stay, thereby potentially resulting in concurrent arbitration and court adjudication, where the

autorise une autre partie de soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion de l'autre partie, surseoir à l'instance.

. . .

(3) Malgré le paragraphe (1), si une convention d'arbitrage ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite, le tribunal judiciaire peut :

a) soit refuser de surseoir à l'instance;

b) soit surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions.

(4) Lorsqu'il rend une décision en vertu du paragraphe (3), le tribunal judiciaire :

c) tient compte de l'importance de veiller à l'exécution des conventions d'arbitrage;

d) détermine s'il est raisonnable de séparer les questions en litige dont il est traité dans la convention d'arbitrage des autres questions en litige. [Je souligne.]

(Conférence sur l'harmonisation des lois au Canada, *Loi de 2002 modifiant la Loi sur l'arbitrage* (en ligne))

[90] Enfin, bien que l'art. 138 de la *Loi sur les tribunaux judiciaires* prévoie qu'il « faut » éviter la multiplicité des instances, cette obligation est tempérée par l'emploi de l'expression « dans la mesure du possible ». En conséquence, si l'application d'une loi ontarienne, interprétée correctement, mène à la multiplicité des instances, les tribunaux doivent malgré tout donner effet à l'intention du législateur. Cette façon de faire est conforme à l'arrêt *Seidel*, où la Cour a reconnu que les tribunaux doivent donner effet au « choix du législateur » reflété dans la loi en cause, même si cela pouvait mener à la multiplicité des instances (par. 50). En l'espèce, le par. 7(5) de la *Loi sur l'arbitrage* prévoit expressément la tenue possible de recours parallèles, car il permet au tribunal d'ordonner un sursis *partiel* — ce qui peut donner lieu à deux procédures concurrentes, soit une procédure d'arbitrage et une procédure judiciaire — lorsqu'il

two preconditions outlined in s. 7(5)(a) and (b) are met. In theory, the *Arbitration Act* could be amended to grant the courts broad discretion to refuse a stay where doing otherwise could result in a multiplicity of proceedings, but the legislature has not taken this step. For these reasons, while a multiplicity of proceedings can cause practical difficulties, this concern cannot be permitted to trump the language of the statute.

(iv) Section 7(6) — Bar on Appeals

[91] Finally, s. 7(6) provides simply that "[t]here is no appeal from the court's decision". Given the absence of any qualifying language, s. 7(6) must be taken as referring to a "decision" made under any subsection contained in s. 7. This would include, for example, a decision to stay the proceeding under s. 7(1), a decision to refuse a stay under s. 7(2), or a decision to order a partial stay under s. 7(5).

[92] I now turn to the application of this framework.

D. *Application*

(1) The Proceeding

[93] The "proceeding" in this case is simply the class action proceeding commenced by Mr. Wellman, who claims to be a "consumer" under the *Consumer Protection Act*. This proceeding serves as a procedural vehicle through which multiple parties can pursue their individual claims together (see *Bisaillon*, at para. 17). As indicated, some of these parties are consumers, while others are business customers.

(2) The Arbitration Agreements

[94] This proceeding involves not a single arbitration "agreement", but rather a constellation of "agreements", each taking the form of a standard

est satisfait aux deux conditions préalables énoncées aux al. 7(5)a) et b). En théorie, la *Loi sur l'arbitrage* pourrait être modifiée pour accorder aux tribunaux un vaste pouvoir discrétionnaire de refuser d'accorder un sursis dans les cas où, s'ils ne le faisaient pas, il pourrait y avoir multiplicité des instances; or, le législateur n'a pris aucune mesure en ce sens. Pour les raisons qui précèdent, bien que la multiplicité des instances puisse causer certaines difficultés sur le plan pratique, on ne peut pas s'appuyer sur cette réalité pour faire fi du libellé de la loi.

(iv) Le paragraphe 7(6) — l'interdiction d'interjeter appel

[91] Enfin, le par. 7(6) prévoit tout simplement que « [l]a décision du tribunal judiciaire n'est pas susceptible d'appel ». Étant donné l'absence de termes restrictifs, il faut considérer que ce paragraphe renvoie à une « décision » rendue aux termes de l'un ou l'autre des paragraphes de l'art. 7. Le paragraphe 7(6) viserait donc, par exemple, la décision de surseoir à l'instance au titre du par. 7(1), la décision de refuser de surseoir à l'instance au titre du par. 7(2) et la décision d'ordonner un sursis partiel au titre du par. 7(5).

[92] J'aborde maintenant l'application de ce cadre d'analyse.

D. *Application*

(1) L'instance

[93] En l'espèce, l'« instance » est tout simplement le recours collectif intenté par M. Wellman, qui soutient être un « consommateur » au sens de la *Loi sur la protection du consommateur*. Cette instance sert de véhicule procédural au moyen duquel de multiples parties peuvent faire valoir ensemble leur réclamation (voir *Bisaillon*, par. 17). Comme je l'ai déjà précisé, certaines de ces parties sont des consommateurs, tandis que d'autres n'en sont pas.

(2) Les conventions d'arbitrage

[94] La présente instance met en jeu non pas une « convention » d'arbitrage, mais une constellation de « conventions » qui prennent chacune la forme

form arbitration clause incorporated into every individual mobile phone service contract between TELUS and each of its customers, consumers and non-consumers alike. Each agreement contains identical terms regarding the types of matters covered by the agreement. Broadly speaking, they stipulate that all claims arising out of or in relation to the contract, apart from the collection of accounts by TELUS, shall be determined through mediation and, failing that, arbitration. In this way, the agreements identify the "matters" in respect of which arbitration *is* mandatory, as well as the "matters" in respect of which arbitration *is not* mandatory: disputes over collections are not subject to mandatory arbitration, whereas disputes over any other matter arising out of or in relation to the contract are.

[95] This brings us to s. 7 of the *Arbitration Act*.

(3) Section 7 of the *Arbitration Act*

[96] Beginning with s. 7(1) of the *Arbitration Act*, the sole "matter" at issue in the proceeding commenced by Mr. Wellman, who is a party to an arbitration agreement, is alleged overbilling. This matter is dealt with in the arbitration agreements into which the consumers and business customers entered. Therefore, because there is at least one matter in the proceeding that is dealt with in the arbitration agreements, the general rule under s. 7(1) would ordinarily require a stay of the proceeding as a whole, leaving both consumers and business customers locked out of court.

[97] But the *Consumer Protection Act* offers the consumers a key to the courtroom. Section 7(2) of the *Consumer Protection Act* renders arbitration clauses contained in a "consumer agreement", defined in s. 1 as an agreement between a "consumer" and a "supplier"[7] in which "the supplier agrees to supply goods or services for payment", "invalid

[7] "Supplier" is defined in s. 1 as "a person who is in the business of selling, leasing or trading in goods or services".

d'une clause d'arbitrage type figurant dans tous les contrats de service de téléphonie cellulaire conclus entre TELUS et ses clients, qu'ils soient des consommateurs ou non. Chaque convention contient des clauses identiques quant aux types de questions qu'elle vise. En gros, elles stipulent que toutes les réclamations découlant du contrat ou s'y rapportant, sauf en ce qui concerne le recouvrement de créances par TELUS, doivent faire l'objet d'une médiation ou, à défaut de règlement, d'un arbitrage. Ainsi, les stipulations d'arbitrage précisent les « questions » à l'égard desquelles l'arbitrage *est* obligatoire, ainsi que les « questions » à l'égard desquelles il *ne l'est pas* : les différends concernant le recouvrement ne sont pas assujettis à l'arbitrage obligatoire, tandis que les différends concernant toute autre question découlant du contrat ou s'y rapportant le sont.

[95] Cela nous amène à l'art. 7 de la *Loi sur l'arbitrage*.

(3) L'article 7 de la *Loi sur l'arbitrage*

[96] Examinons d'abord le par. 7(1) de la *Loi sur l'arbitrage*. La seule « question » en litige dans le recours intenté par M. Wellman, une partie à une convention d'arbitrage, est celle de la surfacturation alléguée. Or, les conventions d'arbitrage qu'ont signé les consommateurs et les clients commerciaux traitent de cette question. Comme l'instance porte sur au moins une question qui est traitée dans les conventions d'arbitrage, la règle générale prévue au par. 7(1) exigerait donc normalement qu'il soit sursis aux procédures dans leur ensemble, ce qui empêcherait tant les consommateurs que les clients commerciaux de recourir aux tribunaux.

[97] Or, la *Loi sur la protection au consommateur* donne la clé de la salle d'audience aux consommateurs. Le paragraphe 7(2) de cette loi prévoit en effet que toute clause d'arbitrage énoncée dans une « convention de consommation », définie à l'article premier comme une convention entre un « consommateur » et un « fournisseur »[7] selon laquelle « le

[7] Selon l'art. 1, le terme « fournisseur » s'entend de « [q]uiconque exerce l'activité de fournir des marchandises ou des services, notamment en les vendant, en les louant ou en en faisant le commerce ».

insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act." Further, s. 8(1) of the *Consumer Protection Act* gives consumers the right to commence a class action, or become members of a class action, in respect of a dispute arising out of a consumer agreement. Read together, these two provisions render the arbitration agreements entered into by the consumers invalid to the extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commenced by Mr. Wellman. To this extent, the provisions of the *Consumer Protection Act* constitute a "legislative override" of the consumer arbitration agreements (*Seidel*, at para. 40). Moreover, since s. 7(2) of the *Consumer Protection Act* applies, s. 7(5) of that statute is triggered. That provision stipulates that "[s]ubsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration". In this way, s. 7(5) of the *Consumer Protection Act* shields the consumers in this case from a stay under s. 7(1) of the *Arbitration Act*.

fournisseur convient de fournir des marchandises ou des services moyennant paiement », « est invalide, dans la mesure où elle empêche le consommateur d'exercer son droit d'introduire une action devant la Cour supérieure de justice en vertu de la présente loi ». De plus, le par. 8(1) de la *Loi sur la protection au consommateur* donne aux consommateurs le droit d'intenter un recours collectif ou de devenir membres d'un groupe dans le cadre d'un recours collectif à l'égard d'un différend relatif à une convention de consommation. Lues conjointement, ces deux dispositions invalident les conventions d'arbitrage auxquelles ont adhéré les consommateurs dans la mesure où celles-ci empêchent ces derniers d'intenter un recours collectif ou de participer à un recours collectif comme celui qu'a introduit M. Wellman. À cet égard, les dispositions de la *Loi sur la protection du consommateur* constituent une « dérogation législative » à la clause d'arbitrage à l'égard des consommateurs (*Seidel*, par. 40). En outre, puisque le par. 7(2) de la *Loi sur la protection du consommateur* s'applique, le par. 7(5) entre en jeu. Cette disposition prévoit que « [l]e paragraphe 7 (1) de la *Loi de 1991 sur l'arbitrage* ne s'applique pas à l'instance visée au paragraphe (2), sauf si, après la naissance du différend, le consommateur consent à le soumettre à l'arbitrage ». Ainsi, le par. 7(5) de la *Loi sur la protection du consommateur* protège les consommateurs dans la présente affaire du sursis visé au par. 7(1) de la *Loi sur l'arbitrage*.

[98] The business customers, however, do not qualify as "consumers" under the *Consumer Protection Act*, and as such they cannot invoke the protections that the consumers enjoy under ss. 7(2), 7(5), and 8 of that statute. To be clear, although s. 7(5) of the *Consumer Protection Act* refers to "any proceeding to which subsection (2) applies", I am not persuaded that the use of the word "proceeding" shields *non-consumers* involved in the proceeding from a mandatory stay under s. 7(1) of the *Arbitration Act*. To reason otherwise would extend the protections of the *Consumer Protection Act* to persons who are not "consumers" and, in turn, erode the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If non-consumers bound by a valid arbitration agreement could do an end run around s. 7(1) of the

[98] Les clients commerciaux, par contre, ne sont pas des « consommateurs » au sens de la *Loi sur la protection du consommateur*; ils ne peuvent donc pas se prévaloir des mesures de protections qu'offrent aux consommateurs les par. 7(2) et (5) ainsi que l'art. 8 de cette loi. En termes clairs, même si le par. 7(5) de la *Loi sur la protection du consommateur* renvoie « à l'instance visée au paragraphe (2) », je ne suis pas convaincu que l'emploi du terme « instance » met les *non-consommateurs* visés par l'instance à l'abri du sursis obligatoire prévu au par. 7(1) de la *Loi sur l'arbitrage*. Si c'était le cas, les mesures de protection offertes par la *Loi sur la protection du consommateur* s'étendraient à des personnes qui ne sont pas des « consommateurs », ce qui éroderait la politique qui sous-tend la *Loi sur l'arbitrage*, selon laquelle les parties à une convention d'arbitrage

Arbitration Act simply by joining their claim with that of a consumer and pointing to s. 7(5) of the *Consumer Protection Act*, then this provision could become a vehicle for "piggybacking" non-consumer claims onto consumer claims. Indeed, if such an interpretation were accepted, a class action proceeding brought on behalf of millions of non-consumers who are each bound by an arbitration agreement would, if certified, be permitted to proceed in court *in its entirety* so long as a single consumer joined the class. In this way, the inclusion of a single consumer would be enough to open the courthouse doors to all. By contrast, interpreting s. 7(5) of the *Consumer Protection Act* in a way that restricts its application to consumers leads to a sound result that upholds the legislative objectives underlying both statutes: it preserves the protections afforded solely to "consumers" under the *Consumer Protection Act* and gives effect to the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.

[99] Having concluded that the business customers cannot avoid a stay under s. 7(1) of the *Arbitration Act* by turning to the *Consumer Protection Act*, they are left with only two potential avenues for avoiding a stay: ss. 7(2) and 7(5) of the *Arbitration Act*. But since Mr. Wellman has not argued that any of the five exceptions listed in s. 7(2) applies, s. 7(5) stands as the business customers' only possible pathway into court. Yet, as I will explain, that provision has no application on these facts.

[100] As indicated, s. 7(5) of the *Arbitration Act* is engaged only where the two preconditions set out in s. 7(5)(a) and (b) are satisfied. The first precondition is that the proceeding must involve both (1) at least one matter that *is* dealt with in the arbitration agreement and (2) at least one matter that *is not*. However,

valide devraient respecter l'entente qu'elles ont conclue. Si des non-consommateurs qui sont liés par une convention d'arbitrage valide pouvaient court-circuiter le par. 7(1) de la *Loi sur l'arbitrage* simplement en joignant leur réclamation à celle d'un consommateur et en invoquant le par. 7(5) de la *Loi sur la protection du consommateur*, cette disposition deviendrait un moyen pour que les réclamations des non-consommateurs « se greffent » à celles de consommateurs. En effet, s'il fallait adopter une telle interprétation, un recours collectif intenté au nom de millions de non-consommateurs chacun lié par une convention d'arbitrage, s'il était certifié, pourrait être entendu par un tribunal *dans son entièreté* à condition qu'un seul consommateur se joigne au recours. Ainsi, l'inclusion d'un seul consommateur suffirait pour que tous aient accès au tribunal. En revanche, donner au par. 7(5) de la *Loi sur la protection du consommateur* une interprétation qui limite son application aux consommateurs mène à un résultat valable, qui concorde avec les objectifs sous-jascents des deux lois : soit préserver les mesures de protection prévues uniquement pour les « consommateurs » dans la *Loi sur la protection du consommateur* et donner effet à la politique qui sous-tend la *Loi sur l'arbitrage*, selon laquelle les parties à une convention d'arbitrage valide devraient respecter l'entente qu'elles ont conclue.

[99] Puisque j'ai conclu que les clients commerciaux ne peuvent pas éviter le sursis prévu au par. 7(1) de la *Loi sur l'arbitrage* en invoquant la *Loi sur la protection du consommateur*, ils ne leur restent que deux avenues possibles pour arriver à leur fin : les par. 7(2) et (5) de la *Loi sur l'arbitrage*. Cela dit, comme M. Wellman n'a pas fait valoir qu'une des cinq exceptions énoncées au par. 7(2) s'applique, seul le par. 7(5) pourrait ouvrir la voie du tribunal aux clients commerciaux. Or, comme je l'expliquerai, cette disposition ne s'applique pas eu égard aux faits de l'espèce.

[100] Comme je l'ai déjà mentionné, le par. 7(5) de la *Loi sur l'arbitrage* ne s'applique que lorsqu'il est satisfait aux deux conditions préalables énoncées aux al. 7(5)a) et b). La première condition exige que l'instance porte sur (1) au moins une question qui *est* traitée dans la convention d'arbitrage et (2) au moins

that is not the case here. Instead, as I have explained, the proceeding involves a single matter — alleged overbilling — and that matter is dealt with in the arbitration agreements into which the consumers and business customers entered. As such, the first precondition is not met, so s. 7(5) has nothing to say.

[101] To illustrate how s. 7(5) could apply in a dispute between TELUS and its business customers, consider a hypothetical scenario in which the proceeding involves both (1) a claim advanced by business customers over alleged overbilling and (2) a claim advanced by TELUS for the collection of accounts. The former matter *is* covered by the arbitration agreements, whereas the latter *is not*. As such, this hypothetical proceeding would meet the first precondition. Hence, if the court were to determine that it would be reasonable to separate the two matters such that the second precondition is also met, then s. 7(5) would permit the court to stay the proceeding in respect of the matter dealt with in the arbitration agreements (i.e., alleged overbilling) and allow the proceeding to continue in respect of the matter *not* dealt with in the arbitration agreements (i.e., the collection of accounts). Alternatively, if the court were to determine that it would *not* be reasonable to separate the two matters such that the second precondition is *not* met, then the general rule under s. 7(1) would apply, meaning the court must stay the proceeding.

[102] But since s. 7(5) does not apply in this case, the proceeding must be stayed pursuant to the general rule under s. 7(1). And although the word "proceeding" is used without qualification in s. 7(1), seemingly in the sense of "proceeding *as a whole*", I am of the view that the stay in this case must be restricted to the parties who are legally bound by an arbitration agreement — namely, TELUS and the business customers. As indicated, the *Consumer Protection Act* grants the consumers the right to seek relief in court. The *Arbitration Act* cannot deprive them of that right. Moreover, taking a purposive approach, a principal object of the s. 7 framework

une question qui *ne l'est pas*. Ce n'est toutefois pas le cas en l'espèce. Comme je l'ai déjà expliqué, l'instance porte plutôt sur une seule question — celle de la surfacturation alléguée —, dont traitent les conventions d'arbitrage qu'ont signées les consommateurs et les clients commerciaux. Il n'est donc pas satisfait à la première condition préalable, et le par. 7(5) ne s'applique pas.

[101] Pour illustrer comment le par. 7(5) pourrait s'appliquer à un différend entre TELUS et ses clients commerciaux, imaginons un scénario où l'instance porte à la fois sur (1) une réclamation présentée par les clients commerciaux concernant la surfacturation alléguée et (2) une réclamation présentée par TELUS pour le recouvrement de créances. La première question *est* visée par la convention d'arbitrage; la seconde *ne l'est pas*. Cette instance fictive satisferait à la première condition préalable. Si le tribunal jugeait qu'il est raisonnable de dissocier les deux questions, de sorte que la deuxième condition préalable serait aussi remplie, le par. 7(5) permettrait donc au tribunal de surseoir à l'instance en ce qui touche la question traitée dans les conventions d'arbitrage (c.-à-d. la question de la surfacturation alléguée) et de permettre qu'elle se poursuive en ce qui touche la question qui *n'*est *pas* traitée dans les conventions d'arbitrage (c.-à-d. la question du recouvrement des créances). Subsidiairement, si le tribunal jugeait qu'il *n'*était *pas* raisonnable de dissocier les deux questions, de sorte que la deuxième condition préalable *ne* serait *pas* remplie, la règle générale prévue au par. 7(1) s'appliquerait et le tribunal serait tenu de surseoir à l'instance.

[102] Puisque le par. 7(5) ne s'applique pas en l'espèce, il faut donc surseoir à l'instance en application de la règle générale prévue au par. 7(1). En outre même si le terme « instance » est utilisé sans autre précision au par. 7(1), vraisemblablement dans le sens d'« instance *dans son ensemble* », je suis d'avis que le sursis en l'espèce doit être limité aux parties qui sont liées légalement par une convention d'arbitrage — à savoir TELUS et les clients commerciaux. Comme je l'ai déjà précisé, la *Loi sur la protection du consommateur* confère aux consommateurs le droit d'intenter un recours judiciaire et la *Loi sur l'arbitrage* ne peut pas leur enlever ce droit. De plus,

is to ensure parties to a valid arbitration agreement abide by their agreement; it is not to keep parties who either never agreed to or are not bound by an arbitration agreement out of court. The *Arbitration Act* has no business interfering with these litigants' procedural or substantive rights, and it certainly has no business denying them the right to seek a remedy in court simply because they happen to be tangentially associated with others who *did* agree to and *are* bound by an arbitration agreement.

[103] In sum, I conclude that the motions judge and the Court of Appeal erred in law by interpreting s. 7(5) of the *Arbitration Act* incorrectly and refusing to order a stay that, under s. 7(1), was mandatory. At the end of the day, s. 7(5) does not, in my view, permit the court to ignore a valid and binding arbitration agreement.

(4) Section 7(6) — Bar on Appeals

[104] Finally, I note that the court below did not address the potential application of s. 7(6) of the *Arbitration Act*, and the matter was discussed only briefly during oral argument before this Court. Neither of the parties has suggested that the s. 7(6) bar applies. In the absence of full submissions, I do not consider it appropriate to make a final ruling on the matter.

VII. Conclusion

[105] In the result, I would allow the appeal and stay the business customer claims. Given this result, TELUS is entitled to its costs in this Court and in the Court of Appeal. However, since TELUS's motion for a stay was heard together with Mr. Wellman's successful application for certification, it would not in my view be appropriate to grant TELUS costs in the Superior Court. I would therefore set aside the

d'un point de vue téléologique, le cadre d'analyse de l'art. 7 vise principalement à garantir que les parties à une convention d'arbitrage valide respectent l'entente qu'elles ont conclue; il ne vise pas à faire en sorte que les parties qui n'ont jamais convenu d'être liées par une convention d'arbitrage ou qui ne sont pas liées par une telle convention se voient refuser l'accès aux tribunaux. La *Loi sur l'arbitrage* ne peut pas interférer avec les droits procéduraux ou substantifs de ces parties, et elle ne peut certainement pas les priver de leur droit de demander une réparation devant les tribunaux uniquement parce qu'ils s'adonnent à être indirectement liés à d'autres qui, eux, *ont* conclu une convention d'arbitrage et à laquelle ils *sont* liés.

[103] En somme, je conclus que la juge des motions et la Cour d'appel ont commis une erreur de droit en interprétant incorrectement le par. 7(5) de la *Loi sur l'arbitrage* et en refusant d'ordonner un sursis qui, suivant le par. 7(1) de cette même loi, était obligatoire. En définitive, selon moi, le par. 7(5) ne permet pas au tribunal d'écarter une convention d'arbitrage valide et exécutoire.

(4) Le paragraphe 7(6) — l'interdiction d'interjeter appel

[104] Enfin, je remarque que la cour d'instance inférieure n'a pas examiné l'application possible du par. 7(6) de la *Loi sur l'arbitrage* et que la question n'a été abordée que brièvement durant les plaidoiries orales devant la Cour. Ni l'une ni l'autre des parties n'a suggéré que l'interdiction d'interjeter appel prévue au par. 7(6) s'applique. En l'absence d'observations complètes, j'estime qu'il ne convient pas de rendre une décision définitive sur la question.

VII. Conclusion

[105] En définitive, je suis d'avis d'accueillir le pourvoi et d'ordonner le sursis des réclamations des clients commerciaux. En conséquence, TELUS a droit à ses dépens devant la Cour et devant la Cour d'appel. Toutefois, comme la motion en vue d'un sursis de TELUS a été entendue en même temps que la demande de certification de M. Wellman qui a été accueillie, j'estime qu'il ne serait pas approprié d'accorder à

costs award made by the Superior Court and order that the parties bear their own costs in that court.

The reasons of Wagner C.J. and Abella, Karakatsanis and Martin JJ. were delivered by

[106] Abella and Karakatsanis JJ. (dissenting) — This appeal involves a class action against TELUS Communications Inc. The mandatory, non-negotiable contract which all purchasers of TELUS cell phone plans must sign, requires individual arbitration for any claim, and prevents court remedies such as class actions. Legislation in Ontario exempts consumers from the operation of these compulsory arbitration clauses. Businesses, on the other hand, no matter their size, and even if they are pursuing identical claims as consumers, can be caught by the operation of the arbitration clause in the contract. The Ontario courts, however, have recognized the denial of access to justice created by this disparity and have interpreted the *Arbitration Act, 1991* in a way that gives a court discretion to redress this anomaly and allow both sets of claimants to access a class action.

[107] Statutory interpretation is the art of inferring what words mean. Sometimes the meaning is obvious, either because of the clarity of the language or of its relationship to the legislative context. But sometimes interpreting words literally in isolation, undermines the policy objectives of the statutory scheme. The debate between those who are "textualists" and those who are "intentionalists" was resolved in Canada in 1998 when this Court decided that "there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[8] We do

[8] Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

TELUS les dépens en Cour supérieure. Je suis donc d'avis d'annuler l'ordonnance quant aux dépens rendue par la Cour supérieure et d'ordonner que chaque partie assume ses propres dépens devant cette cour.

Version française des motifs du juge en chef Wagner et des juges Abella, Karakatsanis et Martin rendus par

[106] Les juges Abella et Karakatsanis (dissidentes) — Le présent pourvoi concerne un recours collectif contre TELUS Communications Inc. Le contrat obligatoire et non négociable que doivent signer tous les acheteurs de forfaits de téléphonie cellulaire TELUS exige l'arbitrage individuel pour toutes les réclamations, et empêche la formation de recours judiciaires comme le recours collectif. La loi ontarienne soustrait les consommateurs à l'application de ces clauses d'arbitrage obligatoire. Cependant, les entreprises, peu importe leur taille, et même si elles présentent des réclamations identiques à celles des consommateurs, peuvent être assujetties à l'application de la clause d'arbitrage prévue dans le contrat. Les tribunaux de l'Ontario ont toutefois reconnu le déni d'accès à la justice que créait cette disparité et ont interprété la *Loi de 1991 sur l'arbitrage* de manière à ce que les tribunaux aient le pouvoir discrétionnaire de corriger cette anomalie et de permettre aux deux catégories de demandeurs d'exercer un recours collectif.

[107] L'interprétation législative est l'art de déduire le sens des mots. Celui-ci est parfois évident, que ce soit en raison de la clarté du libellé ou de son lien avec le contexte législatif. Parfois, cependant, l'interprétation littérale des mots pris isolément compromet les objectifs de politique générale du régime législatif. La Cour suprême a réglé, en 1998, le débat au Canada entre les « textualistes » et les « intentionnalistes » lorsqu'elle a décidé qu'« il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur[8] ». Nous ne faisons pas

[8] Elmer Driedger dans *Construction of Statutes* (2e éd. 1983), p. 87, cité dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21.

not just look at the words. Moreover, in Ontario all statutes are to be read in accordance with s. 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F., which states that: "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

[108] In other words, words matter, policy objectives matter, and consequences matter.

[109] The majority's approach, with respect, in effect represents the return of textualism. The words have been permitted to dominate and extinguish the contextual policy objectives of both the *Arbitration Act, 1991*, S.O. 1991, c. 17, and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, creating a dispute-resolution universe that has the effect of forcing litigants to spend thousands of dollars to resolve a dispute worth a fraction of that cost; denies others meaningful access to a remedy if they are not prepared, or cannot afford to, engage in a cost-benefit losing proposition; and invites the very proliferation of proceedings a class action was invented to avoid. The result of these disincentives is that business consumers will simply not enforce their rights.

[110] That is why the Ontario Court of Appeal has consistently interpreted the words of s. 7(5) of the *Arbitration Act, 1991* in a way that avoids the unpalatable consequences while invigorating the purposes and effective functioning of the relevant legislative schemes. This aligns with the Court's modern approach to statutory interpretation and should, as a result, be endorsed by this Court.

[111] The Ontario Legislature enacted the *Arbitration Act, 1991*, to allow willing parties to pursue arbitration as an alternate form of dispute resolution. To ensure expedient resolution and lower litigation

qu'observer les mots. De plus, en Ontario, toutes les lois doivent être interprétées en tenant compte du par. 64(1) de la *Loi de 2006 sur la législation*, L.O. 2006, c. 21, ann. F, qui prévoit que « [l]a loi est censée apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de ses objets. »

[108] Autrement dit, les mots comptent, les objectifs de politique générale comptent et les conséquences comptent.

[109] Soit dit en tout respect, l'approche des juges majoritaires représente en réalité le retour du textualisme. Les mots ont dominé et supprimé les objectifs contextuels de politique générale à la fois de la *Loi de 1991 sur l'arbitrage*, L.O. 1991, c. 17, et de la *Loi de 1992 sur les recours collectifs*, L.O. 1992, c. 6, créant de cette façon un univers de règlement des différends qui a pour effet de contraindre les parties à un litige à dépenser des milliers de dollars en vue de régler un différend qui ne vaut qu'une fraction de ce coût; de priver d'autres personnes d'un accès concret à un recours si elles ne sont pas préparées ou ne peuvent se permettre de prendre part à une affaire où elles perdraient sur le plan des coûts et des bénéfices; et de susciter la multiplication d'instances, ce que le recours collectif visait justement à éviter. Ces facteurs dissuasifs ont pour résultat que les clients commerciaux ne feront tout simplement pas valoir leurs droits.

[110] C'est pourquoi la Cour d'appel de l'Ontario a toujours interprété le libellé du par. 7(5) de la *Loi de 1991 sur l'arbitrage* de façon à éviter les conséquences inacceptables tout en renforçant les objets et le fonctionnement efficace des régimes législatifs pertinents. Cette façon de faire est conforme à la méthode moderne d'interprétation législative de notre Cour, et devrait, en conséquence, être entérinée par celle-ci.

[111] Le législateur ontarien a adopté la *Loi de 1991 sur l'arbitrage* pour permettre aux parties qui le souhaitent de recourir à l'arbitrage comme autre forme de règlement des différends. Afin d'assurer

costs, the *Arbitration Act, 1991* limited court intervention in arbitrable disputes. But it also gave judges discretion to permit court proceedings in certain limited circumstances, such as where the arbitration agreement was manifestly unfair.

[112] The issue in this appeal is how far that judicial discretion extends under the *Arbitration Act, 1991*. Specifically, the question is whether s. 7(5) gives judges the discretion to hear parties covered by an arbitration agreement when the same issue is the subject of litigation in the courts. Section 7(5) states:

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[113] Since 2002, the Ontario Court of Appeal has interpreted s. 7(5) as granting the discretion to stay matters that would otherwise be subject to arbitration. Similarly, for nearly a decade, the Ontario Court of Appeal has interpreted s. 7(5) as permitting otherwise arbitrable matters to be joined with class actions in the public interests of avoiding duplicative proceedings, increased costs, and the risk of inconsistent results.

[114] This interpretation, in our respectful view, aligns with the text and scheme of the provisions and is consistent not only with the purposes motivating

le règlement opportun des différends et de diminuer les frais de justice, la *Loi de 1991 sur l'arbitrage* a limité l'intervention judiciaire à l'égard des différends arbitrables. Mais elle a aussi investi les juges du pouvoir discrétionnaire d'autoriser les instances judiciaires dans certaines circonstances précises, par exemple lorsque la convention d'arbitrage était manifestement inéquitable.

[112] La question qui se pose dans le présent pourvoi est de savoir jusqu'où peut aller ce pouvoir discrétionnaire en vertu de la *Loi de 1991 sur l'arbitrage*. Il s'agit plus précisément d'établir si le par. 7(5) investit les juges du pouvoir discrétionnaire d'entendre les parties visées par une convention d'arbitrage lorsque la même question fait l'objet d'un litige devant les tribunaux. Le paragraphe 7(5) est ainsi libellé :

Convention s'appliquant à une partie du différend

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

[113] Depuis 2002, la Cour d'appel de l'Ontario a interprété le par. 7(5) comme conférant aux tribunaux le pouvoir discrétionnaire de surseoir aux questions qui seraient par ailleurs soumises à l'arbitrage. De même, depuis une dizaine d'années, la Cour d'appel de l'Ontario a interprété le par. 7(5) comme permettant que des questions par ailleurs arbitrables soient jointes aux recours collectifs afin d'éviter, dans l'intérêt public, le dédoublement des instances, des coûts plus élevés et le risque de résultats incohérents.

[114] Cette interprétation, à notre avis, s'accorde avec le texte des dispositions et le régime créé par celles-ci et est conforme non seulement aux objets

the enactment of the *Arbitration Act, 1991* but also with the purpose of s. 7(5) itself.

[115] In our view, where a proceeding includes both matters covered by an arbitration agreement and other matters that are not, s. 7(5) gives a judge discretion to allow the entire proceeding to continue in court, even if some parties would otherwise be subject to an arbitration clause.

Background

[116] The claim is that TELUS, a Canadian cellular service provider, had for a number of years, and without notifying its customers, rounded the times of cellular phone calls up to the next minute. This resulted in overcharging clients on their monthly bills by small amounts.

[117] TELUS used the same standard-form contract for business and consumer clients, who initiated a class action together against TELUS. The named plaintiff in this appeal, Avraham Wellman, is a consumer and the class representative.

[118] TELUS's standard-form contract is non-negotiable. It contains a dispute resolution clause requiring mediation, and failing resolution, arbitration of any disputes other than in respect of the collection of accounts by TELUS. This arbitration clause is inapplicable to consumers because Ontario's consumer protection legislation renders an arbitration clause in a consumer contract invalid insofar as it prevents a consumer from initiating court proceedings (*Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, s. 7).

[119] On its face, the arbitration clause is valid for business clients. For this reason, TELUS applied to stay the business clients' claims and have them struck from the class proceeding, arguing that those claims had to be resolved by arbitration.

ayant motivé l'adoption de la *Loi de 1991 sur l'arbitrage*, mais aussi à l'objet du par. 7(5) lui-même.

[115] À notre avis, lorsque l'instance porte à la fois sur des questions visées par une convention d'arbitrage et d'autres questions qui ne le sont pas, le par. 7(5) investit le juge du pouvoir discrétionnaire de permettre que toute l'instance se poursuive devant le tribunal, même si certaines parties sont par ailleurs assujetties à une clause d'arbitrage.

Contexte

[116] Il est allégué que TELUS, un fournisseur de services de téléphonie cellulaire canadien, a pendant un certain nombre d'années, et sans en aviser ses clients, arrondi à la minute suivante la durée des appels faits au moyen d'un téléphone cellulaire. Cette pratique a donné lieu à une facturation excessive de petits montants sur les factures mensuelles des clients.

[117] TELUS utilisait le même contrat type pour les clients commerciaux et les clients consommateurs, qui ont intenté ensemble un recours collectif contre elle. Le demandeur désigné dans le présent pourvoi, Avraham Wellman, est un consommateur et représente le groupe.

[118] Le contrat type de TELUS est non négociable. Il contient une clause de règlement des différends exigeant la médiation ou, à défaut de règlement, l'arbitrage de tous les différends, sauf en ce qui concerne le recouvrement de créances par TELUS. Cette clause d'arbitrage ne s'applique pas aux consommateurs parce que la loi sur la protection du consommateur de l'Ontario invalide les clauses d'arbitrage dans les contrats de consommation dans la mesure où celles-ci empêchent le consommateur d'introduire une instance judiciaire (*Loi de 2002 sur la protection du consommateur*, L.O. 2002, c. 30, ann. A, art. 7).

[119] À première vue, la clause d'arbitrage est valide pour les clients commerciaux. C'est pourquoi TELUS a demandé au tribunal de surseoir aux réclamations des clients commerciaux et de les radier du recours collectif, au motif que ces réclamations devaient être soumises à l'arbitrage.

[120] The provisions of the *Arbitration Act, 1991* dealing with stays are found in s. 7, which states:

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

5. The matter is a proper one for default or summary judgment.

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and

[120] Les dispositions de la *Loi de 1991 sur l'arbitrage* traitant du sursis figurent à l'art. 7, qui est ainsi rédigé :

Sursis

7 (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

1. Une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique.

2. La convention d'arbitrage est nulle.

3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.

4. La motion a été présentée avec un retard indu.

5. La question est propre à un jugement par défaut ou à un jugement sommaire.

Poursuite de l'arbitrage

(3) L'arbitrage du différend peut être engagé et poursuivi pendant que la motion est devant le tribunal judiciaire.

Conséquences du refus de surseoir

(4) Si le tribunal judiciaire refuse de surseoir à l'instance :

a) d'une part, aucun arbitrage du différend ne peut être engagé;

b) d'autre part, l'arbitrage qui a été engagé ne peut être poursuivi, et tout ce qui a été fait dans le cadre de l'arbitrage avant que le tribunal judiciaire ne rende sa décision est sans effet.

Convention s'appliquant à une partie du différend

(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui touche les questions traitées dans la convention

allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[121] As previously noted, the provision at issue in this appeal is s. 7(5), which Ontario courts have interpreted to allow business clients who would otherwise be bound by an arbitration agreement to join in class proceedings with consumers.

[122] Both the motions judge and the majority of the Court of Appeal in this case relied on *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, which was decided by a five member panel of the Ontario Court of Appeal. Thaddeus Griffin, who had purchased a Dell notebook computer through his personal business, joined with consumers in a class action alleging deficiencies in Dell's products. Dell's standard-form sales agreement contained a clause requiring that all disputes be submitted to arbitration.

[123] Dell's position at the certification stage was that business clients should not be allowed to join consumers in the class action, and their claims should be stayed and directed to individual arbitration. Lax J. held that it was "fanciful to think that any claimant could pursue an individual claim in a complex products liability case" and that enforcing Dell's arbitration clause would have the effect of immunizing Dell "from accounting to class members for any wrong it may have caused" (*Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (Ont. S.C.J.), at paras. 92-93).

d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :

a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;

b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

[121] Comme il a déjà été mentionné, la disposition en cause dans le présent pourvoi est le par. 7(5), que les tribunaux ontariens ont interprété comme permettant aux clients commerciaux qui seraient par ailleurs liés par une convention d'arbitrage de participer à des recours collectifs avec les consommateurs.

[122] Tant la juge des requêtes que les juges majoritaires de la Cour d'appel en l'espèce se sont fondés sur l'arrêt *Griffin c. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, qui a été rendu par une formation de cinq juges de la Cour d'appel de l'Ontario. Thaddeus Griffin, qui avait acheté un ordinateur bloc-notes Dell par l'intermédiaire de son entreprise personnelle, a participé avec des consommateurs à un recours collectif dans lequel ceux-ci soutenaient que les produits Dell étaient défectueux. Le contrat de vente type de Dell contenait une clause exigeant que tous les différends soient soumis à l'arbitrage.

[123] À l'étape de la certification, Dell a soutenu que les clients commerciaux ne devraient pas être autorisés à participer au recours collectif avec les consommateurs, et que leurs réclamations devraient faire l'objet d'un sursis et être renvoyées à l'arbitrage individuel. La juge Lax a estimé qu'il était [TRADUCTION] « fantaisiste de croire qu'un demandeur pourrait présenter une réclamation individuelle dans une affaire complexe de responsabilité du fabricant » et que l'application de la clause d'arbitrage de Dell aurait pour effet que celle-ci serait immunisée contre l'obligation de [TRADUCTION] « rendre des comptes aux membres du groupe concernant le tort qu'elle a pu causer » (*Griffin c. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (C.S.J. Ont.), par. 92-93).

[124] The Ontario Court of Appeal confirmed the decision to allow Griffin's claim to proceed in court. It found that s. 7(5) gives a motions judge the discretion to refuse a partial stay where an action involves some claims that are subject to an arbitration agreement and some that are not, because

> . . . it would not be reasonable to separate the consumer from the non-consumer claims. We should, therefore, refuse a partial stay and allow all the claims to proceed under the umbrella of the class proceeding.
>
> Granting a stay of the non-consumer claims would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay. This would be contrary to the *Courts of Justice Act*, s. 138, which provides that "[a]s far as possible, a multiplicity of legal proceedings shall be avoided", and contrary to the jurisprudence on the reasonableness of partial stays under s. 7(5) of the *Arbitration Act, 1991*. [paras. 46-47]

[125] A number of cases were relied on to support this interpretation (*Radewych v. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (Ont. S.C.J.), aff'd 2007 ONCA 721; *Johnston v. Goudie* (2006), 212 O.A.C. 79, at para. 18; *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78 (S.C.J.), at para. 31, aff'd 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, 2007 CanLII 55364 (Ont. S.C.J.), at para. 34; *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 245 D.L.R. (4th) 107, at paras. 37-38.)

[126] In the case before us, TELUS brought a similar motion to stay the proceedings with respect to the business customer claims. Conway J. relied on the Ontario Court of Appeal's decision in *Griffin* in concluding that s. 7(5) of the *Arbitration Act, 1991* expressly grants the court the discretion to determine whether it is reasonable to separate the matters dealt with in an arbitration agreement from other matters in the litigation. If the court does not consider it

[124] La Cour d'appel de l'Ontario a confirmé la décision selon laquelle la réclamation de M. Griffin pouvait être portée devant le tribunal. Elle a conclu que le par. 7(5) investit le juge des requêtes du pouvoir discrétionnaire de refuser d'accorder un sursis partiel lorsque l'action porte sur des réclamations qui sont visées par une convention d'arbitrage et d'autres qui ne le sont pas, parce que

> [TRADUCTION] . . . il ne serait pas raisonnable de dissocier les réclamations présentées par des consommateurs de celles qui sont présentées par des non-consommateurs. Nous devrions, par conséquent, refuser d'accorder un sursis partiel et permettre que toutes les réclamations soient examinées dans le cadre du recours collectif.
>
> Accorder un sursis pour les réclamations présentées par des non-consommateurs créerait de l'inefficacité et entraînerait un risque de multiplicité des instances et des coûts et des retards supplémentaires. Cela serait contraire à l'art. 138 de la *Loi sur les tribunaux judiciaires*, qui dispose qu'« [i]l faut éviter, dans la mesure du possible, la multiplicité des instances », et contraire à la jurisprudence sur le caractère raisonnable des sursis partiels ordonnés aux termes du par. 7(5) de la *Loi de 1991 sur l'arbitrage*. [par. 46-47]

[125] Plusieurs décisions ont été invoquées à l'appui de cette interprétation (*Radewych c. Brookfield Homes (Ontario) Ltd.*, 2007 CanLII 23358 (C.S.J. Ont.), conf. par 2007 ONCA 721; *Johnston c. Goudie* (2006), 212 O.A.C. 79, par. 18; *Penn-Co Construction Canada (2003) Ltd. c. Constance Lake First Nation* (2007), 66 C.L.R. (3d) 78 (C.S.J.), par. 31, conf. par 2008 ONCA 768, 76 C.L.R. (3d) 1; *Frambordeaux Developments Inc. c. Romandale Farms Ltd.*, 2007 CanLII 55364 (C.S.J. Ont.), par. 34; *New Era Nutrition Inc. c. Balance Bar Co.*, 2004 ABCA 280, 245 D.L.R. (4th) 107, par. 37-38.)

[126] Dans l'affaire qui nous occupe, TELUS a présenté une demande de sursis similaire à l'égard des réclamations des clients commerciaux. La juge Conway s'est fondée sur l'arrêt *Griffin* de la Cour d'appel de l'Ontario pour conclure que le par. 7(5) de la *Loi de 1991 sur l'arbitrage* confère expressément à la cour le pouvoir discrétionnaire de décider s'il est raisonnable de dissocier les questions traitées dans une convention d'arbitrage des autres

reasonable to separate them and refuses a partial stay, all matters could proceed, notwithstanding the arbitration clause. Pursuant to *Griffin*, she held that this discretion could be exercised to allow non-consumer claims to be joined with a consumer class action, where it is reasonable to do so. Since there is no group arbitration permitted for the non-consumer claims, separating the two proceedings could lead to inefficiency, inconsistent results and a multiplicity of proceedings.

questions en litige. Si la cour estime qu'il n'est pas raisonnable de les dissocier et refuse d'accorder un sursis partiel, toutes les questions peuvent être soumises au tribunal, nonobstant la clause d'arbitrage. Conformément à l'arrêt *Griffin*, elle a conclu que ce pouvoir discrétionnaire pouvait être exercé pour permettre la jonction des réclamations présentées par des non-consommateurs à un recours collectif intenté par des consommateurs, lorsqu'il est raisonnable de le faire. Étant donné que les réclamations présentées par des non-consommateurs ne peuvent pas être soumises à un arbitrage collectif, la dissociation des deux instances pourrait créer de l'inefficacité, mener à des résultats incohérents et entraîner la multiplicité des instances.

[127] TELUS appealed the decision to the Ontario Court of Appeal. Justice van Rensburg, writing for the majority, agreed with the motions judge.

[127] TELUS a interjeté appel de la décision devant la Cour d'appel de l'Ontario. La juge van Rensburg, s'exprimant au nom des juges majoritaires, a souscrit à l'opinion de la juge des requêtes.

[128] TELUS appealed, arguing that *Griffin* was wrongly decided.

[128] TELUS a porté cette décision en appel, faisant valoir que l'arrêt *Griffin* est erroné.

[129] Unlike our colleagues, we agree with van Rensburg J.A. and would dismiss the appeal.

[129] Contrairement à nos collègues, nous partageons l'opinion de la juge van Rensburg et sommes d'avis de rejeter le pourvoi.

Analysis

Analyse

[130] A provision must be assessed in all its textures — language, purpose, effect — to prevent the suffocation of its meaning by a technical literal reading of the words. As Moldaver J. noted in *R. v. Alex*, [2017] 1 S.C.R. 967: "This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms . . ." (para. 31). What is required is an interpretation that is anchored in parliamentary intention, statutory language, jurisprudence, and practice (*Rizzo & Rizzo Shoes*, at paras. 20-41). In other words, the interpretation must be "reasonable and just" (Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 2.9).

[130] Une disposition doit être appréciée sous toutes ses textures — libellé, objet et effet — pour que son sens ne soit pas étouffé par une interprétation littérale et formaliste de ses termes. Comme l'a souligné le juge Moldaver dans *R. c. Alex*, [2017] 1 R.C.S. 967 : « La Cour signale dans maints arrêts que le sens ordinaire n'est pas en soi déterminant et qu'une entreprise d'interprétation législative demeure incomplète sans l'examen du contexte, de l'objet et des normes juridiques pertinentes. . . » (par. 31). Ce qu'il faut, c'est une interprétation qui ancrée dans l'intention du législateur, le libellé de la loi, la jurisprudence et les pratiques (*Rizzo & Rizzo Shoes*, par. 20-41). Autrement dit, l'interprétation doit être [TRADUCTION] « raisonnable et juste » (Ruth Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), § 2.9).

[131] Ontario's *Arbitration Act*, *1991* was enacted to allow parties to design their own settlement processes and resolve their disputes outside the courts. It anticipated two or more parties freely negotiating their arbitral process. Prior to the 1991 legislation, judges exercised considerable discretion to stay arbitration proceedings — even where all the parties had agreed to submit their differences to arbitration. The courts' use of this power was controversial because it was seen to represent judicial interference with the parties' freedom to contract.

[131] La *Loi de 1991 sur l'arbitrage* de l'Ontario a été adoptée afin de permettre aux parties d'élaborer leurs propres processus de règlement et de résoudre leurs différends à l'extérieur des tribunaux. Elle prévoyait que deux ou plusieurs parties peuvent négocier librement leur processus d'arbitrage. Avant l'adoption de la loi de 1991, les juges pouvaient surseoir aux procédures d'arbitrage en vertu de leur large pouvoir discrétionnaire — même lorsque toutes les parties avaient convenu de soumettre leur différend à l'arbitrage. L'exercice de ce pouvoir par les tribunaux prêtait à controverse parce qu'on le voyait comme une ingérence judiciaire à l'égard de la liberté contractuelle des parties.

[132] Ontario's *Arbitration Act, 1991* was based on the *Uniform Arbitration Act* (1990) (online) adopted by the Uniform Law Conference of Canada, which resulted from the Alberta Law Commission's 1989 report on the adoption of uniform arbitration legislation. It was modeled, in part, on the Alberta Institute of Law Research and Reform's 1988 report *Proposals for a New Alberta Arbitration Act* (Report No. 51). In that report, the Institute recommended a substantial overhaul of the existing legislation. Specifically, the Institute proposed limiting the courts' ability to refuse to stay litigation where the parties had agreed to arbitrate. The proposal found expression in s. 7(1) of the *Arbitration Act*, *1991*, which mandates that if a party to an arbitration agreement tries to pursue a remedy to an arbitrable dispute in court, a judge must stay the court proceeding. Limited exceptions to this general rule are found in s. 7(2).

[132] La *Loi de 1991 sur l'arbitrage* de l'Ontario s'inspirait de la *Loi uniforme sur l'arbitrage* (1990) (en ligne) adoptée par la Conférence pour l'harmonisation des lois au Canada, qui découlait du rapport de 1989 sur l'adoption d'une législation uniforme en matière d'arbitrage de l'Alberta Law Commission. Elle prenait modèle, en partie, sur le rapport de 1988 de l'Alberta Institute of Law Research and Reform intitulé *Proposals for a New Alberta Arbitration Act* (Rapport nº 51). Dans ce rapport, l'Institut recommandait une refonte importante de la loi existante. Plus précisément, l'Institut proposait de limiter le pouvoir des tribunaux de refuser de surseoir à l'instance lorsque les parties avaient convenu de recourir à l'arbitrage. Cette proposition a trouvé son expression dans le par. 7(1) de la *Loi de 1991 sur l'arbitrage*, qui prévoit que, si une partie à une convention d'arbitrage tente de former un recours judiciaire à l'égard d'un différend arbitrable, le juge doit surseoir à l'instance. Le paragraphe 7(2) prévoit des exceptions limitées à cette règle générale.

[133] The proposal also included, without commentary, a provision giving the court discretion to refuse a stay of litigation if the "arbitration agreement upon which the application is based . . . does not cover the dispute, or . . . *does not bind all parties to the dispute*" (s. 8(2) (emphasis added)). This provision is the progenitor of s. 7(5) of the current *Arbitration Act, 1991*.

[133] La proposition contenait également une disposition, sans commentaire, conférant au tribunal le pouvoir discrétionnaire de refuser de surseoir à l'instance si la [TRADUCTION] « convention d'arbitrage sur laquelle est fondée la demande [. . .] ne s'applique pas au différend [. . .] *ou ne lie pas toutes les parties au différend* » (par. 8(2) (italiques ajoutés)). Cette disposition est l'ancêtre du par. 7(5) de la *Loi de 1991 sur l'arbitrage* actuelle.

[134] This second proposed provision suggested that courts have discretion to allow court proceedings to go ahead in two circumstances: (1) where an arbitration does not cover all of the issues raised in the dispute, and (2) where both parties *and* non-parties to an arbitration agreement commence litigation against the same defendant.

[135] The policy reasons for these exceptions were the same as those which animated the *Arbitration Act, 1991*, namely, access to justice, expediency, and limiting the role of the courts to circumstances where their participation would improve efficiency and reduce delay. At the introduction of the *Arbitration Act, 1991*, the then-Attorney General, Howard Hampton, said:

> One of the commitments this government has made to the people of Ontario is to *improve access to justice in the province*. The fulfilment of this commitment will involve a wide range of programs and policies. It will also include initiatives in law reform to simplify the often intimidating legal system for the use of the public.
>
> In this context I will be introducing today for first reading the Arbitration Act, 1991. Arbitration is a good and accessible method of seeking resolution for many kinds of disputes. It can be *more expedient and less costly than going to court.* The parties can design their own procedures and select appropriate arbitrators.
>
> . . .
>
> The new statute will make it easier for people to submit private disputes to resolution by arbitration. It will do so in several ways:
>
> First, when people have agreed to go to arbitration, the act will help ensure that all parties abide by this agreement.
>
> Second, the ability of the courts to intervene in an arbitration is spelled out precisely, and as a result, *the*

[134] Cette deuxième disposition proposée semblait indiquer que les tribunaux peuvent, en vertu de leur pouvoir discrétionnaire, permettre que les instances judiciaires se poursuivent dans deux cas : (1) lorsque l'arbitrage ne s'applique pas à toutes les questions soulevées dans le cadre du différend, et (2) lorsque des parties *et* des non-parties à une convention d'arbitrage engagent une poursuite contre le même défendeur.

[135] Les raisons de principe à la base de ces exceptions étaient les mêmes que celles qui sous-tendaient la *Loi de 1991 sur l'arbitrage*, à savoir l'accès à la justice, l'opportunité et la limitation du rôle des tribunaux aux circonstances où leur participation améliorerait l'efficacité et réduirait les retards. Lors de la présentation de la *Loi de 1991 sur l'arbitrage*, Howard Hampton, le procureur général de l'époque, a dit ceci :

> [TRADUCTION] L'un des engagements qu'a pris le présent gouvernement envers les Ontariens est d'*améliorer l'accès à la justice dans la province*. L'exécution de cet engagement comportera la mise en œuvre de toute une série de programmes et de politiques. Elle comprendra également des mesures de réforme du droit visant à simplifier le système judiciaire souvent intimidant pour l'usage du public.
>
> Dans ce contexte, je présente aujourd'hui en première lecture la Loi de 1991 sur l'arbitrage. L'arbitrage est un bon moyen accessible de tenter d'obtenir le règlement de plusieurs types de différends. Il peut être *plus opportun et moins coûteux que de s'adresser aux tribunaux.* Les parties peuvent élaborer leurs propres procédures et choisir des arbitres compétents.
>
> . . .
>
> La nouvelle loi permettra aux gens de soumettre plus facilement leurs différends privés à l'arbitrage en vue d'un règlement, et ce, de plusieurs façons :
>
> D'abord, lorsque les gens auront convenu d'aller en arbitrage, la loi fera en sorte que toutes les parties respectent cette convention.
>
> Ensuite, le pouvoir des tribunaux d'intervenir dans les arbitrages est énoncé précisément et, par conséquent,

role of the courts will be constructive and less likely to be used by reluctant parties to delay the proceedings. [Emphasis added.]

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 1st Sess., 35th Parl., March 27, 1991, at p. 245)

[136] At First Reading of the Bill the same day, the Attorney General further explained:

> The guiding principles of the new Arbitration Act are that the parties to a valid arbitration agreement should abide by their agreements, that they should be free to design the process for their own arbitration as they see fit *within the limits of overall fairness*, that *opportunities for delay should be minimized*, and finally that awards made in arbitrations should be readily enforceable and should be reviewable by the courts only for specific defects. [Emphasis added.]

(Legislative Assembly of Ontario, at p. 256)

[137] These statements outline the guiding rationales of the legislation, as well as the means by which they were intended to be effected. The overall purpose of the *Arbitration Act, 1991* was to promote access to justice. Its chosen means of achieving that goal was to promote accessibility by giving parties the choice of resolving disputes outside the court system. The reason for creating this option was a recognition that the court system could be costly and slow. The courts' discretion to intervene in arbitrable matters was therefore narrowed to further the goals of expedient dispute resolution.

[138] The *Arbitration Act, 1991* provides a scheme for the effective private arbitration of disputes covered by an arbitration agreement. It sets out default rules governing the conduct of arbitrations and the role of courts in relation to private arbitrations. Various provisions address when judicial intervention is warranted, when judicial support is necessary to give effect to private arbitration processes and awards,

les tribunaux joueront un rôle constructif et seront moins susceptibles d'être utilisés par des parties réticentes pour retarder les instances. [Italiques ajoutés.]

(Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, 1re sess., 35e lég., 27 mars 1991, p. 245)

[136] Lors de la première lecture du projet de loi, le même jour, le procureur général a en outre expliqué ceci :

> [TRADUCTION] Les principes directeurs de la nouvelle Loi sur l'arbitrage sont que les parties à une convention d'arbitrage valide doivent respecter l'entente qu'elles ont conclue, qu'elles doivent être libres d'élaborer comme elles l'entendent leur propre processus d'arbitrage *dans les limites de l'équité générale*, que *les possibilités d'occasionner un retard doivent être réduites au minimum* et, enfin, que les sentences arbitrales doivent être faciles à exécuter et susceptibles de contrôle judiciaire seulement en ce qui concerne des irrégularités précises. [Italiques ajoutés.]

(Assemblée législative de l'Ontario, p. 256)

[137] Ces déclarations donnent un aperçu des raisons d'être de la loi ainsi que des moyens par lesquels elles étaient censées être mises en œuvre. L'objet général de la *Loi de 1991 sur l'arbitrage* était de promouvoir l'accès à la justice. Le moyen choisi pour atteindre cet objectif consistait à favoriser l'accessibilité en donnant aux parties le choix de régler leurs différends en dehors du système judiciaire. Cette possibilité a été offerte en reconnaissance du fait que le système judiciaire peut être lent et coûteux. Le pouvoir discrétionnaire des tribunaux d'intervenir dans les affaires arbitrables a donc été restreint afin de favoriser la réalisation des objectifs du règlement opportun des différends.

[138] La *Loi de 1991 sur l'arbitrage* instaure un régime permettant l'arbitrage privé efficace des différends visés par une convention d'arbitrage. Elle établit des règles applicables par défaut qui régissent les arbitrages et le rôle des tribunaux relativement aux arbitrages privés. Diverses dispositions prévoient les situations où l'intervention des tribunaux est justifiée, où l'appui des tribunaux est nécessaire pour donner

and when appeals to the court are required. Broadly speaking, the *Arbitration Act, 1991* seeks to facilitate timely and efficient dispute resolution.

[139] Ontario courts have, since 1998, consistently highlighted the purposes of the *Arbitration Act, 1991* in interpreting s. 7(5) as granting a discretion to override arbitration agreements where it would be unreasonable to separate the arbitrable and non-arbitrable matters. In *Rosedale Motors Inc. v. Petro-Canada Inc*. (1998), 42 O.R. (3d) 776 (S.C.J.), Rosedale Motors attempted to litigate a number of matters, some of which were governed by an arbitration agreement while others were not. Petro-Canada Inc. sought a stay of the arbitrable matters. Sharpe J. concluded that "[t]he language of the *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(5) supports the existence of a discretion to refuse a stay where it is not reasonable to separate the matters dealt with in the agreement from the other matters in dispute between the parties" (pp. 783-84).

[140] The Ontario Court of Appeal adopted this interpretation in *Brown v. Murphy* (2002), 59 O.R. (3d) 404 (C.A.), and endorsed it in the context of multiparty proceedings in *Radewych*.

[141] The following year, in *Penn-Co Construction*, the Court of Appeal highlighted the practical necessity of allowing courts to hear broad claims, some of which would otherwise be subject to arbitration proceedings. In that case, Penn-Co had claimed relief against Constance Lake First Nation beyond the scope of what was identified in the agreement as being arbitrable. They had also claimed against several other parties who were not contractually bound by the arbitration clause. Subsequently, Penn-Co tried to enforce the arbitration agreement against some of the parties. The Court of Appeal upheld the motions judge's ruling that permitting arbitration of some claims and staying the other claims would involve duplication of effort,

effet aux processus et aux sentences d'arbitrage privé et où les appels devant les tribunaux sont nécessaires. D'une manière générale, la *Loi de 1991 sur l'arbitrage* vise à faciliter le règlement efficace et opportun des différends.

[139] Depuis 1998, les tribunaux ontariens ont invariablement mis l'accent sur les objets de la *Loi de 1991 sur l'arbitrage* lorsqu'ils ont interprété le par. 7(5) comme conférant le pouvoir discrétionnaire d'écarter la convention d'arbitrage lorsqu'il serait déraisonnable de dissocier les questions arbitrables de celles qui ne le sont pas. Dans l'affaire *Rosedale Motors Inc. c. Petro-Canada Inc*. (1998), 42 O.R. (3d) 776 (C.S.J.), Rosedale Motors a tenté de porter devant le tribunal plusieurs questions, dont certaines étaient régies par une convention d'arbitrage et d'autres non. Petro-Canada Inc. a demandé un sursis à l'égard des questions arbitrables. Le juge Sharpe a conclu que [TRADUCTION] « [l]e libellé du par. 7(5) de la *Loi de 1991 sur l'arbitrage*, L.O. 1991, c. 17, étaye l'existence d'un pouvoir discrétionnaire de refuser d'accorder un sursis lorsqu'il n'est pas raisonnable de dissocier les questions traitées dans la convention des autres questions opposant les parties » (p. 783-784).

[140] La Cour d'appel de l'Ontario a adopté cette interprétation dans l'arrêt *Brown c. Murphy* (2002), 59 O.R. (3d) 404 (C.A.), et y a souscrit dans le contexte des instances multipartites dans l'arrêt *Radewych*.

[141] L'année suivante, dans l'arrêt *Penn-Co Construction*, la Cour d'appel a souligné la nécessité pratique de permettre aux tribunaux d'instruire les réclamations générales, dont certaines seraient par ailleurs visées par des procédures d'arbitrage. Dans cette affaire, Penn-Co avait présenté contre Constance Lake First Nation une réclamation allant au-delà des questions indiquées dans la convention comme étant arbitrables. Elle avait également présenté une réclamation contre plusieurs autres parties qui n'étaient pas liées contractuellement par la clause d'arbitrage. Penn-Co avait par la suite tenté de faire exécuter la convention d'arbitrage contre certaines parties. La Cour d'appel a confirmé la décision de la juge des requêtes selon laquelle le fait de permettre

extra cost and inconvenience, and risk inconsistent results (para. 5).

[142] This decision was followed by *Griffin*, discussed earlier in these reasons, in which the Court of Appeal found that duplication, inefficiency in the litigation process, and correspondingly higher costs — the very problems the *Arbitration Act, 1991* sought to solve — were key to determining when the discretion would apply. The court discussed how cumbersome and inefficient it would be to separate the proceedings, pointing out that a consumer class action would take place whether or not the business customers' claims were joined. The liability and damages issues would be identical. Carving out the business customers' claims would mean unnecessary duplication and expense. Moreover, individual arbitration would be inefficient, since

> [a] partial stay would require an examination of each claim and a determination of whether it was a consumer or non-consumer claim. This is bound to be contentious in the case of many purchasers, as laptop computers are portable and regularly used for a variety of purposes. Dividing the claims as between those to be litigated and those to be arbitrated would be costly and time-consuming. [para. 51]

[143] This interpretation of s. 7(5) has been followed by Ontario courts since the Court of Appeal's decision in *Griffin* in 2010.

[144] Before this Court, Mr. Wellman argues that the Ontario courts have correctly concluded that s. 7(5) applies whenever a court proceeding includes arbitrable and non-arbitrable matters — whether in circumstances where an arbitration agreement does not cover all of the issues put before the court, or when multiple parties commence proceedings, some of whom are bound by arbitration agreements and

l'arbitrage de certaines réclamations et d'accorder un sursis à l'égard des autres entraînerait un dédoublement des efforts ainsi que des frais et inconvénients supplémentaires, et risquerait de donner lieu à des résultats incohérents (par. 5).

[142] Cette décision a été suivie de l'arrêt *Griffin*, analysé précédemment dans les présents motifs, où la Cour d'appel a estimé que le dédoublement des efforts, l'inefficacité du processus judiciaire et les frais plus élevés en découlant — les problèmes mêmes que la *Loi de 1991 sur l'arbitrage* visait à régler — étaient des éléments essentiels pour déterminer quand le pouvoir discrétionnaire s'appliquait. La cour a expliqué en quoi il serait encombrant et inefficace de dissocier les instances, soulignant qu'un recours collectif intenté par des consommateurs aurait lieu, que les réclamations des clients commerciaux y soient jointes ou non. Les questions relatives à la responsabilité et aux dommages-intérêts seraient identiques. L'exclusion des réclamations des clients commerciaux entraînerait un dédoublement des efforts et des frais inutiles. De plus, l'arbitrage individuel serait inefficace, car

> [TRADUCTION] [un] sursis partiel exigerait que l'on examine chaque réclamation et que l'on détermine s'il s'agit d'une réclamation présentée par un consommateur ou un non-consommateur, ce qui pourrait constituer un point litigieux pour de nombreux acheteurs, car les ordinateurs blocs-notes sont portatifs et fréquemment utilisés à des fins diverses. Le fait de dissocier les réclamations pouvant être portées devant le tribunal de celles devant être soumises à l'arbitrage coûterait cher et prendrait beaucoup de temps. [par. 51]

[143] Les tribunaux de l'Ontario appliquent cette interprétation du par. 7(5) depuis l'arrêt *Griffin* de la Cour d'appel rendu en 2010.

[144] Devant la Cour, M. Wellman soutient que les tribunaux de l'Ontario ont eu raison de conclure que le par. 7(5) s'applique chaque fois qu'une instance judiciaire touche des questions arbitrables et des questions non arbitrables — dans les cas où la convention d'arbitrage ne s'applique pas à toutes les questions soumises au tribunal, ou lorsque de multiples parties introduisent une instance et que

others not. In either case, Mr. Wellman says, a court has discretion to either allow the entire matter to proceed in court or stay the arbitrable matters so they can be decided by the arbitrator. In deciding whether to grant a partial stay of the arbitrable matters under s. 7(5), the judge must determine whether the arbitrable and non-arbitrable claims can be reasonably separated.

[145] TELUS, on the other hand, seeks to overturn *Griffin*, arguing that s. 7(5) applies only when parties who are bound by an arbitration agreement seek to litigate in the courts and there are some matters that are not specifically referred to in the arbitration agreement. A judge can either allow those specific non-arbitrable matters to continue in court or stay them pending the rest of the arbitration. TELUS submits that s. 7(1) of the *Arbitration Act, 1991* entirely precludes courts from hearing any matter covered by an arbitration agreement, and s. 7(5) only gives the court a discretion to decide what to do with the non-arbitrable matters: it can either hold them in abeyance pending the outcome of arbitration or allow them to proceed in court. On TELUS's reading of the provision, therefore, s. 7(5) does not apply to arbitrable matters, but rather gives courts only the discretion to decide whether to stay non-arbitrable matters.

[146] As noted above, s. 7 of the *Arbitration Act, 1991* sets out the statutory rules related to stays. Under the default rule in subs. (1), upon request by another party to the arbitration agreement, any proceeding relating to an arbitrable matter shall be stayed. This rule is qualified by the exceptions set out in subs. (2), which include grounds related to undue delay or a judge's assessment of the merits. If the court refuses to stay the proceeding, subs. (4) renders any arbitration without effect.

certaines de ces parties sont liées par une convention d'arbitrage et d'autres non. M. Wellman affirme que, dans les deux cas, le tribunal a le pouvoir discrétionnaire de permettre que toutes les questions soient soumises au tribunal ou d'ordonner un sursis à l'égard des questions arbitrables afin qu'elles puissent être tranchées par l'arbitre. Pour décider s'il y a lieu d'accorder un sursis partiel à l'égard des questions arbitrables en vertu du par. 7(5), le juge doit établir s'il est raisonnable de dissocier les réclamations arbitrables des réclamations non arbitrables.

[145] Par contre, TELUS cherche à faire infirmer l'arrêt *Griffin*, faisant valoir que le par. 7(5) s'applique uniquement lorsque des parties qui sont liées par une convention d'arbitrage tentent d'engager une poursuite devant les tribunaux et que certaines questions ne sont pas mentionnées expressément dans la convention d'arbitrage. Le juge peut permettre que l'instance se poursuive en ce qui touche ces questions non arbitrables précises, ou encore ordonner un sursis à leur égard en attendant l'issue de l'arbitrage. TELUS soutient que le par. 7(1) de la *Loi de 1991 sur l'arbitrage* empêche absolument le tribunal d'instruire toute question visée par une convention d'arbitrage, et que le par. 7(5) ne confère au tribunal que le pouvoir discrétionnaire de décider quoi faire avec les questions non arbitrables : il peut y surseoir en attendant l'issue de l'arbitrage ou permettre qu'elles soient soumises au tribunal. Selon l'interprétation que donne TELUS à cette disposition, le par. 7(5) ne s'applique donc pas aux questions arbitrables, mais confère plutôt aux tribunaux uniquement le pouvoir discrétionnaire de décider de surseoir ou non aux questions non arbitrables.

[146] Comme il a été mentionné précédemment, l'art. 7 de la *Loi de 1991 sur l'arbitrage* énonce les règles en ce qui a trait au sursis. Suivant la règle applicable par défaut énoncée au par. (1), sur demande d'une autre partie à la convention d'arbitrage, toute instance ayant trait à une question arbitrable doit faire l'objet d'un sursis. Cette règle est assortie des exceptions énoncées au par. (2), qui comprennent les motifs liés au retard indu et à l'évaluation du bien-fondé par le juge. Si le tribunal refuse de surseoir à l'instance, le par. (4) rend tout arbitrage sans effet.

[147] Section 7(5) addresses situations where the proceeding includes both matters subject to an arbitration agreement and non-arbitrable "other matters," which are properly before the court. In such cases, subs. (5) permits a judge to partially stay the arbitrable matters while allowing the non-arbitrable matters to proceed if the court is satisfied that (a) the proceeding is "hybrid"; and (b) it is reasonable to separate the matters. The determination of whether it is reasonable to separate the matters governs this latter exercise of discretion.

[148] Nothing in the text directs a court to read s. 7(5) (or s. 7 as a whole) on a party-by-party basis, as TELUS urges this Court to do. Rather, the focus of the provision is on "matters in respect of which the proceeding was commenced". Subsection (5) uses "proceeding" and "other matters" generally and without qualification. The motions judge is required, as a result, to consider "the proceeding" as a whole. TELUS correctly notes that "other matters" in s. 7(5) will, in certain circumstances, refer to disputes between the same parties that fall outside their arbitration agreement. But it does not follow that "other matters" must be read restrictively. "Other matters" simply refers to non-arbitrable disputes, whether they involve parties to the arbitration agreement at issue or individuals who are not subject to the arbitration agreement.

[149] The scheme of the Ontario legislation is markedly different from the British Columbia legislation at issue in *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, a decision TELUS relied on. In that case, Michelle Seidel sought to certify a class action against TELUS for overbilling on cell phone contracts. TELUS sought to stay the proceedings because there was a requirement in the standard form contract that disputes be resolved through individual arbitration. In *Seidel*, this Court stated that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of

[147] Le paragraphe 7(5) traite des situations où l'instance touche à la fois des questions visées par une convention d'arbitrage et d'« autres questions » non arbitrables, qui ont été à juste titre soumises au tribunal. Dans de tels cas, le par. (5) permet au juge d'ordonner un sursis partiel à l'égard des questions arbitrables tout en permettant que l'instance se poursuive en ce qui touche les questions non arbitrables si le tribunal est convaincu a) que l'instance est « hybride »; et b) qu'il est raisonnable de dissocier les questions. La question de savoir s'il est raisonnable de dissocier les questions régit cet exercice du pouvoir discrétionnaire.

[148] Rien dans le libellé de la disposition n'oblige le tribunal à interpréter le par. 7(5) (ou l'art. 7 dans son ensemble) sur la base partie-partie, comme TELUS invite la Cour à le faire. Cette disposition est plutôt axée sur les « questions à l'égard desquelles l'instance a été introduite ». Le paragraphe (5) emploie les termes « instance » et « autres questions » d'une manière générale et sans réserve. Le juge des requêtes doit par conséquent considérer « l'instance » dans son ensemble. TELUS a raison de souligner que le terme « autres questions » employé au par. 7(5) peut, dans certaines circonstances, désigner les différends entre les mêmes parties qui échappent à leur convention d'arbitrage. Mais il ne s'ensuit pas que ce terme doive recevoir une interprétation restrictive. Le terme « autres questions » s'entend simplement des différends non arbitrables, qu'ils concernent ou non les parties à la convention d'arbitrage en cause ou des personnes qui ne sont pas visées par la convention d'arbitrage.

[149] Le régime de la loi de l'Ontario est très différent de celui de la loi de la Colombie-Britannique qui était en cause dans l'affaire *Seidel c. TELUS Communications Inc.*, [2011] 1 R.C.S. 531, décision que TELUS a invoquée. Dans cette affaire, Michelle Seidel cherchait à faire autoriser un recours collectif contre TELUS pour la surfacturation relativement à des contrats de services de téléphonie cellulaire. TELUS a demandé un sursis d'instance parce que le contrat type exigeait que les différends soient soumis à l'arbitrage individuel. Dans *Seidel*, la Cour a affirmé que « [e]n l'absence d'intervention de la législature, les tribunaux donnent généralement

adhesion, including an arbitration clause" (para. 2). Therefore, clear legislative intent is required for a court to entertain otherwise arbitrable matters.

[150] *Seidel*'s direct application to the case before us is blocked by the fact that it involved a completely different legislative framework. Two British Columbia statutes were in issue, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and B.C.'s *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55. The Court permitted a consumer claim to proceed in court pursuant to s. 172 of the *Business Practices and Consumer Protection Act*, even though it was subject to an arbitration agreement. A stay was granted on all other arbitrable claims, based on the mandatory language in s. 15 of B.C.'s *Commercial Arbitration Act*, which stated:

15 (2) In an application under subsection (1), the court *must* make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[151] The issue in *Seidel* was whether s. 172 of British Columbia's consumer protection legislation constituted a legislative override of the arbitration clause at issue. The Court emphasized that the relevant provincial legislation was determinative of whether a court must stay matters covered by an arbitration agreement.

[152] Notably, in the legislation at issue in *Seidel*, there was no analogous provision to s. 7(5) of Ontario's *Arbitration Act, 1991* permitting the exercise of discretion. In fact, unlike B.C.'s arbitration legislation, Ontario's statute expressly authorizes a discretionary judicial override of arbitration clauses in several circumstances. Section 7(2) contains exceptions similar to those in B.C. but adds discretionary

effet aux clauses d'un contrat commercial librement conclu dans lequel figure une clause d'arbitrage, et ce, même s'il s'agit d'un contrat d'adhésion » (par. 2). Par conséquent, pour que le tribunal puisse instruire des questions par ailleurs arbitrables, le législateur doit avoir exprimé une intention claire en ce sens.

[150] Le fait que l'arrêt *Seidel* portait sur un cadre législatif complètement différent empêche son application directe à l'espèce. Deux lois de la Colombie-Britannique étaient en cause, la *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, et la *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55. La Cour a permis qu'une réclamation présentée par un consommateur soit portée devant le tribunal en vertu de l'art. 172 de la *Business Practices and Consumer Protection Act*, même si elle était visée par une convention d'arbitrage. Un sursis a été accordé à l'égard de toutes les autres réclamations arbitrables, compte tenu du libellé impératif de l'art. 15 de la *Commercial Arbitration Act* de la Colombie-Britannique, qui prévoyait ceci :

[TRADUCTION]

15 (2) Le tribunal saisi de la demande visée au paragraphe (1) *sursoit* à l'instance à moins qu'il ne constate que la convention d'arbitrage est nulle, inopérante ou non susceptible d'être exécutée.

[151] La question en litige dans l'affaire *Seidel* était de savoir si l'art. 172 de la loi sur la protection du consommateur de la Colombie-Britannique constituait une dérogation législative à la clause d'arbitrage en cause. La Cour a souligné que la loi provinciale applicable était déterminante quant à savoir si le tribunal doit accorder un sursis à l'égard des questions visées par une convention d'arbitrage.

[152] Il convient de souligner que la loi en cause dans *Seidel* ne contenait aucune disposition analogue au par. 7(5) de la *Loi de 1991 sur l'arbitrage* de l'Ontario permettant l'exercice d'un pouvoir discrétionnaire. En fait, contrairement à la loi sur l'arbitrage de la Colombie-Britannique, la loi ontarienne permet expressément la dérogation judiciaire discrétionnaire aux clauses d'arbitrage dans plusieurs cas. Le

evaluations to determine whether the motion for a stay "was brought with undue delay" and whether "the matter is a proper one for default or summary judgment." Under both of these latter exceptions, and unlike B.C.'s legislation, a court may override an arbitration clause for reasons unrelated to the clause's contractual validity.

[153] Section 7(5) of the Ontario legislation similarly reflects an explicit legislative intention to override an otherwise applicable arbitration clause. The words of the provision state that "[t]he court *may* stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters . . . ." This means that the court can either stay the arbitrable matters before it *or* allow them to proceed. Logically, a discretionary ability to grant a partial stay also includes the power to refuse a partial stay. In other words, "may" means "may".

[154] Non-arbitrable disputes, by definition, fall outside an arbitrator's jurisdiction. Unless the parties agree to arbitrate after the dispute arises, non-arbitrable claims cannot proceed by arbitration. In addition, statutory language is not required for a court to continue hearing a non-arbitrable matter which is properly before it. Therefore, the only interpretation that gives meaningful effect to the discretionary language of s. 7(5) is one that confers on judges the ability to allow both arbitrable and non-arbitrable disputes to proceed *in court*.

[155] TELUS's assertion that a court can *never* stay arbitrable matters under s. 7(5) renders the opening phrase — "may stay the proceeding with respect to the matters dealt with in the arbitration agreement" — superfluous. And by interpreting the provision to apply only to non-arbitrable matters, s. 7(5) adds nothing to a judge's existing discretion: a court already has the ability to stay proceedings "on its own

paragraphe 7(2) contient des exceptions semblables à celles de la loi de la Colombie-Britannique, mais prévoit aussi des évaluations discrétionnaires visant à déterminer si la demande de sursis « a été présentée avec un retard indu » et si « [l]a question est propre à un jugement par défaut ou à un jugement sommaire ». En vertu de ces deux dernières exceptions, et contrairement à la loi de la Colombie-Britannique, le tribunal peut écarter une clause d'arbitrage pour des motifs n'ayant rien à voir avec la validité contractuelle de la clause.

[153] De la même façon, le par. 7(5) de la loi ontarienne révèle l'intention explicite du législateur d'écarter la clause d'arbitrage par ailleurs applicable. La disposition prévoit que « [l]e tribunal judiciaire *peut* surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions. . . », ce qui signifie que le tribunal peut surseoir à l'instance en ce qui touche les questions arbitrables qui lui sont soumises *ou* permettre qu'elle se poursuive. Logiquement, le pouvoir discrétionnaire d'accorder un sursis partiel comprend également le pouvoir de refuser d'accorder un sursis partiel. Autrement dit, le terme « peut » signifie « peut ».

[154] Les différends non arbitrables, par définition, ne relèvent pas de la compétence d'un arbitre. Sauf si les parties conviennent de recourir à l'arbitrage après que le différend est survenu, les réclamations non arbitrables ne peuvent faire l'objet d'un arbitrage. De plus, le tribunal n'a pas besoin d'un texte législatif pour continuer à instruire une question non arbitrable qui lui a été soumise à juste titre. Par conséquent, la seule interprétation qui donne véritablement effet au libellé discrétionnaire du par. 7(5) est celle qui confère aux juges le pouvoir de permettre que les différends arbitrables ainsi que les différends non arbitrables soient portés *devant le tribunal*.

[155] L'affirmation de TELUS selon laquelle le tribunal ne peut *jamais* surseoir aux questions arbitrables en vertu du par. 7(5) rend superflue la première phrase de cette disposition — « peut surseoir à l'instance en ce qui touche les questions traitées dans la convention d'arbitrage ». Et si on l'interprète comme s'appliquant seulement aux questions non arbitrables, le par. 7(5) n'ajoute rien au pouvoir

initiative or on motion by any person, whether or not a party, . . . on such terms as are considered just" (*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 106).

[156] By inserting the reasonableness requirement in s. 7(5)(b), Ontario's legislature clearly contemplated that in certain circumstances, it would be *unreasonable* "to separate the matters dealt with in the [arbitration] agreement from the other matters". However, TELUS's interpretation would mean that arbitrable and non-arbitrable matters would *always* be separated, and could never be heard together — hardly an efficient outcome, or one that promotes access to justice.

[157] Finally, TELUS's interpretation would result in costly and time-consuming factual inquiries on how to divide the arbitrable and non-arbitrable claims even where the substance of both claims is identical, as in this case. Both parties acknowledged the potential difficulties associated with drawing the line between a "consumer" as defined by the *Consumer Protection Act*, who is exempt from arbitration, and a business customer, who is not. This distinction may be especially difficult to determine for those individuals who use their cell phone for both personal and business purposes. For these individuals, determining whether they fall within the scope of the exception in the *Consumer Protection Act* adds unnecessary complexity.

[158] For class actions, the real-world effect of separating out everything subject to an arbitration clause could well turn the certification stage into a search by the defendant of the precise status of each member of the class to determine whether they are in fact business or consumer clients. As the interveners Public Interest Advocacy Centre and Consumers Council of Canada pointed out in their factum, this determination could well result in "an individual fact-finding process", leading to "confusion [that] would further undermine Ontario's class actions regime

discrétionnaire existant du juge : le tribunal peut déjà « de son propre chef ou sur motion présentée par une personne qui est partie ou non au litige, surseoir à une instance aux conditions qu'il estime justes » (*Loi sur les tribunaux judiciaires*, L.R.O. 1990, c. C.43, art. 106).

[156] En insérant l'exigence du caractère raisonnable dans l'al. 7(5)b), le législateur ontarien a manifestement prévu que, dans certains cas, il ne serait *pas raisonnable* « de dissocier les questions traitées dans la convention [d'arbitrage] des autres questions ». Or, selon l'interprétation préconisée par TELUS, les questions arbitrables seraient *toujours* dissociées des questions non arbitrables, et elles ne pourraient jamais être instruites ensemble — ce qui ne constitue guère un résultat efficace ou qui favorise l'accès à la justice.

[157] Enfin, l'interprétation préconisée par TELUS donnerait lieu à des examens des faits longs et coûteux quant à la façon dont les réclamations arbitrables seraient dissociées de celles qui ne le sont pas, même lorsque le fond des réclamations est identique, comme en l'espèce. Les deux parties ont reconnu les difficultés éventuelles que peut susciter le fait d'établir une distinction entre le « consommateur » au sens de la *Loi sur la protection du consommateur*, qui échappe à l'arbitrage, et le client commercial, qui n'y échappe pas. Cette distinction pourrait être particulièrement difficile à établir pour les personnes qui utilisent leur téléphone cellulaire tant à des fins personnelles que dans le cadre de leur entreprise. Établir si ces personnes tombent sous le coup de l'exception prévue dans la *Loi sur la protection du consommateur* rendrait l'analyse inutilement plus complexe.

[158] Dans les recours collectifs, la dissociation de toutes les questions visées par une clause d'arbitrage pourrait bien avoir pour effet concret de transformer l'étape de la certification en une recherche par le défendeur du statut précis de chaque membre du groupe, dans le but d'établir s'il s'agit en fait de clients commerciaux ou de clients consommateurs. Comme l'ont souligné dans leur mémoire les intervenants Centre pour la défense de l'intérêt public et Consumers Council of Canada, cette évaluation pourrait déclencher [TRADUCTION] « un processus

as a viable, procedural access to justice mechanism for consumers" (para. 25). TELUS's interpretation, in short, not only renders s. 7(5) meaningless, but also undermines the *Class Proceedings Act, 1992*, by making class certification overly cumbersome.

[159] Thus, when s. 7 is read as a whole, it becomes evident that subs. (1) and (5) are complementary, not incompatible. Both provisions align with the purposes of the *Arbitration Act, 1991*. They both prevent courts from undermining arbitration agreements. At the same time, the legislature also saw fit to include several exceptions in s. 7, exceptions which allow a court to override arbitration clauses in prescribed circumstances when doing so would promote access to justice and the efficient resolution of disputes.

[160] TELUS argues that while there may be negative consequences associated with mandatory, individualized arbitration, these consequences are the foreseeable results of bargains into which its clients freely entered. Their position is that freedom of contract requires that parties abide by their agreements, and courts should not rewrite bargains. This argument, however, is undermined by the fact that their standard form contract hardly represents a bargain freely entered into — they were non-negotiable compulsory terms that were preconditions to being able to purchase TELUS products.

[161] Arbitration was intended to be a means by which parties on a relatively equal bargaining footing chose to design an alternative dispute mechanism. Respecting parties' autonomy was a key goal of the *Arbitration Act, 1991*. As Prof. Shelley McGill points out,

> The new arbitration policy . . . proceeded from the assumption that *sophisticated disputants with relatively*

individuel de constatation des faits », donnant lieu à une certaine « confusion [qui] minerait encore davantage le régime de recours collectifs de l'Ontario en tant que mécanisme procédural viable d'accès à la justice pour les consommateurs » (par. 25). En somme, l'interprétation que préconise TELUS vide non seulement le par. 7(5) de tout son sens, mais affaiblit aussi la *Loi de 1992 sur les recours collectifs* en rendant trop encombrant le processus de certification des recours collectifs.

[159] Par conséquent, lorsqu'on considère l'art. 7 dans son ensemble, il devient évident que les par. (1) et (5) sont complémentaires, et non incompatibles. Les deux dispositions sont conformes aux objets de la *Loi de 1991 sur l'arbitrage*. Elles empêchent toutes deux les tribunaux de miner les conventions d'arbitrage. Parallèlement, le législateur a jugé bon d'inclure plusieurs exceptions à l'art. 7, lesquelles permettent aux tribunaux d'écarter les clauses d'arbitrage dans les circonstances prescrites lorsqu'ils peuvent ainsi favoriser l'accès à la justice et le règlement efficace des différends.

[160] TELUS fait valoir que s'il peut y avoir des conséquences négatives liées à l'arbitrage individuel obligatoire, ces conséquences sont les résultats prévisibles des accords que ses clients ont librement conclus. Elle soutient que la liberté contractuelle commande que les parties respectent l'entente qu'elles ont conclue et que les tribunaux s'abstiennent de réécrire les accords. Cet argument se trouve toutefois amoindri par le fait que son contrat type ne représente guère un accord librement conclu — il s'agissait de clauses non négociables obligatoires constituant des conditions préalables à l'achat de produits TELUS.

[161] L'arbitrage se voulait un moyen permettant à des parties relativement égales en situation de négociation de choisir de créer un mécanisme extrajudiciaire de règlement des différends. Le respect de l'autonomie des parties était un objectif essentiel de la *Loi de 1991 sur l'arbitrage*. Comme le souligne la professeure Shelley McGill :

> [TRADUCTION] La nouvelle politique sur l'arbitrage [. . .] était fondée sur l'hypothèse que des *parties averties*

equal bargaining power would collaborate to design their own resolution process. Inherent in this policy was the goal of empowering disputants and giving them more control over dispute resolution while facilitating international trade. [Emphasis added.]

(Shelley McGill, "The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses" (2006), 43 *Can. Bus. L.J.* 359, at p. 365)

[162] The standard terms of TELUS's contract did not permit group arbitration, but required individualized arbitration proceedings for each complaint. The impact of not permitting group proceedings was discussed by the Court of Appeal in *Griffin*:

It is important to note . . . that Dell's arbitration clause not only requires all claims to be arbitrated, but also provides that "[t]he arbitration will be limited solely to the dispute or controversy between Customer and Dell", thereby precluding the possibility of a class arbitration. *I would have found Dell's position much more persuasive had Dell been prepared to submit to an arbitration that would allow for the efficient adjudication of the claims on a group or class basis*. . . . In my view, this provides further evidence . . . that Dell does not genuinely seek to have the claims advanced against it determined by way of arbitration. Dell is simply seeking to exploit the inefficiency of arbitrating individual claims. [Emphasis added; para. 60.]

[163] The empirical reality is that the effect of mandatory arbitration clauses is to deny access to justice in the context of low-value claims. As Prof. Cynthia Estlund points out,

. . . the great bulk of disputes that are subject to mandatory arbitration agreements . . . simply evaporate before they are even filed. It is one thing to know that mandatory arbitration draws a thick veil of secrecy over cases that are subject to that process. It is quite another to find that almost nothing lies behind that veil. Mandatory arbitration is less of an "alternative dispute resolution" mechanism than it is a magician's disappearing trick or a mirage. Metaphors beckon, but I have opted for that of

jouissant d'un pouvoir de négociation relativement égal collaboreraient en vue de créer leur propre processus de règlement. De pair avec cette politique allait l'objectif de donner des moyens d'agir aux parties et de leur permettre d'exercer un plus grand contrôle sur le règlement de leur différend tout en facilitant le commerce international. [Italiques ajoutés.]

(Shelley McGill, « The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses » (2006), 43 *Rev. can. dr. comm.* 359, p. 365)

[162] Les clauses types du contrat de TELUS ne permettaient pas l'arbitrage collectif, mais exigeaient l'arbitrage individuel pour chaque plainte. Dans l'arrêt *Griffin*, la Cour d'appel a analysé l'incidence du fait de ne pas permettre les procédures collectives :

[TRADUCTION] Il importe de souligner [. . .] que la clause d'arbitrage de Dell exige non seulement que toutes les réclamations soient soumises à l'arbitrage, mais prévoit aussi que « [l']arbitrage se limitera uniquement aux conflits ou aux désaccords entre le client et Dell », écartant ainsi la possibilité qu'il y ait un arbitrage collectif. *J'aurais trouvé la thèse de Dell beaucoup plus convaincante si elle avait été disposée à se soumettre à un arbitrage permettant que soient tranchées efficacement les réclamations sur une base collective*. [. . .] À mon avis, cet élément constitue une preuve supplémentaire [. . .] que Dell ne cherche pas véritablement à faire trancher par voie d'arbitrage les réclamations présentées contre elle. Dell cherche simplement à tirer parti de l'inefficacité de l'arbitrage individuel des réclamations. [Italiques ajoutés; par. 60.]

[163] La réalité empirique est que les clauses d'arbitrage obligatoire ont pour effet d'entraver l'accès à la justice dans le contexte des petites réclamations. Comme le souligne la professeure Cynthia Estlund,

[TRADUCTION] . . . la plupart des différends qui sont visés par des conventions d'arbitrage obligatoire [. . .] disparaissent simplement avant même d'être déposés. C'est une chose de savoir que l'arbitrage obligatoire tire un épais voile de secret sur les affaires qui font l'objet de ce processus, c'en est une autre de constater qu'il n'y a presque rien derrière ce voile. L'arbitrage obligatoire n'est pas tant un mécanisme de « règlement extrajudiciaire des différends » qu'un tour de magie ou un mirage. Plusieurs

the black hole into which matter collapses and no light escapes.

(Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018), 96 *N.C. L. Rev.* 679, at p. 682)

[164] The Court of Appeal in *Griffin* recognized this reality when it observed:

The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually *but when aggregated form the subject of a viable class proceeding*: see Theodore Eisenberg, Geoffrey P. Miller and Emily Sherwin, "Mandatory Arbitration for Customers but not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts" (2008), 92 *Judicature* 118. [Emphasis added; para. 30.]

[165] All of TELUS's clients — both businesses and consumers — signed the same, non-negotiable standard form agreement. TELUS's individualized arbitration clause effectively precludes access to justice for business clients when a low-value claim does not justify the expense. And its mandatory nature, in turn, illustrates that the animating rationales of party autonomy and freedom of contract are nowhere to be seen. As the court in *Griffin* stated:

Deference to arbitration is largely based on freedom of contract and the value of personal autonomy. How can such values come into play in contracts of adhesion where that autonomy is only exercised by one of the parties? *There is no reason to defer to businesses that seek to advance only their own self-interests and evade laws not to their liking*. [para. 30]

(Citing Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006), 51 *McGill L.J.* 693, at p. 734.)

métaphores me viennent à l'esprit, mais j'ai choisi celle du trou noir dans lequel s'engouffrent les affaires et d'où ne s'échappe aucune lumière.

(Cynthia Estlund, « The Black Hole of Mandatory Arbitration » (2018), 96 *N.C. L. Rev.* 679, p. 682)

[164] Dans l'arrêt *Griffin*, la Cour d'appel a reconnu cette réalité lorsqu'elle a fait remarquer ce qui suit :

[TRADUCTION] La préférence déclarée du vendeur pour l'arbitrage n'est souvent rien de plus qu'une façon d'éviter d'être tenu responsable de fautes multiples donnant lieu à de petites pertes pécuniaires, qui ne peuvent faire l'objet de poursuites individuelles, *mais qui, ensemble, peuvent faire l'objet d'un recours collectif viable* : voir Theodore Eisenberg, Geoffrey P. Miller et Emily Sherwin, « Mandatory Arbitration for Customers but not for Peers : A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts » (2008), 92 *Judicature* 118. [Italiques ajoutés; par. 30.]

[165] Tous les clients de TELUS — tant les clients commerciaux que les clients consommateurs — ont signé le même contrat type non négociable. La clause d'arbitrage individuel de TELUS empêche en fait les clients commerciaux d'avoir accès à la justice lorsqu'une réclamation de faible valeur ne justifie pas la dépense. Son caractère obligatoire, en outre, indique que les principes sous-jacents de l'autonomie des parties et de la liberté contractuelle brillent par leur absence. Comme l'a affirmé la cour dans l'arrêt *Griffin* :

[TRADUCTION] La retenue à l'égard de l'arbitrage est fondée en grande partie sur la liberté contractuelle et la valeur de l'autonomie personnelle. Comment ces valeurs peuvent-elles entrer en jeu dans les contrats d'adhésion où l'autonomie n'est exercée que par l'une des parties? *Il n'y a aucune raison de faire preuve de déférence envers des entreprises qui ne cherchent qu'à faire valoir leurs propres intérêts et à se soustraire aux lois qui ne leur plaisent pas*. [par. 30]

(Citant Jonnette Watson Hamilton, « Pre-Dispute Consumer Arbitration Clauses : Denying Access to Justice? » (2006), 51 *R.D. McGill* 693, p. 734.)

[166] One cannot talk about "equal bargaining power" and "party autonomy" if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot, therefore, reasonably be said to have "come to the table" and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choices, but of an *absence* of choice.

[167] Perhaps the most ironic contradiction of refusing to acknowledge the discretion embodied in s. 7(5) is its corrosive effect on access to justice. The purpose of the *Arbitration Act, 1991*, was to facilitate the ability of parties to negotiate their own process for resolving disputes outside of the courts, on the premise that access to justice had as much to do with access to a result as with access to a judge. To impose arbitration on unwilling parties violates the spirit of the *Arbitration Act, 1991* and the arbitral process. This operates as an invisible but formidable barrier to a remedy and presumptively immunizes wrongdoing from accountability contrary to our most fundamental notions of civil justice.

[168] The concurring judge in the Court of Appeal expressed concern that using s. 7(5) to override otherwise valid arbitration clauses could result in sophisticated parties sidestepping arbitration agreements by including a few consumers in a class action alongside numerous business clients. However, experience teaches us that this is anxiety without a cause. There are no known cases where such a ruse has been attempted in Canadian courts. That does not mean it could never happen, but such gossamer speculation cannot drive statutory interpretation.

[169] In any event, such concerns are mitigated by the fact that the availability of judicial discretion in s. 7(5) does not *require* judges to allow a class action including arbitrable claims to proceed: it simply lets them decide when it is reasonable to do so.

[166] On ne peut pas parler de « pouvoir de négociation égal » et d'« autonomie des parties » si la nature même du contrat révèle qu'une partie possède le pouvoir exclusif de décider du contenu du contrat. On ne saurait donc raisonnablement affirmer que les parties aux conventions d'arbitrage individuel obligatoire ont [TRADUCTION] « pris place à la table » et négocié, car il n'y a pas de table de négociation. La signature de ces contrats par les particuliers et les sociétés est fonction non pas de choix négociés, mais d'une *absence* de choix.

[167] La contradiction sans doute la plus ironique qui découle du refus de reconnaître le pouvoir discrétionnaire que prévoit le par. 7(5) est son effet corrosif sur l'accès à la justice. L'objet de la *Loi de 1991 sur l'arbitrage* était d'accroître la capacité des parties de négocier leur propre processus de règlement extrajudiciaire des différends, en partant du principe que l'accès à la justice avait autant à voir avec l'accès à un résultat qu'avec l'accès à un juge. Imposer l'arbitrage à des parties qui n'en veulent pas va à l'encontre de l'esprit de la *Loi de 1991 sur l'arbitrage* et du processus arbitral. Cela tient lieu de barrière invisible, mais énorme, à la réparation et fait en sorte que les auteurs d'actes répréhensibles sont présumés soustraits à leur responsabilité, contrairement à nos notions les plus fondamentales de justice civile.

[168] La juge qui a rédigé des motifs concordants en Cour d'appel a dit craindre que le recours au par. 7(5) pour écarter des clauses d'arbitrage par ailleurs valides fasse en sorte que des parties averties puissent échapper aux conventions d'arbitrage en incluant quelques consommateurs parmi de nombreux clients commerciaux dans un recours collectif. Cependant, l'expérience nous enseigne qu'il s'agit d'une crainte sans fondement. Nul n'a jamais eu recours à pareil subterfuge devant les tribunaux canadiens, ce qui ne signifie pas que cela n'arrivera jamais, mais une hypothèse aussi diaphane ne saurait dicter l'interprétation des lois.

[169] Quoi qu'il en soit, de telles craintes sont atténuées par le fait que la possibilité d'avoir recours au pouvoir discrétionnaire prévu au par. 7(5) n'a pas pour effet d'*obliger* les juges à permettre que l'instance relative à un recours collectif comportant des

Eliminating judicial discretion, on the other hand, effectively eliminates access to justice.

[170] In this light, s. 7(5) must be interpreted to give judges the discretion to refuse to stay arbitrable claims if it is unreasonable to separate them from non-arbitrable claims. This interpretation applies with equal force whether the proceeding is between two or more named parties, or is a class action.

[171] TELUS's arbitration agreement "deals with only some of the matters in respect of which the proceeding was commenced", namely, the claims of business customers. The consumer claims are "other matters" which are not subject to arbitration. Therefore, s. 7(5)(b) gave the motions judge discretion to consider whether it was "reasonable to separate the matters dealt with in the agreement [the claims of business customers] from the other matters [the consumer claims]".

[172] In our view, the discretion in this case was properly exercised to allow the business claims to be joined with the consumer class action dealing with the same issues. We would therefore dismiss the appeal.

Appeal allowed, Wagner C.J. *and* Abella, Karakatsanis *and* Martin JJ. *dissenting.*

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver; TELUS Communications Inc., Vancouver.

Solicitors for the respondent: Rochon, Genova, Toronto; Morganti & Co., Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

réclamations arbitrables se poursuive : ils peuvent simplement décider quand il est raisonnable de le faire. L'élimination de ce pouvoir discrétionnaire, par contre, réduit à néant l'accès à la justice.

[170] Dans ce contexte, le par. 7(5) doit être interprété de façon à conférer aux juges le pouvoir discrétionnaire de refuser de surseoir aux réclamations arbitrables s'il n'est pas raisonnable de les dissocier des réclamations non arbitrables. Cette interprétation s'applique tout autant lorsque l'instance oppose deux parties désignées ou plus que lorsqu'il s'agit d'un recours collectif.

[171] La convention d'arbitrage de TELUS « ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite », c'est-à-dire les réclamations des clients commerciaux. Les réclamations des consommateurs constituent d'« autres questions » qui ne sont pas visées par l'arbitrage. L'alinéa 7(5)b) conférait donc à la juge des requêtes le pouvoir discrétionnaire de décider s'il était « raisonnable de dissocier les questions traitées dans la convention [les réclamations des clients commerciaux] des autres questions [les réclamations des consommateurs] ».

[172] Nous estimons que le pouvoir discrétionnaire dans la présente affaire a été correctement exercé pour permettre la jonction des réclamations des clients commerciaux au recours collectif intenté par des consommateurs et traitant des mêmes questions. Nous sommes donc d'avis de rejeter le pourvoi.

Pourvoi accueilli, le juge en chef Wagner *et les juges* Abella, Karakatsanis *et* Martin *sont dissidents.*

Procureurs de l'appelante : Fasken Martineau DuMoulin, Vancouver; TELUS Communications Inc., Vancouver.

Procureurs de l'intimé : Rochon, Genova, Toronto; Morganti & Co., Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Solicitors for the intervener ADR Chambers Inc.: Bennett Jones, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: McCarthy Tétrault, Toronto.

Solicitors for the interveners the Public Interest Advocacy Centre and the Consumers Council of Canada: Sotos, Toronto.

Solicitor for the intervener the Canadian Federation of Independent Business: Canadian Federation of Independent Business, Ottawa.

Solicitor for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the intervener the Consumers' Association of Canada: Siskinds, Toronto; Michael Sobkin, Ottawa.

Procureurs de l'intervenante ADR Chambers Inc. : Bennett Jones, Toronto.

Procureurs de l'intervenante la Chambre de commerce du Canada : McCarthy Tétrault, Toronto.

Procureurs des intervenants le Centre pour la défense de l'intérêt public et Consumers Council of Canada : Sotos, Toronto.

Procureur de l'intervenante la Fédération canadienne de l'entreprise indépendante : Fédération canadienne de l'entreprise indépendante, Ottawa.

Procureur de l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko : Université d'Ottawa, Ottawa.

Procureurs de l'intervenante l'Association des consommateurs du Canada : Siskinds, Toronto; Michael Sobkin, Ottawa.

TAB 27

See para. 54.

Saskatchewan Court of Queen's Bench

Citation: Ursel Investments Ltd., Re
Date: 1990-03-02
Docket: Saskatoon 1917

Between:
Re Ursel Investments Ltd. et al.; Canadian Imperial Bank of Commerce
and
Ursel Investments Ltd. et al.

Before:

Osborn J.

Appearances:
C.R. Clark and W.R. Rooke, for petitioners-respondents
C.G. Morris, for applicant secured creditor
D.C. Hodson, for Alta Surety Company

[1] OSBORN J.: – There are two motions before the Court.

> A. Firstly there is a motion by the Ursel group of companies, as petitioners, for an order under ss. 4 and 5 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 requesting the Court to order a meeting of the creditors or class of creditors, and, if the Court so determines, of the shareholders of the company, to be summoned in such manner as the Court directs.
>
> B. Secondly there is a motion by the Canadian Imperial Bank of Commerce, one of the secured creditors, for an order appointing a receiver and manager.

[2] I propose to deal with these motions in the order set out above.

A. Order for a Meeting of the Creditors to be Summoned

1. Issue

[3] The issue to be decided is whether, on the basis of the material filed, the petitioners are entitled to an order of this Court directing a meeting of the creditors.

2. Facts

[4] The petitioners collectively are a close-knit group of family-held corporations involved in the construction business. Adam Ursel is an officer and one of the founding and principal shareholders, either directly or indirectly, of each of the petitioner companies.

[5] Over the past 7 years the Ursel Group has grown rapidly through obtaining larger and more complex contracts in its Construction Division and the acquisition of companies with which to expand its Building Products Division. These activities have had a positive impact on the Ursel Group's revenue but have also strained its cash resources.

[6] In part, as a result of their recent financial difficulties, the operations of the companies have become inextricably intertwined. Certain assets are utilized by all of the companies. Some of the employees work for all of the companies.

[7] The companies operated quite profitably through their first years of existence, until 1988, when problems began to be experienced on two substantial contracts, the "City Hospital" contract and the "St. Paul's Hospital" contract.

[8] Finally realizing that the timing of the collection of their outstanding claims would not permit them to continue to operate within the confines of their bank lines and cash-flow, they, in March 1989, contacted Alta Surety Company, their performance bonding company, and requested that it complete a number of their contracts. An agreement to this effect dated March 22, 1989 was entered into and signed by the parties, Vijan General Contractors Ltd., Ursel Constructors Ltd., Lois Ursel and Adam Ursel.

[9] By petition dated May 2, 1989, the petitioners applied ex-parte for numerous orders pursuant to, inter alia, the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36. By a fiat dated May 3, 1989, it was ordered that the petitioners' application be set over to May 17, 1989, and that notice of the petitioners' applications be given to Canadian Imperial Bank of Commerce (hereinafter referred to as "C.I.B.C."), the principal secured creditor of the petitioners. Without deciding the applicability of ss. 2 and 3 of the *Companies' Creditors Arrangement Act,* it was further ordered, pursuant to s. 11, that:

> "(a) All proceedings taken or that might be taken, in respect of the companies named as petitioners in the petition filed on this application, under the *Bankruptcy Act* and the *Winding-up Act* or either of them, be stayed until this application has been heard in Chambers on May 17, 1989, or to any adjourned date and a decision has been handed down on this application, or until any further order.
>
> (b) All further proceedings in any action, suit or proceeding against the petitioner companies is restrained until May 17, 1989, or until further order.
>
> (c) No suit, action or other proceeding shall be proceeded with or commenced against the petitioner companies prior to May 17, 1989, except with the leave of the court."

[10] By debenture dated October 30, 1987, in the principal amount of $2,000,000, Hawk Holdings Inc., Websen Technical Products (Canada) Ltd., Nu-Hawk Distributors Ltd. and Specco Construction Products Ltd. (hereinafter referred to as

"Hawk Group") are jointly and severally indebted to C.I.B.C. in an amount in excess of $866,000 as of September 27, 1989. On May 5, 1989, after demand for payment of and cognizant of the said indebtedness, C.I.B.C. applied the account balances of the Hawk Group, totalling $102,024.89, against their joint and several indebtedness to C.I.B.C.

[11] By debenture dated October 30, 1987, in the principal amount of $5,000,000 Ursel Investments Ltd., Ursel Constructors Ltd. and Ursel Fabricators Ltd. are jointly and severally indebted to C.I.B.C. in an amount in excess of $2,745,000 as of September 27, 1989. By virtue of the said debenture and certain guarantees, Ursel Investments Ltd., Ursel Constructors Ltd., Vijan General Contractors Ltd. and Krane Service Inc. (hereinafter, together with Ursel Fabricators Ltd., referred to as "Ursel Group") are jointly and severally indebted to C.I.B.C. for the said amounts of $866,000 and $2,745,000. On May 5, 1989, after demand for payment of and cognizant of the said indebtedness, C.I.B.C. applied the account balance of the Ursel Group, totalling $28,294.16, against their joint and several indebtedness to C.I.B.C.

[12] On May 10, 1989, on the application of the petitioners and with the qualified consent of C.I.B.C., the fiat dated May 3, 1989, was varied by ordering, inter alia, that Deloitte, Haskins & Sells Limited be appointed interim receiver of the undertaking, property and assets of the petitioners until further order of the Court of Queen's Bench for Saskatchewan (hereinafter referred to as "Court"); that all persons, firms and corporations be enjoined from discontinuing utility services to the petitioners except upon further order of the Court; and that the right of any person, firm or corporation to realize upon or otherwise deal with any security held on the undertaking, property and assets of the petitioners be postponed until further order of the Court. The consent of C.I.B.C. was given without prejudice to the right of C.I.B.C. to challenge the fiat dated May 3, 1989, and the order dated May 10, 1989.

[13] On May 31, 1989, on the application of the petitioners and with the consent of C.I.B.C., it was ordered, inter alia, that the petitioners are corporations to which the *Companies' Creditors Arrangement Act* applies; that the petitioners be authorized to file with the Court on or before September 30, 1989, a formal plan of compromise or arrangement between the petitioners and their creditors; that all proceedings taken or that might be taken by any of the petitioners' creditors be stayed until further order of the Court: that the right of any person, firm or corporation to realize upon or otherwise deal with any security held on the undertaking, property and assets of the petitioners be postponed; that no creditor of any of the petitioners exercise any right of set-off against any of the debts owing to any of the petitioners except with leave of the Court; that all persons, firms and corporations be enjoined from discontinuing utility services to the petitioners except upon further order of the Court; that Deloitte, Haskins & Sells Limited be appointed interim receiver of the undertaking, property and assets of the petitioners until further order of the Court; and that liberty be reserved to any and all persons interested to apply to the Court for further or other order.

[14] On September 29, 1989, on the application of the petitioners, it was ordered that the date for filing of the formal plan of compromise or arrangement be extended to November 22, 1989. Also, on September 29, 1989, C.I.B.C. applied for leave to have Clarkson Gordon Inc. appointed as receiver-manager of the undertaking, property and assets of the petitioners, which motion was ordered adjourned until November 22, 1989.

[15] The petitioners commenced an action against C.I.B.C. by statement of claim dated November 16, 1989, wherein they allege that C.I.B.C. refused to honour its commitments to provide financial support to the petitioners; that C.I.B.C. failed to give reasonable demand or notice prior to commencing realization proceedings; and that, in applying the account balances totalling $102,024.89 against the indebtedness of the Hawk Group and in applying the account balances totalling $28,294.16 against the indebtedness of the Ursel Group, both on May 5, 1989, C.I.B.C. acted in direct and flagrant violation of the fiat dated May 3, 1989. The petitioners contend that the alleged actions of C.I.B.C. were the direct cause of their acute financial distress and seek damages in excess of $15,000,000; exemplary, aggravated and punitive damages; and declaration that the petitioners be released and discharged from any and all liability to C.I.B.C., and order that C.I.B.C. indemnify the petitioners for any and all liability of the petitioners to their unsecured creditors; and an order that C.I.B.C. be held in contempt of court.

[16] By notice of motion dated November 16, 1989, the petitioners filed with the Court an information circular, a reorganization plan in respect of the Hawk Group and a reorganization plan in respect to the Ursel Group. A perusal of the information circular and the reorganization plans reveals that the petitioners unilaterally determined the amount of C.L.B.G's secured claim, for the purposes of the *Companies' Creditors Arrangement Act,* by setting off their claim for unliquidated damages against the amount owing to C.I.B.C. Hence, the combined effect of the information circular and the reorganization plans is to prevent C.I.B.C., without judicial sanction, from voting in respect of the reorganization plans.

[17] Invoking ss. 4 and 5 of the *Companies' Creditors Arrangement Act,* the petitioners now ask that the Court order meetings of the classes of creditors, as those classes are defined in the information circular and the reorganization plans, for the purpose of voting in respect of the reorganization plans. In response, C.I.B.C. asks that the Court refuse to order the meetings sought by the petitioners; that it conclusively deem the petitioners to be unentitled to relief pursuant to the *Companies' Creditors Arrangement Act;* and that it entertain C.I.B.C.'s application, adjourned from September 29, 1989, to have Clarkson Gordon Inc. (now Ernst & Young Inc.) appointed as receiver-manager of the undertaking, property and assets of the petitioners.

3. Law

[18] The *Companies' Creditors Arrangement Act,* which I will refer to as the C.C.A.A., poses many interesting problems and has great potential importance. In

spite of this, it has received little attention in either Canadian legal literature or the decisions of the courts. This Act was passed during the depression to provide a means by which an insolvent company could avoid or get out of bankruptcy by composing or rearranging the rights of its shareholders and creditors, and thereby maintain its going-concern value. This process is called "reorganization". (See S.E. Edwards, "Reorganizations Under the *Companies' Creditors Arrangement Act*" (1947) 25 Can. Bar Rev. 587.

[19] A close reading of the Act indicates that the court has an opportunity to see and deal with the proposal at only three points. The first of these occurs when an application is made under s. 11 for an order staying all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* R.S.C. 1985, c. B-3, and the *Winding-up Act,* R.S.C. 1985, c. W-11, or either of them and further restraining further proceedings in any action, suit or proceeding against the company. The second occurs when the application is made to direct the meetings and the third occurs when the scheme is brought back to it for final sanction.

[20] The first stage is a qualifying stage. The court here concerns itself mainly with the requirements of s. 3 of the Act and whether the companies, on the basis of the material filed, come within the restrictive provisions of s. 3 in order to obtain the benefit of the Act. In this case the companies have met the minimum requirements of s. 3 and were properly entitled to the order made on May 31, 1989, which provided that the petitioners were corporations to which the C.C.A.A. applies; that the petitioners be authorized to file with the court on or before September 30, 1989, a formal plan of compromise or arrangement between the petitioners and their creditors.

[21] The second stage occurs when the application is made under ss. 4 and 5 of the Act to direct the meetings and it is at this stage that we must direct our attention to all the material filed to date in order to determine the main issue between the petitioner companies and their principal secured creditor.

[22] Counsel for the companies argued that ss. 4 and 5 of the Act does not contemplate the court involving itself in a consideration of the merits of the plan or the fairness of the plans at this stage but should order the meetings to be held and then become involved when the application is made under s. 6, which will occur after the meetings have been held and the votes taken and the compromise or arrangement is submitted to the court to be sanctioned.

[23] Counsel for C.I.B.C., the principal secured creditor, argued that the Court should consider all of the material filed to date and on the basis of that material decide whether a compromise or arrangement, within the meaning and intent of the Act has been proposed between the debtor company and its secured and unsecured creditors or any class of them which would persuade the Court to exercise the discretion contained in the word "may" as it appears in ss. 4 and 5 of the Act.

[24] In the absence of any decided cases directly on point I must examine the

wording of the ss. 4 and 5 in light of legislative purpose and intent of the Act along with the ordinary meaning of such words. The expression "may", as it appears in ss. 4 and 5, defines the scope of the court's jurisdiction to summon meetings. By virtue of subss. 2(1) ("enactment") and 3(1) and s. 11 of the *Interpretation Act,* R.S.C. 1985, c. I-21, the expression "may", wherever it occurs in federal enactments, is to be construed as permissive.

[25] Accepting that the Court's jurisdiction to summon meetings is discretionary, the Court should examine carefully all of the material filed before considering the order sought by the petitioners. Recourse to s. 4 of the *Companies' Creditors Arrangement Act* presupposes the proposal of a compromise or an arrangement between a debtor company and its unsecured creditors; similarly, recourse to s. 5 presupposes the proposal of a compromise or an arrangement between a debtor company and its unsecured creditors. When deciding an application to direct meetings of creditors, therefore, a court must ensure that, inter alia, the reorganization plan submitted by a debtor company constitutes a compromise or an arrangement.

[26] Neither the *Companies' Creditors Arrangement Act* nor the case law construing that Act defines the phrase "a compromise or an arrangement". In general, statutory language is to be accorded its grammatical and ordinary meaning, that is, it is to be understood in its proper and most known signification. Dictionaries assist in deciding the ordinary meaning of statutory language.

[27] *The Shorter Oxford English Dictionary on Historical Principles,* 3d ed. (Oxford: Clarendon Press, 1973), at p. 386, defines the term "compromise" as follows:

> "Compromise ... 3. Arrangement of a dispute by concessions on both sides; partial surrender of one's position, for the sake of coming to terms; the terms offered by either side ... ."

[28] *Webster's New World Dictionary,* 2d ed. (William Collins & World Publishing, 1978), at p. 292, similarly defines the term "compromise";

> "Compromise ... 1. a settlement in which each side gives up some demands or makes concessions ...."

[29] Having regard to dictionary entries, the term "compromise" implies a mutual or consensual agreement between opposing parties; it implies an adjustment of contested claims by mutual accommodation or concession.

[30] Of particular significance is *Re N.F.U. Development Trust Ltd.,* [1973] 1 All E.R. 135, [1972] 1 W.L.R. 1548 (Ch. D.), in which Brightman J. was called upon to construe subs. 206(1) of the *Companies Act 1948* (U.K.) c. 38, the English equivalent of ss. 4 and 5 of the *Companies' Creditors Arrangement Act.* At p. 140 [All E.R.], Brightman J. reasoned:

> "Section 206 is dealing with what is described as a 'compromise or arrangement ...

between a company and its creditors ... or between the company and its members'. The word 'compromise' implies some element of accommodation on each side."

[31] The expression "arrangement" is defined in *The Shorter Oxford English Dictionary on Historical Principles,* supra, at p. 106:

"Arrangement... 5. A settlement of mutual relations, claims, or matters in dispute ..."

[32] *Webster's New World Dictionary,* supra, at pp. 76-77, similarly defines the expression "arrangement":

"arrangement... 5. a settlement or adjustment, as of a dispute, difference, etc ..."

[33] *Black's Law Dictionary,* 5th ed. (St. Paul, Minnesota: West Publishing Co., 1979) at p. 100, defines the somewhat comparable phrase "arrangement with creditors":

"Arrangement with creditors. A plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his debts. Chapter XI of the Federal Bankruptcy Act [the American equivalent of the *Companies' Creditors Arrangement Act*] provides for a device whereby, under the protection and supervision of the court, a financially troubled business may work out a composition or extension agreement with its creditors permitting it to stay in business, rather than going bankrupt."

[34] Having regard to dictionary entries, the expression "arrangement" connotes a mutual or consensual settlement of disputed matters. Again, of particular import is *Re N.F.U. Development Trust Ltd.,* supra, in which Brightman J. considered the English equivalent of ss. 4 and 5 of the *Companies' Creditors Arrangement Act.* Having ruled that the term "compromise" implies some element of accommodation, Brightman J. continued, at p. 140 [All E.R.]:

"Similarly, I think that the word 'arrangement' in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A member whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression."

[35] The case law and dictionary entries in respect of the expressions "compromise" and "arrangement" instruct that any reorganization plan filed by a debtor company pursuant to ss. 4 or 5 of the *Companies' Creditors Arrangement Act* must comprise a mutual or consensual agreement between the company and those of its creditors which the plan purports to bind. They instruct that any reorganization plan proferred by a debtor company as a compromise or an arrangement must embody an adjustment of claims effected by mutual accommodation or concession. Indeed, while the case law in respect of the *Companies' Creditors Arrangement Act* does not

define the phrase "a compromise or an arrangement", it can be said that the case law does imply some element of mutual accommodation in the reorganization process. For example, in *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc.* v. *Nu-West Group Ltd.,* 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.), Wachowich J. commented [p. 114 C.B.R.; p. 155, Alta. L.R.]:

> "The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors."

[36] In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 138 (B.C. S.C.), at p. 139, Trainor J. commented in like fashion:

> "I made the order, being satisfied, on the material which was then presented to me, that they should have the opportunity to attempt a reorganization. I was satisfied that the purpose of the legislation was to permit such an attempt for the benefit not only for the corporations themselves but also of all of the creditors who were affected by the business enterprise."

[37] The reorganization plans filed by the petitioners do not suffice either as compromises or arrangements within the meaning of ss. 4 and 5 of the *Companies' Creditors Arrangement Act.* A comprehensive assessment of the reorganization plans proffered by the petitioners can be achieved only through careful scrutiny of the reorganization plans and the information circular. In deciding the petitioners' application to direct meetings, which application involves matters of considerable complexity, the Court is permitted to scrutinize not only the reorganization plan but also the information circular; indeed, in order to exercise its discretionary jurisdiction properly, the Court ought to be informed fully as to all relevant matters. In *Re Dorman, Long & Co.; Re South Durham Steel & Iron Co.,* [1934] 1 Ch. 635, [1933] All E.R. Rep. 460, debtor companies availing themselves of English reorganization legislation sought judicial sanction of their compromises or arrangements. With reference to explanatory circulars, Maugham J. stated, at p. 665 [Ch.]:

> "I now pass to an important question – namely, the question in relation to the explanatory circular sent out by the directors. I think I have already observed that there is no obligation under the Act to send out such a circular at all... The practice being to send out an explanatory circular in such a case, it is, in my opinion, the duty of the Court very carefully to scrutinize the circular when the matters involved are matters of considerable difficulty and doubt."

[38] An examination of the information circular leads the reader to the conclusion that the petitioners are more concerned with conveying the impression that C.I.B.C. is responsible for the financial state of the companies which existed immediately prior to the application of May 3, 1989. The information circular, which will, if this

application is granted, be sent to all unsecured creditors, contains the following statements:

"2.01 These cash demands were to a great degree anticipated by Management and they had made previous arrangements with the Bank to ensure adequate financing. It is alleged by the Companies that their current financial situation is a direct result of the conduct of the Bank described below. The Companies have commenced an action against the Bank seeking damages for refusal by the Bank to honour its commitments to provide additional financing to the Companies, the failure of the Bank to give reasonable demand or notice prior to commencing enforcement and realization proceedings and the disregard by the Bank of an order of the Court staying all proceedings against the Companies (see Article 3.06).

...

3.02 Commencing in approximately December, 1988, the Bank reneged on its agreement to provide increased lines of credit and additional capital financing to the Companies. Subsequently, and on or about March 17, 1989, the Bank, without any notice or demand and at a time when the Ursel Group were not in default under their loan agreements or otherwise, cancelled all of the bank accounts and operating loans of the Ursel Group.

...

3.06 Legal Proceedings by the Companies against the Bank The Companies have recently commenced an action in the Court against the Bank. In general terms this action is based on the following allegations:

a) refusal by the Bank to honour its commitment to provide additional financial support to the Companies;

b) failure of the Bank to give reasonable demand or notice prior to commencing realization proceedings; and

c) disregard by the Bank of the order of the Court made May 3, 1989 wherein all proceedings against the Companies were stayed.

It is alleged by the Companies that the unlawful conduct of the Bank was the direct cause of the Companies' current difficult financial situation and the Companies have claimed relief against the Bank including:

a) a declaration that the Companies are released and discharged from any and all liability to the Bank;

b) an order that the Bank indemnify the Companies for the liability of the

Companies to their secured creditors;

c) an order that the Bank be held in contempt of Court;

d) damages in excess of $15,000,000.; and

e) Exemplary, aggravated and punitive damages."

[39] Page 17 under heading of "notes":

"1. The claims of the Bank are subject to a set-off of any damages awarded to the Companies pursuant to the action commenced against the Bank more fully described at Article 3.06. The Companies' claim for damages against the Bank is in excess of $15,000,000."

[40] The information circular containing such unproven statements, circulated to all unsecured creditors of the companies, would lead them to believe that the claim against the bank would result in all of the claims of the unsecured creditors being paid out of the anticipated damage award.

[41] The information circular presents only the petitioners' version of the facts, yet s. 4 and 5 of the Act refer to a compromise or an arrangement between the debtor company and its secured creditors. The Act does not contemplate that the court will order a meeting of the creditors when there exists such a definite conflict between the companies and the principal creditor.

[42] The allegations made by Thomas Bauman in his affidavit of December 4, 1989 merit consideration if only to show the facts that existed prior to May 3, 1989. These allegations are not contained in the information circular and will not be made available to the unsecured creditors.

[43] The following paragraphs are taken from the Bauman affidavit and, although Adam Ursel and Lou Ursel in their respective affidavits of January 3, 1990 attempted to justify the Bauman allegations they did not deny them. The Bauman allegations remain uncontradicted. Excerpts from the Bauman affidavit:

"8. That as a result of concerns that CIBC was having with the operating of the Ursel line of credit, at the regional office level, CIBC advised the Ursels that a full review of their financial affairs would have to be conducted and CIBC requested Clarkson Gordon Inc. in February, 1989 to review and assess the financial position of the companies, assess the security value to CIBC and review the companies' contracts. As a result of the investigations made by Clarkson Gordon Inc., who had access to and examined the records of all the companies, they determined that the financial information given by the companies to CIBC was wrong and misleading.

…

19. That I am advised by Clarkson Gordon Inc. that at a time when the principals of the companies were saying that the companies were cash deficient and requesting increased operating lines from CIBC the shareholders were bleeding the companies.

20. That the records of the Ursel companies disclose that the shareholders, Lou Ursel, Adam Ursel and Don Hnatuk, and their wives, drew out of the companies from October 1, 1987, to April 30, 1989, the sum of $1,044,193.43 at a time when they knew or ought to have known that the companies were having or would have cash flow problems and were undercapitalized. Of this amount the sum of approximately $240,000.00 was used to reduce the personal indebtedness of the shareholders to Lloyds Bank. Of the $1,044,193.43, the sum of $204,785.82 was withdrawn from the companies by the said shareholders and their wives between October, 1988 and February, 1989, a time when the companies were short of operating funds and needed all their cash to meet their pressing liabilities, and therefore to the detriment of both its secured and unsecured creditors. Of the said $204,785.82 the sum of $21,000.00 was used to reduce the shareholders' personal liability to CIBC.

21. That I am advised by Clarkson Gordon Inc. that at a time when the Ursel companies were requesting additional financing, that the companies, in addition to the amounts referred to in paragraph 20, advanced to Don Hnatuk on February 8, 1989, the sum of $71,430.00

22. That I am advised by Clarkson Gordon Inc. that Ursel Constructors at a critical time paid the tax liabilities of Ursel Fabricators, in the sum of $75,000 to Revenue Canada as follows: $25,000.00 in February, 1989, $25,000.00 in March 1989, and $25,000.00 in April, 1989. I am informed by Clarkson Gordon Inc. that Ursel Fabricators is a defunct company, no longer carrying on business and has no assets and no ability to repay $75,000.00 to Ursel Constructors. This money was paid by Ursel Constructors at a time when Lou and Adam Ursel knew that the Ursel companies had cash flow problems.

23. That I am advised by Clarkson Gordon Inc. that in the course of their review, they determined that two computers valued at $14,532 which had been shown as assets of Ursel Constructors, having been purchased and paid for by Ursel Constructors, were removed from the Ursel companies' premises and are being claimed as personal assets of Lou Ursel and Kathy Ursel-Hnatuk.

24. That on page 13 of Schedule C of the Information circular filed by the petitioners under Material Contracts it states that:

> '(1) The mortgage granted by Lou Ursel to Ursel Constructors with a balance of $85,000 owing is subject to a setoff for employee compensation in the amount of $75,000 by Lou Ursel; and

(2) that a mortgage granted by Kathy Ursel-Hnatuk with a balance owing of $70,000 is subject to a setoff for employee compensation in the amount of $40,000 by Kathy Ursel-Hnatuk.'

25. That the audited financial statement of the Ursel companies dated September, 1988 show that the said mortgages referred to in paragraph 24 are outstanding with no set offs, and the Ursel companies' first proposal in regard to its indebtedness to CIBC dated March 14, 1989, states, that 'the mortgage receivable (the said mortgages) would be financed with an outside financial institution and repaid to the company in the amount of $156,673.00'.

26. That in the Ursel companies' second proposal to CIBC on March 29, 1989, the company stated 'Ursel would dispose of the mortgage receivables within four months for the amount of $156,673.00 which would be applied to Ursel loans (at CIBC)'.

27. That I am advised by Clarkson Gordon Inc. that as of March 31, 1989, there were no wages or other employee compensation due by Ursel Constructors to Lou Ursel and Kathy Ursel-Hnatuk; accordingly either the written information given to CIBC and Clarkson Gordon Inc. by Lou Ursel regarding the mortgages was false and misleading or this employee compensation must have accrued since March 31, 1989, which in such event it would then be contrary to the court order of May 31, 1989, which states in paragraph 16(f) that no remuneration shall be paid to the officers and directors of the petitioners except Don Hnatuk.

28. That in any event Lou Ursel was employed by and receiving compensation from Alta Surety pursuant to an agreement made between the petitioners and Alta Surety Company dated March 22, 1989, whereby Lou Ursel was being paid $4,000 per month.

31. That as a result of the investigations made by CIBC and Clarkson Gordon Inc. it was determined that the Ursel companies were in hopeless financial shape, and CIBC immediately began discussions with the principals of the companies, Adam and Lou Ursel, to resolve matters. That I am informed that the series of meetings were held with the principals of the companies, their accounting and legal advisors, over a period of five weeks from March 14, 1989, to April 21, 1989. At the final meeting an agreement was reached with CIBC whereby CIBC would appoint a monitor to monitor the affairs of the Hawk Group and Krane Service Inc. and that there would be an orderly liquidation of the Ursel companies' assets by CIBC using the services of a receiver and Lou and Adam Ursel. Documents were prepared by CIBC's solicitors for execution by the companies to reflect the agreement and were delivered to the companies' solicitors for execution by the companies but the companies have subsequently refused to implement or be bound by the said agreement and have neglected and refused to execute documents reflecting the said agreement."

[44] Adam Ursel in his affidavit of January 3, 1990 responded to the Bauman

affidavit as follows:

> "13. ... The improved financial performance projected is a result of the fact that the Hawk Group has dramatically reduced its overhead expenses, and assuming that sales recover to the same levels as they were in 1988, it is my opinion and belief that the Hawk Group could easily afford the financing costs and be able to have additional cash available for distribution amongst its trade creditors as is indicated by the projection. Given the Court Proceedings that have been commenced by the Petitioners against the CIBC, it is quite possible that there will be no financing costs to take into consideration and, in fact, there may be funds available for unsecured creditors depending on the damages that the Hawk Group is able to prove at trial."

[45] Lou Ursel in his affidavit of January 3, 1990 responded to the Bauman affidavit as follows:

> "21. That in response to paragraphs 19 and 20 of the Bauman Affidavit, I disagree completely with the statement that the shareholders were 'bleeding the companies'. During the 1988 fiscal year of Ursel Investments Ltd. ended September 30, 1988, Ursel Investments Ltd. made a pre tax operating profit of $345,439.00 as indicated in the Corporate Statement of Earnings which is attached and marked as Exhibit 'M' to this my Affidavit. In accordance with the normal accrual of management bonuses suggested by our auditor, $311,000.00 was allocated. The subsurface soil contracts on the City Hospital Project only became apparent to the Ursel Group in late September of 1988 and was only considered to be a problem towards the end of November, 1988. The problems with the St. Paul's Hospital Project only became apparent in late November of 1988. Up to the end of November, 1988, the Ursel Group did not have a cash flow problem and was operating under the impression that it had a $2,000,000.00 line of credit available. Cash flow problems only became apparent when the CIBC advised us that the increased line of credit of Ursel Investments Ltd. had not received 'formal' approval. As and from the 1st day of December, 1989, [sic] to the 3rd day of May, 1989, the principals of the Ursel Group, being myself, my father, Adam Ursel, my mother, Viola Ursel, my sister, Kathy Ursel-Hnatuk and my brother-in-law, Don Hnatuk, received total remuneration of $332,787.27. Of this amount $16,896.06 went to tax shelters with the full knowledge of the CIBC; $4,787.65 was paid for life insurance premiums with the full knowledge of the CIBC; $215,256.86 was accrued to the Receiver General for Canada for income taxes for the prior year but has never been paid and forms part of the claim of Revenue Canada; $82,813.34 was for personal use and $13,033.35 was withheld by the Ursel Group to cover the purchase of 2 computers by myself and my sister. With respect to the sum of $240,000.00 paid to Lloyds Bank, the CIBC was aware of the indebtedness to Lloyds Bank in the amount of $740,000.00 for tax shelters prior to entering into the Commitment Letter. The CIBC was only prepared to allow a maximum debt in the tax shelter of $250,000.00 and knew that funds from the Ursel Group would be used to pay down the debt. The majority of the excess debt to Lloyds Bank above the level of $250,000.00 was paid out by December of 1987.

By letter dated the 10th day of December, 1987, a copy of which is attached as Exhibit 'N' to this my Affidavit, the CIBC paid out the remaining portion of the tax shelter loan to Lloyds Bank (referred to as the 'V.G.B. and Associates') in the amount of $250,000.00."

[46] Counsel for the Bank argued that the Court should decline to order the meetings sought by the petitioners because they filed with the Court two reorganization plans in respect of nine corporations. As a matter of procedure it would have been preferable for the petitioners to have applied to the Court for leave to file two organizational plans instead of the one plan contemplated in the May 31, 1989 order. It is not necessary to decide this point at this time as it has little bearing on deciding whether or not a meeting of the creditors is ordered.

[47] Stanley E. Edwards in his article 'Reorganizations Under the *Companies' Creditors Arrangement Act*' which appeared in (1947) 25 the Can. Bar Rev., 587 outlined the main problems which counsel and the courts will face in applying the Act. This article suggests that the Court before it orders a meeting of the creditors under ss. 4 and 5 of the Act must first be satisfied that:

(a) The companies should be kept going despite insolvency.

(b) The public has an interest in the continuation of the enterprise, particularly if the companies supply commodities or services that are necessary or desirable to large numbers of consumers, or if they employ large numbers of workers who would be thrown out of employment by its liquidation.

(c) The plan of reorganization is so framed that it is likely to accomplish its purpose.

(d) The plan should embrace all parties, if possible, but particularly secured creditors.

(e) The reorganization plan should be fair and equitable as between the parties.

[48] Applying these guidelines to the facts of this proposed reorganization plan I have concluded as follows:

(a) The petitioners by proposing two plans of reorganization have divided the debtor companies into two categories. One category, i.e., the Ursel Group will be continued in accordance with Article I of the plan as follows:

"ARTICLE I – PURPOSE AND EFFECT OF PLAN

1.01 *Purpose of Plan.* The purpose of this Plan is:

(a) to permit the Ursel Group to remain in possession of the crane rental and leasing business and the undertaking property and assets associated therewith to

continue to carry on that business, as reorganized;

(b) with respect to the construction business, the purpose is to permit the orderly and cost-effective liquidation of the property and assets used in that business in order to repay the Creditors associated therewith as their interests appear and permit the Ursel Group to realize the maximum benefit from the Construction Claims that remain unsettled; and

(c) to permit the Ursel Group, by invoking this Plan, to pay each Creditor as much or more on account of its Claim, calculated on a net present value basis, than would be paid on a liquidation of the assets of the Ursel Group under proceedings available to wind-up the affairs or liquidate the assets of insolvent debtors or other proceedings which might be initiated by Creditors to recover their Claims or to enforce security granted to them by the Ursel Group.

1.02 *Effect of Plan.* This Plan involved the amalgamation and restructuring of certain of the Ursel Group and the sale and transfer of assets among certain of the Ursel Group. If this Plan is approved by the Creditors as required by the Acts and therefore sanctioned by the Court, this Plan will be binding on the Ursel Group and its Creditors."

[49] The other category, i.e., The Hawk Group will be continued in accordance with Article I of the Plan as follows:

"ARTICLE I – PURPOSE AND EFFECT OF PLAN

1.01 *Purpose of Plan.* The purpose of this Plan is:

(a) to permit the Hawk Group to remain in possession of their building supply business and the undertaking, property and assets associated therewith to continue to carry on that business, as reorganized; and

(b) to permit the Hawk Group, by involving the Plan, to pay each Creditor as much or more on account of its Claim, calculated on a net present value basis, than would be paid on a liquidation of the assets of the Hawk Group under proceedings available to wind-up the affairs or liquidate the assets of insolvent debtors or other proceedings which might be initiated by Creditors to recover their Claims or to enforce security granted to them by the Hawk Group.

1.02 *Effect of Plan.* This Plan involves the amalgamation and restructuring of the Hawk Group and the amendment of certain terms of the Hawk Group's obligations. If this Plan is approved by the Creditors as required by the Acts and thereafter sanctioned by the Court, this Plan will be binding on the Hawk Group and its Creditors."

[50] The two plans put forward by the petitioners will result in one group of companies being wound up after the assets have been liquidated and the other

group of companies being continued in the building supply business indefinitely. To accomplish this the companies would have to continue to use the bank's security and attempt to defeat the claim of the bank by way of a set off of anticipated damages from the lawsuit commenced after the court order was obtained to prepare and file a reorganization plan.

[51] I have concluded that the continuation of these companies cannot be justified by either the provisions or the intent of the *Companies' Creditors Arrangement Act.*

(b) It has not been shown by the material filed that the public has any interest in the continuation of the enterprise. The companies do not provide essential services and do not employ a large number of workers. The continuation of these companies will benefit only the Ursel family members.

(c) The plan of reorganization as it is presently framed is not likely to accomplish its purpose as the principal creditor has been excluded from participation in the plan. Throughout the information circular reference is made to the result of the lawsuit to the success of the plan. This Court cannot forecast the result of any lawsuit, much less this one.

(d) The plan cannot succeed as it does not embrace all parties, particularly the principal secured creditor. The debtor companies by suing the principal secured creditor for $15,000,000 and then indicating in the information circular that it intended to set off against the secured claim the amount of the unproven claim in damages showed lack of good faith and will result in the principal secured creditor voting against the plan.

[52] Supportive of the conclusion is *Re United Maritimes Fisherman Co-Op* (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) at pp. 172-173, where Landry J. reasoned:

> "All evidence points to the fact that the proposed restructuring cannot succeed and that there is absolutely no hope that the contemplated plan of arrangement or compromise will be acepted in accordance with the *Companies' Creditors Arrangement Act.*
>
> ...
>
> Since the restructuring cannot succeed, the normal course of action would be for the court to rescind the 1st December, 1987 order [which order declared that the debtor companies were corporations to which the *Companies' Creditors Arrangement Act* applied, authorized the debtor companies to file a formal plan of compromise or arrangement, stayed all actions, suits and proceedings by the creditors or the debtor companies and appointed an interim receiver]."

(e) On careful examination of the reorganization plans, as to their propriety or

impropriety, their fairness or unfairness, the inescapable conclusion is that they are devised for the sole benefit of a select few, namely, shareholders, directors and officers of the petitioners. They are grossly unfair to the principal secured creditor, namely, C.I.B.C., and offer no substantial benefit to the other creditors of the petitioners."

[53] The reorganization plans submitted by the petitioners do not comply with the purpose and intent of the *Companies' Creditors Arrangement Act.* The petitioners have invoked the Act, not for the legitimate purpose of compromise or arrangement, but for their own purposes as extracted from Adam Ursel's affidavit sworn on January 3, 1990, wherein he states in para. 34:

"The survival of the Hawk Group is very important to me personally as is the survival of Krane Service Inc. for my son-in-law, Dan Hnatuk."

[54] On the basis of the material filed I have concluded that the reorganization plans are nothing more than a scheme of liquidation to be spread out over a considerable period of time to the benefit of the Ursel family and to the detriment of the creditors and in particular the principal secured creditor, the Canadian Imperial Bank of Commerce. The object and purpose of the Act is to continue the company through its period of difficulty to become a viable company for the benefit of its creditors, shareholders, employees and the public.

[55] The reorganization plans as proposed fall far short of these objectives.

[56] The application by way of notice of motion dated November 16, 1989 returnable November 22, 1989 and adjourned to February 21, 1990 is hereby dismissed.

[57] It is ordered that the following orders made by this Court are hereby rescinded:

Fiat dated May 3, 1989,
Fiat dated May 10, 1989,
Fiat dated May 31, 1989.

[58] The Act is silent as to costs and since the matter of costs was not addressed during argument, leave is granted to argue the question of costs by way of a telephone conference call with me on a date to be arranged with the local Registrar at Yorkton.

B. Order for a Court-Appointed Receiver and Manager

[59] I will now deal with the second motion. This is the application by the Canadian Imperial Bank of Commerce for an order appointing Clarkson Gordon Inc. as receiver-manager of the undertaking, property and assets of the petitioners. This motion has been adjourned from time to time to be argued following the motion for an order to direct meetings of the creditors. Leave was granted to the applicant to amend para. 3 of the notice of motion to include the words "pursuant to the

provisions of the *Business Corporations Act* for the Province of Alberta".

[60] Counsel for the applicant, the Canadian Imperial Bank of Commerce, submitted in argument the following points in support of the application:

"The Bank could, pursuant to its Debenture, appoint a receiver and manager with respect to all of the Respondents except Krane Services Inc. ('Krane') and Vijan General Contractors Ltd. ('Vijan') as neither of those companies has granted the Bank a debenture, it is imperative that all of the Respondents be administered by a court appointed receiver and manager for the following reasons.

1. Assets and funds are being moved among corporate entities within the Respondents.

2. Assets and funds of the Respondents have been transferred and comingled among the Respondents without observance of corporate formalities.

3. While the Bank does not have debenture security from Krane and Vijan, it does have security in the form of assignments of accounts receivable and they are both jointly and severally liable for the entire indebtedness of the other Respondents.

4. The existence of intercorporate loan guarantees.

An instrument appointed receiver and manager would be frustrated in its attempts to carry out efficiently its work and duties as a result of the complexities of the operations of the Respondents including:

a) The fact that the Respondents operate within British Columbia, Alberta, Saskatchewan and Manitoba;

b) The fact that there are a number of construction projects being carried out within Saskatchewan, some of which are being performed by a bonding company;

c) The fact that there is a manufacturing plant in British Columbia;

d) The fact that a number of the Respondents are involved in distribution of products within British Columbia, Alberta and Saskatchewan;

e) The fact that some of the Respondents are involved in the leasing of equipment within Saskatchewan and Alberta;

f) The fact that there has been interim [sic] receiver appointed by the Court since May 10, 1989, with very broad powers and duties.

g) The fact as stated in the Respondents' petition under the *Companies'*

Creditors Arrangement Act at page 28 that:

> 'The operations of the Ursel Group are inextricably intertwined by way of the ownership of assets, management of the business, employment of employees and the undertaking of various projects. CIBC has loaned approximately $4,500.00 to the companies and the Companies collectively are indebted to more than 1,000 creditors for more than $4,500.00 In addition, depending upon the ability of Alta to profitably complete the projects currently proceeding under their direction, the Companies may be indebted to Alta.'

h) The fact that there are significant contract claims by some of the Respondents in regard to construction projects which will require the co-operation of the principal officers of the Respondents to prosecute and whose co-operation and assistance will not be forthcoming without the intervention of this Court."

[61] Because the respondents also operate within British Columbia and Alberta, and because those jurisdictions do not have personal property security legislation, an instrument appointed receiver in those jurisdictions would have greater difficulty in obtaining the assistance of the court if problems arose. As a result, it is anticipated the court appointment will be sought in British Columbia and Alberta and it would be impractical not to have a court-appointed receiver and manager in this jurisdiction.

[62] A court-appointed receiver and manager would be able to preserve any goodwill that may be left and would facilitate the sale of any of the respondents as a going concern.

[63] Counsel for the respondent, the debtor companies submitted in argument the following points in opposition to the appointment of a receiver and manager:

> "The Courts in Saskatchewan should only make an appointment when:
>
> (a) it is shown to be necessary for the Receiver and Manager to more efficiently carry out its work and duties; and
>
> (b) such an appointment would place the parties interested in this matter, other than the Debenture holder, in a better and more secure position.
>
> 2. A Court appointment is not necessary to allow a Receiver and Manager to more efficiently carry out its duties.
>
> 3. A Court appointed Receiver and Manager would not place the remaining parties (other than the Bank) in a more secure position.
>
> 4. Neither Krane Service Inc. or Vijan General Contractors Ltd. have given Debenture security to the Bank.

5. The Court appointment of a Receiver and Manager would necessarily prejudice the rights of the companies that have simply guaranteed the indebtedness of their parent companies.

6. The Courts have been very consistent that if a borrower defaults in making payment, that it must be given a reasonable opportunity to pay prior to enforcement proceedings being taken.

7. It is respectfully submitted that the application by the Bank to have this Court appoint a Receiver and Manager is simply a device being utilized by the Bank to attempt to circumvent the legal proceedings that have been commenced by the Petitioners against the Bank. The Receiver and Manager being proposed by the Bank is the same Receiver and Manager that the Bank retained to do a complete analysis of the Bank's security. The reports that were prepared by Clarkson Gordon have been referred to throughout these proceedings. It is suggested that there would be a conflict of interest with Clarkson Gordon Inc. (now Ernst & Young Inc.) acting as Receiver and Manger for any or all of the companies as it has previously acted for the Bank in preparing the Clarkson Gordon reports.

8. It is respectfully submitted that none of the reasons given by the Bank in support of a Court appointed Receiver and Manager outweigh the extreme prejudice to the Petitioners if a Receiver and Manager is appointed."

[64] Having considered the very able arguments made by counsel and having considered the briefs filed in support of such arguments, I am persuaded to give weight to the words of Estey J. in *Bank of Nova Scotia* v. *Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.) at p. 17 when he said:

"The difference in law between a receiver and manager appointed in a debenture and a receiver and manager appointed by the court appears to be that in the latter instance he is acting in a fiduciary capacity to all parties who may have an interest in the matter after the claim of the debenture holder has been satisfied. I am of the view that the order as asked should be granted only if such an appointment would place the parties interested in this matter, other than the debenture holder, in a better or more secure position."

[65] This statement together with the fact that there is already a court-appointed receiver in charge of the petitioners' assets leads me to the conclusion that the Court should appoint the receiver-manager. From the standpoint of the transfer of powers that it should be from one court-appointed receiver to another court-appointed receiver.

[66] The relief sought in the notice of motion is granted and an order shall issue in the form of the draft order filed with the following changes thereto:

"(a) The addition of the words 'and s. 95 of the *Business Corporations Act* of Alberta' in the third line of the second paragraph of the draft order.

(b) The addition of the following paragraph into the draft order:

'THAT nothing in this Order shall be interpreted as interfering with the completion of those construction contracts being undertaken by Alta Surety company pursuant to that agreement made as of March 22, 1989 (the "Contracts") provided that:

(a) Alta Surety Company will provide an accounting of the Contracts to any creditor requesting the same and to the Interim Receiver on a Contract by Contract basis on or before the 15th day of each month commencing on June 15, 1989; and

(b) Subject to the provisions of *The Builders' Lien Act,* S.S. 1984-85, c. B-7.1, Alta Surety Company shall be entitled to use all revenue received from the Contracts to complete such Contracts and the use of such revenue shall be without prejudice to any claim that Canadian Imperial Bank of Commerce may have to the revenue.'"

[67] Costs may be spoken to by way of telephone conference call.

[68] As to both applications I wish to say that I am indebted to all counsel who presented their very able arguments in such a professional way and supported such arguments with well organized briefs of law containing photocopies of the applicable case authority. Counsel also went out of their way to assist me by assembling in binder form the material most referred to during the course of argument.

[69] Counsel filed such complete briefs of facts and law that I have taken the liberty of incorporating much of their wording in the factual portion of this judgment.

First motion dismissed; second motion allowed.

TAB 28

See p. 2.

Although it is almost always the debtor corporation that seeks approval of the plan before the court, creditors can seek approval.[116] Where an interim receiver has been appointed in the context of a *CCAA* proceeding, the interim receiver can also apply for an order sanctioning the plan.[117] Once the court sanctions a plan, it becomes binding on the debtor company and on its creditors.

The court has the discretion to adjourn an application to sanction a plan, but will not do so to allow for further negotiation where the creditor seeking the adjournment did not propose any amendments at the creditors' meeting to vote on the proposed plan, the creditor was not affected by the plan, and the adjournment request was made only shortly before the sanctioning hearing.[118]

2. The Fairness and Reasonableness Inquiry

The court will review the plan to determine whether it is fair, reasonable and equitable.[119] In assessing the fairness and reasonableness of a plan, the court has held that "'fairness' is the quintessential expression of the court's equitable jurisdiction–although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation makes its exercise an exercise in equity–and 'reasonableness' is what lends objectivity to the process".[120] Fairness is assessed by whether the plan is feasible, whether it fairly balances the interests of all the creditors, the company and its stakeholders. The court has held that it must weigh the equities or balance the relative degrees of prejudice that might flow from granting or refusing the relief sought under the *CCAA*.[121]

The court will consider the views of the monitor on the fairness and reasonableness of a proposed plan of compromise and/or arrangement. Section 23(1)(i) of the *CCAA* requires the monitor to report on the fairness and reasonableness of the plan to the court. In practice, the monitor comments on the proposed plan

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[116] For an example of where creditors brought the application for approval and the court sanctioned the plan, see *Paris Fur Co. v. Nu-West Fur Corp.* (1950), 30 C.B.R. 193 (Que. S.C.), leave to appeal refused (1950), 30 C.B.R. 197 (Que. C.A.), where a plan was guaranteed in part by an officer of the debtor and accepted by the requisite number of creditors. When the debtor subsequently declined to bring the plan to the court for sanctioning, creditors made an application to sanction the plan so that the guarantees were not lost and received approval of the court for the plan.

[117] *Re Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2003 CarswellOnt 730, 2003 CarswellOnt 731 (S.C.C.).

[118] *Re GT Group Telecom Inc.* (2002), 38 C.B.R. (4th) 203 (Ont. S.C.J. [Commercial List]).

[119] *Re Air Canada*, 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]).

[120] *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at 1.

[121] *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. S.C.J.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), affirmed (1989), (*sub nom.* Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada) 73 C.B.R. (N.S.) 195 (B.C.C.A.) at 201; *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (B.C.C.A.) at 116, leave to appeal refused (1991), 7 C.B.R. (3d) 164 (note) (S.C.C.).

in a report before the creditors vote on the plan, so that the creditors have the benefit of the monitor's view when determining how they intend to vote. The monitor's opinion of the fairness and reasonableness of any proposed strategy is thus important to the debtor company and is considered during development of the plan, given its consideration by creditors and the court. The monitor will consider the criteria outlined in the caselaw by the courts in forming its views as to the fairness and reasonableness of a proposed plan.

In *Canadian Airlines*, the Alberta Court of Queen's Bench held that its role in the sanctioning hearing is to consider whether the plan fairly balances the interests of all stakeholders; to look forward and determine whether the plan represents a fair and reasonable compromise that will permit a viable commercial entity to emerge.[122] The court will also consider factors such as whether the proposed plan brings more value to creditors than a bankruptcy or liquidation alternative, whether there has been any oppressive conduct towards creditors, whether there is retention of jobs and support by the debtor's unions, and will consider the public interest in a successful workout strategy.[123] One measure of whether a plan is fair and reasonable is the parties' degree of approval of the plan. The court has held that parties generally know what is in their best interests, and in engaging in the fairness inquiry, the court will be reluctant to refuse to sanction a plan where creditors have strongly supported the plan.

Thus, fairness and reasonableness are assessed in the context of a proposed plan's impact on creditors, having regard to the purpose of the statutory scheme. Courts will look at all categories of interest holders in assessing if compromises are fair and reasonable in the circumstances.[124] The plan must be inherently fair, reasonable and equitable, and in exercising its discretion to approve an agreement, the court will consider the relationship between the debtor corporation and stakeholders.[125] The courts have held that reference should be made to the substance, not the form, of a plan and that there is nothing in the *CCAA* that prohibits a creditor from agreeing to subordinate its claim to another creditor; hence the Court in *Air Canada* approved a plan that included an agreement among some of the insolvent company's creditors to subordinate their debts to the debts of other creditors.[126]

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[122] *Re Canadian Airlines Corp.*, 2000 CarswellAlta 662, [2000] A.J. No. 771 (Alta. Q.B.) at para. 95, leave to appeal refused 2000 CarswellAlta 919 (Alta. C.A. [In Chambers]), affirmed 2000 CarswellAlta 1556 (Alta. C.A.), leave to appeal refused 2001 CarswellAlta 888, 2001 CarswellAlta 889 (S.C.C.); *Re Canadian Airlines Corp.*, 2000 CarswellAlta 919, [2000] A.J. No. 1028 (Alta. C.A. [In Chambers]), affirmed 2000 CarswellAlta 1556 (Alta. C.A.), leave to appeal refused 2001 CarswellAlta 888 (S.C.C.).

[123] *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), leave to appeal refused (2000), 84 Alta. L.R. (3d) 52, [2000] A.J. No. 1028 (Alta. C.A. [In Chambers]), affirmed 2000 CarswellAlta 1556 (Alta. C.A.), leave to appeal refused 2001 CarswellAlta 888, 2001 CarswellAlta 889, [2001] S.C.C.A. No. 60 (S.C.C.).

[124] *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Algoma Steel Corp. v. Royal Bank*, 1992 CarswellOnt 2843, [1992] O.J. No. 795 (Ont. Gen. Div.).

[125] *Re Air Canada*, 47 C.B.R. (4th) 163, 2003 CarswellOnt 5296 (Ont. S.C.J. [Commercial List]).

[126] *Re Air Canada*, 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]).

TAB 29

compromise

NOUN

See p. 2.

Etymology

Summary

A borrowing from French.

Etymon: French *compromis*.

< French *compromis*, **< Latin** *comprōmissum*, past participle of *comprōmittĕre* (also **Old French** *compromisce*, **Latin** type **compromissa*): see **compromit** *n.*

Meaning & use

1. † Promise or mutual promise. *rare*. *Obsolete*. **1448**

> **1448** Me semeth by feiture of womanly property Ye should be trusty and trew of comprimis.
> *Craft of Lovers* (R. Supplement)

2. †

2.a. A joint promise or agreement made by contending parties to abide by the decision of an arbiter or referee. Also, the document in which such an agreement is drawn up. *Obsolete*. **1464–1656**

> **1464** Horbury sais that ye & the minister stand in comprimise to abide the award of Sir John Malivera & others.
> in T. Stapleton, *Plumpton Correspondence* (1839) 10
>
> ***c*1503** To this present compromise my sayd lorde of glouceter hath sub stribid his name..and in semblable forme my lorde of winchester in a nother compromise substribid w^{t} his hand..to stond at the aduyse ordinaunce and arbitrement of y^{e} parsons aboue sayd.
> R. Arnold, *Chronicle* f. Cxvi^{v}/2
>
> ***a*1559** The compromise of them all made unto the said King Edward the First to stand to his judgment.
> Tonstal, *Letter* in Burnet, *Records* No. 9 (R.)
>
> **1594** A Compromise is the faculty or power of pronouncing sentence between persons at variance, given to Arbitrators by the parties mutuall private consent.
> W. West, *Symbolæography* ii *Compromise* §1
>
> **1656** Compromize.
> T. Blount, *Glossographia*

law

2.b. **election by compromise**: see quots. **1726–1885**

1726 The third Form of an Election was that of a Compromissum, viz. when some certain Clergymen qualified by Law, had a power granted to them of electing by a Compromise.
J. Ayliffe, *Parergon Juris Canonici Anglicani* 242

1728 The Word is also used in Beneficiary Matters; where it signifies an Act, whereby those who have the Right of Election, transfer it to one or more Persons, to elect a Person Capable of the Office or Dignity. Thus, we have seen Members of Parliament elected by Compromise.
E. Chambers, *Cyclopædia* (at cited word)

1885 Compromise is, when all the cardinals agree to entrust the election to a small committee of two or three members of the body.
W. E. Addis & T. Arnold, *Catholic Dictionary* (ed. 3) 204/1

3. The settlement or arrangement made by an arbiter between contending parties; arbitration. **1479–**

1479 The Maire and Shiref of Bristowe to kepe theire due residence at the Counter..to sett parties in rest and ease by theire advertysement, compromesse, or otherwise; ynless then it so requyre that they must remit theym to the lawe.
in J. T. Smith & L. T. Smith, *English Gilds* (1870) 426

1580 Eyther the parties are persuaded by friendes, or by their Lawyers to put the matter in comprimyse.
E. Knight, *Triall of Truth* f.30

***a*1616** I..will be glad to do my beneuolence, to make attonements and compremises betweene you.
W. Shakespeare, *Merry Wives of Windsor* (1623) i. i. 30

***a*1626** The Company and I made even of all things ever past betwen us, by compramis of fower woorthy personages.
J. Horsey, *Relacion Trav.* in E. A. Bond, *Russia at Close of 16th Century* (1856) 256

1644 Those who..refer their controversies to an arbiter, put to comprimise, or chuse an umpier.
J. Bulwer, *Chirologia* 93

4.a. A coming to terms, or arrangement of a dispute, by concessions on both sides; partial surrender of one's position, for the sake of coming to terms; the concession or terms offered by either side. **a1513–**

In U.S. history, the name of various arrangements between contending sections on the questions of the tariff, (e.g. *Compromise Act* of 1833) and of slavery (*Missouri Compromise* of 1820, *Compromise of 1850*, *Crittenden C.* of 1860).

***a*1513** The sayd Cristofer suyd the Sheryffes..and fynally [they] were fayne by waye of Compremyse to gyue vnto hym an Hondreth marke.
R. Fabyan, *New Cronycles of Englande & Fraunce* (1516) vol. II. f. ccxxiiii^{v}

1597 Warrde he hath not, But basely yeelded vpon compromise, That which his noble auncestors atchiued with blowes.
W. Shakespeare, *Richard II* ii. i. 254

***a*1616** Shall we..make comprimise, Insinuation, parley, and base truce To Armes Inuasiue?
W. Shakespeare, *King John* (1623) v. i. 67

1726 If the affair with Partinton were adjusted this winter, by reference or compromise.
G. Berkeley, *Letter* 12 November in *Works* (1871) vol. IV. 137

1845 It was..necessary to come to a compromise with the papal commissioners.
S. Austin, translation of L. von Ranke, *History of Reformation in Germany* (ed. 2) vol. II. 509

1878 The Missouri Compromise of 1820.
General R. Taylor in *North American Review* vol. 126 77

1879 Invidious laws had been softened by compromise.
J. A. Froude, *Cæsar* xv. 225

religion

4.b. A settlement *of* debts by composition. **1848–**

1848 Munir-al-Mulk had consented to a compromise of his debts.
H. H. Wilson, *History of British India 1805–35* vol. III. viii. 388

5.a. *figurative*. Adjustment for practical purposes of rival courses of action, systems, or theories, conflicting opinions or principles, by the sacrifice or surrender of a part of each. **a1711–**

***a*1711** I in my Breast would lodge a double Mind, One to the World, and one to Heav'n inclin'd; And by this Compromise strove to adjust The Rights of Conscience, and the Claims of Lust.
T. Ken, *Hymnotheo* in *Works* (1721) vol. III. 119

1775 All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter..we give and take; we remit some rights, that we may enjoy others.
E. Burke, *Speech Resolutions for Conciliation with Colonies* 52

1849 Logic admits of no compromise. The essence of politics is compromise.
T. B. Macaulay, *History of England* vol. II. x. 629

1860 Our governors now..make a fair compromise between discipline and freedom.
C. Kingsley, *Miscellanies* (ed. 2) vol. II. 65

5.b. Quasi-*concrete*. Applied to anything that results from or embodies such an arrangement. **1797–**

1797 All virtue is a compromise between opposite motives and inducements.
W. Godwin, *Enquirer* i. i. 2

1821 This last decree is a compromise between philosophical theory and inveterate popular habits.
J. Q. Adams in C. Davies, *Metric System* (1871) iii. 175

1858 You deny the self-consistency of the Church of England and call it a compromise.
J. Martineau, *Studies in Christianity* 270

6. A putting in peril or hazard, endangering, exposure to risk or suspicion: see **compromise** *v.* II.8 †**to put to compromise** [French *mettre en compromis*] : to risk, hazard, imperil (*obsolete*). **1603–**

1603 It is absurd..to hazzard and put to comprimise (as it were) our owne reputation and vertue for another man.
P. Holland, translation of Plutarch, *Morals* 172

1844 Where each could come without compromise of dignity.
C. J. Lever, *Tom Burke* vol. II. lv. 40

7. *attributive*, esp. defining a thing intermediate between two others or possessing an accommodating combination of characteristics. **1833–**

1833 The olive branch, the compromise tariff bill, will probably allay the excited feelings of the South.
Reg. Deb. Congress U.S. 27 February 1864

1893 It is said that a compromise amendment will be laid before the Senate tomorrow.
Westminster Gazette 17 October 7/3

1898 Better practice requires that the exhaust or low-pressure steam should be used, supplemented by high-pressure steam from the boilers, the combination giving the desired temperature. There are several similar compromise points, which need not be mentioned.
Engineering Magazine vol. 15 102

1904 The House of Deputies subsequently adopted by a great majority a compromise resolution.
Daily Chronicle 21 October 5/6

1906 Wellington is a compromise capital. Auckland, the original capital, was too far north to suit the southern folks, and Dunedin..was too far south to be tolerated by the northerners.
Daily Chronicle 24 October 6/6

1953 The morpheme is a compromise-unit rather than a purely distributional unit.
C. E. Bazell, *Linguistic Form* 60

Pronunciation

BRITISH ENGLISH

/ˈkɒmprəmʌɪz/

KOM-pruh-mighz

U.S. ENGLISH

/ˈkɑmprəˌmaɪz/

KAHM-pruh-mighz

Pronunciation keys

Forms

Variant forms

Middle English–1600s **comprimise**, 1500s–1600s **comprimize**, 1500s **comprymise**; 1500s–1600s **compremise**, 1500s **compremyse**, **compremize**, **compremisse**; Middle English **compromesse**, 1500s **compromisse**, 1600s **compromize**, (1500s **compramis**), Middle English– **compromise**.

Frequency

compromise is one of the 5,000 most common words in modern written English. It is similar in frequency to words like *composite*, *monastery*, *paid*, *rehabilitation*, and *seventeenth*.

It typically occurs about ten times per million words in modern written English.

compromise is in frequency band 6, which contains words occurring between 10 and 100 times per million words in modern written English. More about OED's frequency bands

Frequency data is computed programmatically, and should be regarded as an estimate.

Compounds & derived words

Sort by Date (oldest first)

compromise, v. **1598–**
intransitive. To come to terms by mutual concession; to come to an agreement by the partial surrender of position or principles.

compromisal, n. **1702**
= compromise, n. 2b.

Missouri Compromise, n. **1820–**
The measure passed by the U.S. Congress in 1820 (and repealed in 1854) which provided that Missouri should be admitted to the Union as a Slave State...

TAB 30

See p. 346.

CHAPTER 11

THE FOUNDATIONS OF COMMERCIAL RESTRUCTURING LAW

The creation of a bankruptcy system has naturally given rise to a parallel phenomenon — arrangements between debtors and creditors under which the creditors agree to accept something less than full and timely payment of their debts. These arrangements, which in a commercial context are referred to as restructurings or reorganizations, are negotiated within a statutory framework created by federal insolvency legislation. If approved by the creditors, the arrangement operates as an alternative to bankruptcy or receivership. A successful restructuring will often permit a debtor to continue in business, although sometimes it will result in the sale of a going concern to an outside party.

The growth of restructuring law in Canada in the past three decades has been an astonishing phenomenon on several levels. It has eclipsed bankruptcy law and has become the insolvency proceeding that is used by the very largest business enterprises. It has also stimulated an unforeseen creativity on the part of the judiciary in formulating new kinds of orders, many of which have had the effect of altering pre-existing contractual and property rights of third parties. Restructuring law continues to be in a state of rapid evolution, and its proper role as well as its relationship with other commercial insolvency regimes continues to be controversial.

A. A SHORT HISTORY OF RESTRUCTURING LAW

1) Voluntary Arrangements

Originally, voluntary arrangements operated in the absence of a statutory framework. A variety of different agreements were possible, and a number of different terms were used to describe the various types of agreements. An agreement under which a creditor agreed to accept a lesser amount in full satisfaction of the debt was referred to as a composition agreement. An agreement under which the time for payment of debts was postponed was called a moratorium. A deed or scheme of arrangement was employed in a wide range of situations. It could be used where the claims of the creditors were partially released or converted into other kinds of claims. In many instances, the arrangement provided for the transfer of some or all of the debtor's assets to a trustee. Agreements between debtors and creditors that are concluded outside a statutory framework are commonly referred to as workouts or private arrangements.

It became increasingly common for such agreements to be concluded within a statutory framework. These statutory regimes addressed one or more of the following four problems associated with the negotiation of a private arrangement. First, there was no method through which the debtor could prevent creditors from enforcing their claims through judicial or extra-judicial seizure of the debtor's assets while the debtor was attempting to negotiate with the creditors. This made negotiations more difficult, since each creditor had a strong incentive to attempt to join in the race to grab assets.[1] Second, the agreement bound only the creditors who agreed to the arrangement and could not be imposed on dissenting creditors.[2] This gave dissenting creditors the opportunity to make strategic threats to derail the whole arrangement by instituting bankruptcy proceedings against the debtor unless their claims were given preferred treatment. This type of holdout threat has a corrosive effect, since it lessens the likelihood that any arrangement will be negotiated. Third, creditors generally lacked sufficient information concerning the affairs of the debtor and therefore were unable to make informed decisions. Fourth, there were concerns that private arrangements might not be properly administered and that, through

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1 See Chapter 1, Section A(2).

2 See I Treiman, "Majority Control in Compositions: Its Historical Origins and Development" (1938) 24 *Virginia Law Review* 507.

fraud or neglect, amounts properly due to the creditors would not be accounted for or distributed.

2) The Emergence of Canadian Restructuring Law

In common with English bankruptcy legislation of the Victoria era, both the *Insolvent Act*[3] of 1869 and the *Insolvent Act*[4] of 1875 permitted a debtor to enter into a deed of composition with creditors. The deed was binding on all creditors if approved by a majority of creditors holding three-quarters of the value of debts. After the repeal of federal insolvency legislation in 1880, the only arrangements were those governed by provincial law. This state of affairs persisted until the enactment of the *Bankruptcy Act* of 1919.

The *Bankruptcy Act* of 1919 reintroduced a statutory scheme that permitted an insolvent debtor to make a proposal for a composition, extension, or scheme of arrangement.[5] Concern over fraudulent proposals led to amendments to Canadian bankruptcy legislation in 1923 which allowed a debtor to make a proposal only if the debtor first went into bankruptcy.[6] Although this afforded creditors better information concerning the financial affairs of the debtor and curbed opportunities for abuse by fraudulent trustees, the stigma of bankruptcy cast a pall over the debtor's ability to carry on business. In 1949 this restriction was eliminated so that debtors were again able to make proposals without having to go into bankruptcy.[7] However, the proposal provisions were afflicted with another critical weakness: secured creditors were left unaffected. The inability to stay the rights of secured creditors pending consideration of the proposal by the creditors severely curtailed the effectiveness of these provisions in a commercial context.

In 1933, in the midst of the Great Depression, the Parliament of Canada enacted the *Companies Creditors' Arrangement Act* (*CCAA*),[8] which provided a mechanism through which a company could attempt to negotiate an arrangement with its creditors. Unlike the proposal provisions in the bankruptcy legislation, the *CCAA* permitted a court to stay enforcement proceedings of secured creditors. In 1953 amendments to the *CCAA* restricted its application to companies that had

3 32–33 Vict, c 16, s 49.
4 38 Vict, c 16, s 94.
5 SC 1919, c 36, s 13.
6 SC 1923, c 11.
7 SC 1949, c 7.
8 SC 1933, c 36.

issued bonds or debentures under a trust indenture.[9] This restriction seriously limited the availability of the statute, with the result that it was on the verge of being rendered a dead letter.

The *CCAA* was resuscitated in the early 1980s during an economic recession. The courts, aware of the unavailability of an effective regime for corporate restructuring, breathed new life into the *CCAA* by recognizing "instant trust deeds" issued by corporations to secure a nominal sum that were issued for the sole purpose of qualifying the corporation to restructure under the *CCAA*.[10] The *CCAA* rapidly became the primary vehicle through which cooperate restructurings were attempted.[11] Although the original statute was sparsely worded, the fundamental legal principles of restructuring law were articulated and developed in the decisional law.

In 1992 the proposal provisions of the *Bankruptcy and Insolvency Act* (*BIA*)[12] were amended to permit an insolvent debtor to make a proposal to both secured and unsecured creditors.[13] The threshold for acceptance of the proposal by creditors was also reduced so that it was necessary to obtain the consent only of a majority of creditors holding two-thirds the value of the claims. Although it was anticipated that the proposal provisions of the *BIA* would become the primary vehicle for restructuring financially distressed enterprises, this prediction turned out to be incorrect. The *CCAA* was not repealed, and it continued to be employed to restructure corporations and was the vehicle of choice in respect of large corporate enterprises.

This has given rise to a highly distinctive feature of Canadian insolvency law — the existence of dual commercial restructuring regimes. Because of this duality, an insolvent debtor corporation will usually need to make an assessment of the advantages and disadvantages of attempting to restructure under each regime in order to choose the one that will maximize the chances of success. The reform of commercial insolvency law has since adopted a deliberate strategy of convergence under which the rules and principles pertaining to each restructuring regime have been increasingly aligned.[14] Despite this process, there

9 SC 1952–53, c 3.

10 See *United Maritime Fishermen Co-operative* (1988), 67 CBR (NS) 44 (NBQB); *Elan Corp v Comiskey* (1990), 1 CBR (3d) 101 (Ont CA). The requirement for the issue of a trust indenture was subsequently removed from the *CCAA* in 1997.

11 For a history of this development, see R Jones, "The Evolution of Canadian Restructuring Law: Challenges for the Rule of Law" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2005* (Toronto: Thomson/Carswell, 2006) 481.

12 RSC 1985, c B-3 [*BIA*].

13 SC 1992, c 27.

14 For example, in 1997 the threshold for acceptance of an arrangement by creditors under the *CCAA* was reduced from 3/4 to 2/3 of the value of the claims in

are still many significant differences between the two regimes, and it remains necessary for legal advisors to conduct a careful evaluation of each before making a choice in those cases where both restructuring regimes are available.

The 2009 insolvency reforms proceeded on the basis that the two general commercial restructurings regimes should be kept separate. This was based in part on the view that the *CCAA* was more flexible and better suited for resolving the multitude of issues that arise in connection with restructuring larger businesses. The rule-based approach of the *BIA* was regarded as more suitable for small- and medium-sized enterprises. Fewer court applications were needed, thereby reducing the cost of restructuring.[15] The reforms continued to adhere to the policy of convergence under which differences between the two restructuring regimes were to be minimized. Although this policy has brought the two regimes even closer together, the process is incomplete. Many significant differences between the two restructuring regimes remain.

B. THE OBJECTIVES OF RESTRUCTURING LAW

At one time, the objectives of restructuring law were relatively uncontroversial. Courts had consistently maintained that the purpose of restructuring law was to provide an insolvent debtor with a limited but reasonable period of time within which to develop a plan or proposal and to put it before the creditors who must then decide to accept or reject it.[16] However, the task has become more complicated because restructuring proceedings are increasingly employed as a mechanism for selling the business as a going concern. In a "liquidation *CCAA*" or "liquidation commercial proposal," it is often the case that a plan is never developed and the creditors never vote.

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order to bring it in line with the proposal provisions of the *BIA*.

15 See Senate Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors: Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* by Richard H Kroft & David Tkachuk (Ottawa: Standing Senate Committee on Banking, Trade and Commerce, 2003) at 171–74.

16 See, for example, *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3d) 24 at para 6 (Ont Ct Gen Div) [*Lehndorff*].

1) Rescuing Financially Distressed Firms

The traditional justification for restructuring law was that it permitted the rescue of financially distressed businesses. The recognition of this objective represented a significant shift in commercial insolvency law. Although the idea of debtor rehabilitation was of fundamental importance in respect of bankrupt individuals, bankruptcy of a corporation or other artificial entity represented the cessation of its commercial activities. The emergence of restructuring law in the 1980s therefore represented a shift in favour of insolvency proceedings that sought to restructure the affairs of a financially distressed enterprise so as to avoid liquidation.

This did not mean that bankruptcy was regarded as a bad thing and that it was always desirable to rescue a firm from liquidation. There are many reasons why firms become financially distressed. It may result from incompetent management or the inefficient use of assets. It may be due to a temporary downturn in markets. It may be that the firm has taken on too much debt or has embarked on projects that turn out to be less profitable than anticipated. Depending on the nature of the problem, the solution may be to replace the management of the firm, to get rid of unprofitable portions of the business, to cut costs, or to reschedule debt or convert some of it to equity.[17] However, it may be that there is no longer a realistic prospect that the firm can be made economically efficient. In that case, it is not an appropriate candidate for rescue. The best outcome is for its assets to be liquidated so that others may put them to higher-valued uses.

The traditional view of rescue centred upon the survival of the legal entity. The normal expectation was that an enterprise that underwent restructuring proceedings would continue to operate the business in some restructured or reorganized form. It was therefore the debtor corporation that was rehabilitated and which survived to carry on operations. This view has been displaced to a large degree by a new view that regards the rescue of the ongoing business rather than the legal entity as the legitimate goal of the restructuring effort. On this view, a going-concern sale of the business to a third party can satisfy the rehabilitation objective as it preserves the economic relationships with the employees, suppliers, and other stakeholders.

17 See *Re 843504 Alberta Ltd* (2003), 4 CBR (5th) 306 at para 14 (Alta QB).

2) Maximizing the Value of Assets for Creditors

Traditional restructurings were thought to be desirable because they provided a process through which creditors could obtain a higher recovery than otherwise would be available to them through bankruptcy or other liquidation proceedings. The reason for enhanced recoveries by creditors in restructuring proceedings is due to the preservation of the value of the firm as a going concern. The value of a business as a going concern is generally higher than the value that would be obtained by breaking it up and selling off the assets to individual buyers. If there is not a reasonable prospect that a restructuring will give creditors more than they would receive in a bankruptcy, the case is not considered to be appropriate for restructuring, and the proceedings should be terminated.[18]

One difficulty with this explanation is that it does not adequately explain why the same value cannot be obtained for the creditors through a liquidation in which the business is sold to a buyer as a going concern. As a liquidation process does not involve the additional costs associated with the negotiation of the arrangement with creditors, it is not obvious why restructuring proceedings are the preferred method of retaining the going-concern value of a firm through a sale of the business.

In some instances, particularly where a smaller firm is involved, the reason may be that an owner/manager has firm-specific skills and knowledge that would be lost on a sale of the business.[19] Alternatively, it may be that there are few potential outside buyers or that it is too costly for them to obtain accurate information about the business.[20] In other instances, bankruptcy proceedings or receivership proceedings may simply not be a viable option. Because bankruptcy does not stay the enforcement remedies of secured creditors, a going-concern sale may not be possible where a creditor has a security interest in certain key assets. Receivership proceedings are typically available only where a creditor has a security interest on the entire undertaking.

Sometimes the causes of the financial distress and the best method of redressing the difficulty may not be immediately apparent. Restructuring proceedings provide an opportunity to evaluate the nature of the problem and to propose strategies designed to achieve a turnaround.

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18 See Chapter 12, Section E.

19 See T Jackson & D Baird, "Bargaining After the Fall and the Contours of the Absolute Priority Rule" (1988) 55 *University of Chicago Law Review* 738 at 742–43.

20 See R Clark, "The Interdisciplinary Study of Legal Evolution" (1981) 90 *Yale Law Journal* 1238 at 1252.

After the parties have been given an opportunity to assess the various options, it may turn out that a going-concern liquidation of the enterprise is the best alternative. If so, the firm can be liquidated within the restructuring regime. The longer time frames associated with restructuring proceedings may also provide more time within which to search for potential buyers. In other cases, the expertise and assistance of the debtor's management team may be needed in order to obtain the best possible price from potential buyers.[21] The restructuring process might also involve a dual track in which both liquidation and restructuring are put forward as possibilities, with the ultimate choice depending on the best offer that is obtained.[22]

The growth in liquidating *CCAA*s and liquidating commercial proposals may signify a change in the economic environment. Some believe that the traditional restructuring is no longer able to outperform a going-concern liquidation of the business.[23] It is argued that asset sales are now much more likely able to yield more than can be obtained through keeping the firm intact. Assets have become more fungible and less firm-specific so that there is less going-concern value. Markets are more liquid so that even when there is going-concern value, the whole enterprise can be sold off.[24] The increase in the number of liquidating *CCAA*s and commercial proposals does not in itself vindicate this argument. Some of the increase may be due to the fact that a liquidation that would formerly be carried out through a receivership is now carried out through restructuring proceedings. Moreover, it cannot be assumed that a liquidation will necessarily maximize the value obtained by the creditors. It may be that senior secured creditors have

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21 See W Bodoh, J Kennedy, & J Mulligan, "The Parameters of the Non-Plan Liquidating Chapter Eleven: Refining the Lionel Standard" (1992) 9 *Emory Bankruptcy Developments Journal* 1 at 12–13.

22 See K McElcheran, *Commercial Insolvency in Canada*, 2d ed (Markham, ON: LexisNexis Canada, 2011) at 289–91. See also D Baird & R Rasmussen, "Chapter 11 at Twilight" (2003) 56 *Stanford Law Review* 673 at 675, who conclude that "corporate reorganizations today are the legal vehicles by which creditors in control decide which course of action — sale, prearranged deal, or a conversion of debt to controlling equity stake — will maximize their return."

23 D Baird & R Rasmussen, "The End of Bankruptcy" (2002) 55 *Stanford Law Review* 751; D Baird, "The New Face of Chapter 11" (2004) 12 *American Bankruptcy Institute Law Review* 69.

24 D Baird, "Bankruptcy's Undiscovered Country" (2008) 25 *Emory Bankruptcy Developments Journal* 1 at 7.

developed more effective strategies to prevent a beneficial restructuring that would yield greater value to creditors as a group.[25]

3) Protecting the Public Interest

The idea that the creditors in a restructuring must receive at least as much as they would receive in bankruptcy does not mean that courts should take into account only the interests of creditors.[26] Canadian courts on a number of occasions have considered the effect of bankruptcy of the enterprise on employees, suppliers, and the larger community.[27] Justice Deschamps in *Century Services Inc v Canada (AG)*[28] recognized that restructurings may serve the public interest by serving stakeholders beyond the employees and creditors who have contractual relationships with the debtor company.

Some commentators have questioned why this subject should be the exclusive concern of insolvency law. The closure of a plant that occurs outside insolvency may have precisely the same consequences on employees and the community.[29] In any event, one should not overstate the role of non-creditor stakeholders in restructuring proceedings. Although courts may consider such stakeholder interests when deciding whether to permit restructuring proceedings to go ahead and when deciding whether the plan should be sanctioned by the court, the decision whether or not to accept the plan ultimately is one that is made by the creditors. If the creditors do not consent to the plan, then it will fail and there is nothing that a court can do to reverse this outcome.

4) The Appropriateness of Restructuring Proceedings for Liquidation

The initial shift from receivership proceedings to liquidating *CCAA*s and commercial proposals occurred because of a concern over the potential

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25 See R Wood, "Rescue and Liquidation in Restructuring Law" (2013) 53 *Canadian Business Law Journal* 407.

26 Review Committee of Insolvency Law and Practice, *Report of the Review Committee of Insolvency Law and Practice*, Cmnd 8558 (London: HMSO, 1982) at 56 [*Cork Report*].

27 See *Re Algoma Steel Inc* (2002), 30 CBR (4th) 1 (Ont SCJ); *Re Canadian Airlines Corp* (2000), 20 CBR (4th) 1 (Alta QB). And see J Sarra, *Creditor Rights and the Public Interest* (Toronto: University of Toronto Press, 2003).

28 2010 SCC 60 at para 18 [*Century Services*].

29 See D Baird, "Bankruptcy's Uncontested Axioms" (1998) 108 *Yale Law Journal* 573 at 588.

liability of the receiver.[30] Because a monitor or proposal trustee does not take control of the business, it is less likely that the insolvency professional will be liable for employment obligations under successor liability provisions of labour and employment legislation. Although the 2009 *BIA* amendments limited the liability of receivers under such statutes,[31] the restructuring regimes continued to be used for liquidations.

There are a number of reasons why a senior secured creditor might prefer to liquidate under a restructuring regime. Some of these reasons may be consistent with the objectives described above, while some of these reasons may undermine these goals. A major difference between restructuring proceedings and receivership proceedings is that the debtor remains in control of the business in the former, and an insolvency professional takes control in the latter. To the extent that it can be shown that value can be maximized by having the debtor remain in control, a liquidation that is carried out through restructuring proceedings may not be objectionable.

The use of restructuring regimes to liquidate will undercut the goals if it permits a creditor to force a sale under circumstances in which some other process would yield a higher return to creditors as a group. A senior secured creditor has a strong preference to conduct a quick sale of the assets if the expected value of the sale proceeds are sufficient to pay out its claim. A secured creditor may opt for a liquidation under restructuring proceedings because it gives the creditor a better ability to control the process. There are two mechanisms by which this control can be exercised.[32] The first is through the use of contractual provisions in the financing agreements that are entered into after the restructuring proceedings are commenced. A secured lender can influence the direction of the insolvency proceedings by the use of negative and positive covenants in the interim financing agreement. These may set strict timelines that make it less likely that a traditional restructuring can be achieved or that will limit access and use of cash flow. The agreements may also include events of default that effectively impose onerous financial stress tests that are difficult to satisfy.[33] The second is through devices that give the creditor power over the selection or compensation of the managers.

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30 *GMAC Commercial Credit Corporation - Canada v TCT Logistics Inc*, 2006 SCC 35.

31 *BIA*, s 14.06. And see Chapter 19, Section E(1).

32 See Kenneth M Ayotte & Edward R Morrison, "Creditor Control and Conflict in Chapter 11" (2009) 1 *Journal of Legal Analysis* 511.

33 D Skeel, Jr, "The Past, Present and Future of Debtor-in-Possession Financing" (2004) 25 *Cardozo Law Review* 1905 at 1916–919; G Kuney, "Hijacking Chapter 11" (2004) 21 *Emory Bankruptcy Developments Journal* 19 at 52–59.

Although receivership proceedings provide a secured creditor with the means to liquidate the firm, a senior creditor may prefer to use restructuring proceedings as a vehicle for liquidation because of the ability to assert influence on the process and may have access to the monitor and to financial information that is not made available to other creditors. This is in stark contrast to a court appointed receiver who is under an obligation to act fairly and consider the interests of all the stakeholders. This access to information may be particularly important if the secured creditor is a potential bidder in the sale process.

The use of restructuring proceedings to carry out a going-concern sale may also be problematic because many of the features of the process were designed for a traditional restructuring and may not be well-suited for a liquidation. For example, interim financing is of critical importance in the case of a traditional restructuring. The extraordinary terms associated with such financing is more difficult to justify if the process is primarily for the benefit of the senior secured creditors.[34] Other attributes of the restructuring process may similarly be ill-suited for carrying out a liquidation. Suppliers are given super-priority rights over recent deliveries (thirty-day goods) and agricultural inputs in bankruptcy and receivership.[35] A similar right was not conferred in respect of restructuring proceedings because it was thought to interfere with the rescue objective. Unpaid employees are also treated differently in restructuring proceedings. Unpaid employees may make an immediate claim against the *Wage Earner Protection Program Act*[36] (WEPPA) insurance scheme in the bankruptcy and receivership proceedings. In restructuring proceedings, they must wait. These provisions were designed when a sharp division existed between rescue and liquidation. The use of the restructuring process as a liquidation vehicle permits a secured creditor to nullify the rights of employees and suppliers that would otherwise be available to them.

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34 See D Bish, "The Plight of Receiverships in a CCAA World" (2013) 2 *Journal of the Insolvency Institute of Canada* 221 at 242–43.

35 See Chapter 5, Section C.

36 SC 2005, c 47, s 1.

C. THE FUNDAMENTAL PRINCIPLES OF RESTRUCTURING LAW

1) The Debtor's Control of the Assets

In bankruptcy, the assets of the debtor vest in a bankruptcy trustee. In receivership proceedings or winding-up proceedings, the assets remain vested in the debtor but a receiver or administrator obtains control over the management of the business. Restructuring proceedings in Canada diverge from both of these models in that the debtor retains both ownership and control of the business assets. The debtor therefore has the ability to operate the business while the restructuring proceedings are under way.

In order to create an environment in which negotiation with creditors is facilitated, it is necessary to impose a stay of proceedings on the creditors and prevent them from engaging in manoeuvres during this period that would give them an advantage over other creditors. This prevents creditors from seizing assets or otherwise enforcing their claims against the debtor's assets. Unlike bankruptcy, the stay of proceedings applies to both secured and unsecured creditors. The stay also prevents legal actions from being commenced or continued. This permits the managers of the firm to direct their undiverted attention to the restructuring attempt.

2) The Maintenance of Business Operations

Although creditors are prevented from enforcing their claims against the business assets or from wresting managerial control from the existing managers, this alone is not enough to maintain the business as a going concern while the restructuring plan is being developed. Because the debtor continues to operate the business, it is necessary to distinguish between pre-filing and post-filing creditors.

The plan that will be negotiated and voted on affects only the pre-filing creditors — i.e., creditors who were owed obligations on or before the date that restructuring proceedings were commenced. Post-filing creditors expect to receive full payment of their claims. They will often refuse to extend any further credit, and suppliers will frequently insist on being paid cash on delivery. The insolvent business also is faced with the prospect of paying sizeable fees to insolvency professionals and lawyers. The obligations incurred by the enterprise following the initiation of restructuring proceedings must be paid, and a source of interim financing is needed in order to meet these interim expenses. In

addition, performance of contractual obligations incurred by the enterprise prior to the initiation of the proceedings may impair the ability of the enterprise to restructure successfully. Restructuring law provides mechanisms by which interim financing can be obtained and onerous contractual obligations can be disclaimed.[37]

3) The Creditors' Right to Information

Restructuring proceedings provide the debtor an opportunity to devise a restructuring plan and place it before the creditors for acceptance or rejection. Because the debtor retains control over the management of the enterprise during this period, it is critically important that the creditors are supplied with full and accurate information to permit them to make an informed decision on the merits of the proposed plan. For this reason, Canadian restructuring law ensures the flow of relevant information to creditors. A salient feature of Canadian restructuring law is the use of independent insolvency professionals to act as monitors or trustees. These persons are officers of the court and are under an obligation to act in the best interests of all the creditors. Their primary role is to ensure that creditors obtain accurate information about the financial condition of the firm.[38]

4) The Need for Creditor Approval

In a traditional restructuring, a plan is developed by the debtor and a meeting of creditors is called so that the creditors can vote on whether to accept or reject it. This requirement for creditor approval of the plan is of critical importance, and it shapes the dynamics of the negotiations among the debtor and the creditors. Where restructuring proceedings are used to liquidate the business, it is often the case that a plan is never developed and a vote is never conducted. The requirement for creditor approval of a plan is therefore only a fundamental characteristic in relation to a traditional restructuring where the debtor survives the process and thereafter continues business operations.

In a traditional restructuring, there must be a viable business plan as well as a restructuring plan. The business plan is largely within the control of management. The managers of the debtor must come up with a plan that will produce a turnaround in the fortunes of the business. This may involve decisions to downsize operations by eliminating units

37 See Chapter 13, Sections A and D.
38 See Chapter 14, Section B.

or product lines and reducing the workforce. The creditors do not vote upon the business plan, although it will influence the decision of the creditors in voting on the restructuring plan. The restructuring plan involves the deal that is presented to the creditors. It describes how the claims of the creditors will be treated. The restructuring plan is not binding on the creditors unless they approve it.

The restructuring plan does not require unanimous consent in order to be binding on the creditors. In other words, dissenting creditors who vote against the plan may nevertheless find that they are bound by its terms. In order to bind creditors to a plan, a head count as well as a dollar count is undertaken for each class of affected creditors. The plan must be approved by a majority in number of the creditors who hold at least two-thirds of the value of the claims for each class of claimant.[39]

The ability of a majority to bind a minority to a modification of contractual or other claims represents a marked departure from ordinary private law principle. It is considered necessary because of a complex dynamic that comes into play when multiparty negotiations are involved. Opportunistic creditors may adopt "hard-line" bargaining positions in the hopes that their threat to upset the applecart will induce the debtor to agree to give preferred treatment to their claims. This is undesirable for two reasons. First, it results in similarly situated creditors being afforded different treatment and rewards non-cooperative behaviour over cooperative behaviour on the part of creditors. Second, it makes it much less likely that any agreement will be concluded among the creditors. Creditors will naturally prefer to obtain the greater rewards afforded by non-cooperative behaviour, but, if all creditors behave in this fashion, no agreement will be reached. A dual-majority requirement is imposed in order to curtail the power of creditors who adopt value-reducing holdout strategies.

A second element of the rules for creditor approval governs the classification of claims.[40] Claimants hold a variety of different kinds of rights, and a voting regime under which the majority could impose their will on a dissenting minority can result in the unfair confiscation of value by the majority from the minority. Suppose that secured creditors who are fully secured are placed into the same class as unsecured creditors. There are five secured creditors who have claims that total $1 million; there are also one hundred unsecured creditors whose total claims amount to $4 million. If they are all placed in the same class, there is a strong incentive for the unsecured creditors to gang up

39 See Chapter 16, Section C(2).
40 See Chapter 16, Section D.

against the secured creditors and agree to a plan that unfairly prejudices the latter. For example, the plan might provide that all creditors, whether secured or unsecured, be treated equally under the plan and receive fifty cents on the dollar. This is patently unfair, since secured creditors have a higher priority ranking that entitles them to be paid in full in a bankruptcy of the debtor. Restructuring law prevents claimants who have different legal rights from being included in the same class if their claims are so dissimilar that it prevents them from voting on the plan with a common interest. Each separate class of creditors must approve the plan by a dual majority.

5) The Supervisory Role of the Court and Its Officers

The two restructuring regimes differ from one another in that the *CCAA* relies more heavily upon involvement of courts in framing the parameters of the restructuring attempt, while the commercial proposal provisions in the *BIA* rely more upon statutory rules in doing so. Despite this difference, the courts perform a unique and crucial role under both restructuring regimes. It is said that the courts play a supervisory role in commercial restructurings. In fact, there are several distinct functions that they undertake in restructuring proceedings.[41]

Courts serve a gatekeeping function in that they screen out ineligible or inappropriate applications.[42] Ineligible applications are ones that do not meet the conditions imposed by the governing statute concerning availability of the proceedings. Inappropriate applications are ones where the court is of the view that the restructuring attempt is unlikely to succeed because the debtor is not acting diligently or in good faith or because it is anticipated that creditors who have the ability to veto the plan will vote against its approval or that a viable plan is unlikely to be developed.

Courts also have an important role in ensuring that there is a framework within which negotiations between the parties is possible. In order to achieve this, it is necessary to maintain the status quo and prevent parties from engaging in manoeuvres that seek to undermine the legal position of other parties. Therefore, courts will often make rulings to ensure procedural fairness. For example, courts will review

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41 See Chapter 14, Section C.

42 See L LoPucki & G Triantis, "A Systems Approach to Comparing US and Canadian Reorganization of Financially Distressed Companies" in J Ziegel, ed, *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford: Clarendon Press, 1994) 109 at 125.

the classification scheme of a plan in order to ensure that it does not unfairly prejudice certain of the creditors.

In a traditional restructuring, courts have the responsibility to decide whether or not to give their approval to a plan that has been accepted by the creditors. This is an essential final step, since the plan is not binding on creditors until the court has approved it. In a liquidating CCAA or commercial proposal, the court oversees the sale process.

D. JURISDICTION OF THE COURT TO MAKE ORDERS

1) Development of the Judicial Powers

Prior to 2009, although courts routinely exercised wide powers in making a variety of different types of orders in connection with restructuring proceedings, there was considerable controversy concerning the source of and limits on these powers. The powers that were exercised by the courts in restructuring matters under the *CCAA* greatly exceeded the powers expressly conferred on the courts by the statute.[43]

On several matters, the *CCCA* and the *BIA* expressly confer power upon the courts to make certain kinds of orders. For example, both the *CCAA* and the commercial proposal provisions of the *BIA* give a court the power to approve the plan or proposal. The *CCAA* also gives a court the power to stay proceedings. This power is not needed under the commercial proposal provisions, since a statutory stay of proceedings arises automatically upon the initiation of the restructuring proceedings.[44] There are many other matters in respect of which courts found that they had jurisdiction to make orders under the *CCAA* despite the absence of express power-conferring provisions. These include the following types of orders:

- orders that authorize the debtor to obtain interim financing and that give the interim financer superpriority over existing secured creditors;[45]

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43 See K. Yamauchi, "The Courts' Inherent Jurisdiction and the *CCAA*: A Beneficent or Bad Doctrine?" (2004) 40 *Canadian Business Law Journal* 250.

44 See Chapter 12, Section D.

45 *Skydome Corp v Ontario* (1998), 16 CBR (4th) 118 (Ont Ct Gen Div).

- orders that create charges that secure the extension of credit by post-filing creditors and that give the post-filing creditors superpriority over existing secured creditors;[46]
- orders that create a charge for administrative expenses such as the monitor's fees and disbursements and that give the charge superpriority over existing secured creditors;[47]
- orders that permit the debtor to terminate contractual obligations owed to a third party;[48]
- orders that authorize the assignment of a contract notwithstanding that it contains an anti-assignment clause and the other contracting party does not consent to the assignment;[49]
- orders that authorize the debtor to pay arrears in payment to a supplier in order to ensure that the supplier will continue to supply the critical goods or services that cannot be obtained from another supplier;[50]
- orders that prevent a person from exercising a remedy or taking proceedings against a third party (as opposed to the debtor) where the exercise of the remedy would detrimentally affect the success of the restructuring proceedings;[51]
- orders that authorize a sale of substantially all the business assets before a plan has been put before the creditors for approval;[52] and
- orders that authorize the use of a claims bar procedure that will bar a claimant from making a claim unless the claim is filed within a particular date after the claimants are notified.[53]

Courts struggled to explain the jurisdictional basis for such orders. In many of the cases, the courts stated that the orders were made pursuant to their "inherent jurisdiction." The Supreme Court of Canada in *Century Services Inc v Canada (AG)*[54] ultimately rejected this view and held that in most instances the statute itself confers these powers.

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46 *Re Smoky River Coal Ltd* (2001), 28 CBR (4th) 127 (Alta CA).
47 *Re United Used Auto & Truck Parts Ltd* (2000), 16 CBR (4th) 141 (BCCA).
48 *Re Skeena Cellulose Inc* (2003), 43 CBR (4th) 187 (BCCA).
49 *Re Playdium Entertainment Corp* (2001), 31 CBR (4th) 302 (Ont SCJ).
50 *Re Air Canada* (2003), 47 CBR (4th) 163 (Ont SCJ).
51 *Lehndorff*, above note 16; *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp* (2008), 45 CBR (5th) 163 (Ont CA).
52 *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299 (Ont Ct Gen Div).
53 *Re Blue Range Resource Corp* (1999), 251 AR 1 (QB).
54 Above note 28. And see R Wood, "Priorities and Judicial Authority under the *CCAA*: *Century Services Inc v Canada (Attorney General)* (2011) 51 *Canadian Business Law Journal* 118.

The ability to make these types of orders under the *CCAA* was one of the reasons why the *CCAA* emerged as the dominant restructuring regime for larger corporations. It was far less clear whether courts had the same latitude to make similar orders in the context of commercial proposals under the *BIA*. If the ability to make such orders were derived from the court's inherent jurisdiction, there would be no reason in principle why similar orders could not be made in respect of *BIA* restructurings.[55] The rejection of inherent jurisdiction as the source of authority for the orders means that it is unlikely that similar orders can be made under the *BIA*. The greater detail and framework of rules provided by the commercial proposal provisions in the *BIA* indicate that Parliament exhaustively dealt with the matters and that supplementation of these rules by the courts was not intended.

2) Statutory Reform

To a large extent, these jurisdictional worries about the source of the court's powers have been resolved by the 2009 amendments to the *BIA* and *CCAA*. The amendments expressly confer jurisdiction on the courts to make the kinds of orders that were routinely granted in *CCAA* proceedings. Similarly worded provisions were introduced into both the *CCAA* and the *BIA*. These give the court the power to make a wide variety of orders, including:

- the power to authorize the debtor to obtain interim financing that gives the interim financer priority over existing secured creditors;[56]
- the power to create a charge for administrative expenses that has priority over existing secured creditors;[57]
- the power to authorize a sale of substantially all the business assets before a plan has been put before the creditors for approval;[58]
- the power to authorize the assignment of a contract notwithstanding that it contains an anti-assignment clause and the other contracting party does not consent to the assignment;[59]
- the power to approve a disclaimer of a contract;[60] and
- the power to remove a director.[61]

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55 *Re Bearcat Explorations Ltd* (2004), 3 CBR (5th) 167 (Alta QB); *Re FarmPure Seeds Inc*, 2008 SKQB 381.
56 *CCAA*, s 11.2(1); *BIA*, s 50.6(1).
57 *CCAA*, s 11.52; *BIA*, s 64.2.
58 *CCAA*, s 36; *BIA*, s 65.13.
59 *CCAA*, s 11.3; *BIA*, s 84.1.
60 *CCAA*, s 32; *BIA*, s 65.11.
61 *CCAA*, s 11.5(1); *BIA*, s 64(1).

In addition to these powers, a court is given a general power under the *CCAA* to make any other order it thinks appropriate, subject to the restrictions contained in the legislation.[62] A similar power is not conferred on a court in respect of *BIA* restructuring proceedings.

These statutory reforms are highly significant for a number of different reasons. First, they greatly enhance the kinds of orders that are available in *BIA* restructurings. A court now has jurisdiction in *BIA* restructurings to make the kinds of orders that were formerly thought to be available only under the *CCAA*. Whether this will cause debtors to choose to restructure under the *BIA* instead of the *CCAA* remains to be seen. Although the statutory reforms have resulted in a greater similarity in the kinds of orders that can be made under the *CCAA* and the *BIA*, the reforms have not produced a complete convergence. The stay of proceedings in *CCAA* proceedings has a potentially wider scope. It can be used to stay proceedings against parties other than the debtor,[63] and it covers both pre-filing and post-filing creditors.[64] The *CCAA* has been amended by a new provision that permits a court to make an order in respect of a critical supplier.[65] A similar provision was not included in the *BIA*. As well, there are a number of important differences in the rules pertaining to executory contracts.[66] In deciding which restructuring regime is more appropriate, insolvency lawyers must continue to give close attention to the potential consequences of these dissimilarities.

Second, in some instances, the reforms impose a stricter rule in respect of *CCAA* restructurings than was formerly the case. For example, courts are not permitted to make orders that disturb the priority ranking of secured creditors unless the secured creditors are notified of the application. As well, certain features, such as cross-collateralization provisions in DIP ("debtor-in-possession") loans, may no longer be approved.[67]

Third, the existence of the new statutory provisions appears to put to rest the uncertainty over the source of the court's power to make orders under the *CCAA*. It is no longer necessary for courts to attempt to justify their exercise of power on the basis of inherent jurisdiction, equitable

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62 *CCAA*, s 11.

63 *Re T Eaton Co* (1997), 46 CBR (3d) 293 (Ont Ct Gen Div).

64 *ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd* (2007), 33 CBR (5th) 50 (Sask CA). The stay under the *BIA* restructuring provisions covers only pre-filing creditors. See Chapter 12, Section D(10).

65 *CCAA*, s 11.4. And see Chapter 13, Section B.

66 See Chapter 13.

67 See Chapter 13, Section A(2).

jurisdiction, or implied statutory power based on notions of gap filling.[68] The statute now expressly confers upon the court the power to make orders. Given the history of the *CCAA*, it seems likely that courts will not hesitate to engage in further innovations when appropriate.[69] However, the failure to include a similar general power on courts under the *BIA* means that it is unlikely that the court will be able to make similar orders. There are two reasons supporting this view. The first is that the inclusion in 2009 of a general power in the *CCAA* but not in the *BIA* indicated that Parliament intended that such powers should be available to a court only in *CCAA* proceedings. Secondly, the decision of the Supreme Court of Canada in *Century Services*[70] indicates that the powers are conferred by statute and not by virtue of the principle of inherent jurisdiction. In determining whether to exercise this power, the requirements of appropriateness, good faith, and due diligence are baseline considerations.[71]

The statutory reforms will not resolve all controversies concerning the powers of the court in *CCAA* restructuring proceedings. Where the legislation has specifically addressed a matter, the courts may be asked to decide if it was intended as an exhaustive codification of the court's power, or if the court may issue some other order under its general power to address the matter in a different manner. For example, the statutory provision that governs critical suppliers under the *CCAA* sets out a legislative approach to the problem of suppliers who refuse to deal with the debtor unless pre-filing obligations are satisfied. The provision permits a court to order the critical supplier to continue to supply the critical goods or services to the debtor. It is unclear if the provision is to be an exhaustive source of authority in respect of critical supplier orders, or if a court is able to make other types of critical supplier orders based upon the more general authority to make orders.[72]

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68 See G Jackson & J Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P Sarra, ed, *Annual Review of Insolvency Law, 2007* (Toronto, Thomson/Carswell, 2008) 41.

69 See J Sarra, "Judicial Discretion" in S Ben-Ishai & A Duggan, eds, *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (Markham, ON: LexisNexis Canada, 2007) 199 at 224–25.

70 Above note 28 at paras 64–67.

71 *Ibid* at para 70.

72 See *Canwest Global Communications Corp (Re)*, (2009) 59 CBR (5th) 72 at para 43 (Ont SCJ).

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

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Motions for Sanction Orders and
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